Patrick Monette-Shaw
975 Sutter Street, Apt. 6
San Francisco, CA 94109
Phone: (415) 292-6969 • e-mail: pmonette-shaw@eartlink.net

September 19, 2012

Benedict Hur
Chair
San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Re: Rebuttal to Recommendation to Dismiss: Ethics Complaint # 08-110816 (SOTF #11013)

Dear Mr. Hur,

I am in receipt of the September 6, 2012 memo to the San Francisco Ethics Commission submitted by Ms. Lisa Herrick, a Senior Deputy City Attorney in the San Jose City Attorney's Office enclosing her recommendation to dismiss my Ethics complaint #08-110816. Her review of the record, facts in the case, and relevant law is flawed. I believe she incorrectly applied the law to reach her recommendation to dismiss this complaint.

Ms. Herrick does not address and appears to have ignored salient facts in this case. For instance, she appears to have ignored my April 10, 2011 rebuttal entitled "***Re: #11013: Rebuttal to Ethics and Controller's Responses – Executive Summary***" on pages 57 and 58 in the packet of materials titled "SOTF 11013 April 26 2011 Packet.pdf" submitted for her review. My April 10 rebuttal asserted §C3.699-13 **applies only to the Ethics Laws**, not to the public records Access Laws:

> As I noted in my initial March 6 complaints (#11013 and #11014): As noted in the ***Allen Grossman vs. San Francisco Ethics Commission***[1] case, §C3.699-13 "**applies only to the Ethics Laws**," not to the public records Access Laws [emphasis added].

Nowhere does Herrick ever address in her Recommendation that the Ethics Commission, City Controller, and the Sunshine Task Force have each been repeatedly informed that §C3.699-13

[1] *Allen Grossman vs. San Francisco Ethics Commission,* "Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate," October 5, 2009, page 4.

does not apply in this case, and Herrick presents no rationale why §C3.699-13 should.

Just as the anonymous analysis[2] of the misconduct proceedings against Sheriff Mirkarimi noted that law professors like to say that "hard cases make bad law," Herrick's *Recommendations* expose views not well thought out and not clearly presented. The ***Legal Analysis*** Ms. Herrick prepared is deficient for a number of reasons, relying on misinterpretation of relevant citations (one hopes that first-year law students wouldn't rely on Herrick's flawed analysis). Here's where she went wrong:

§C3.699-13

As I noted in my initial SOTF Complaint on March 6, 2011:

> Charter Appendix §C3.699-13(a) applies only to "campaign finance, lobbying, conflicts of interest and governmental ethics," **not** to whistleblower complaints. The term "whistleblower" doesn't appear at all in Charter §C3.699-13(a). … Charter §C3.699-13(a) is not a State law, and this Charter section only applies to campaign finance, lobbying, conflicts of interest and governmental ethics cases.

I also noted on March 6, 2011:

> As noted in the ***Allen Grossman vs. San Francisco Ethics Commission*** case, §C3.699-13 "**applies only to the Ethics Laws**," not to the public records Access Laws[3] [emphasis added].
>
> §C3.699-13 states "The Charter states plainly that the Commission shall investigate alleged violations of the Ethics Laws. … Nowhere in the Charter is this investigative mandate extended to violations of the Access Laws. [4]"
>
> Narrow construction of Section C3.699-13 compels the conclusion that [§C3.699-13] **applies only to the Ethics Laws** that it names, and not to the Access Laws about which it is silent[5].

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[2] *Anonymous,* "San Francisco Ethics Commission Official Misconduct Proceeding against Sheriff Ross Mirkarimi "***Thoughts on Final Hearing — August 16, 2012***," dated September 9, 2012, page 1.

[3] *Allen Grossman vs. San Francisco Ethics Commission,* "Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate," October 5, 2009, page 4.

[4] *Allen Grossman vs. San Francisco Ethics Commission,* "Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate," October 5, 2009, page 3.

> Section C3.699-13, which mandates investigations and provides that investigation records be kept confidential, **applies only to the Ethics Laws**[6]. Therefore, Massey's claim that **all Ethics investigations** are confidential is incorrect, since §C3.699-13 — which mandates investigations and provides that investigation records be kept confidential — only applies to Ethics Laws.

In footnote 2 on page 3 of Deputy City Attorney Jerry Threet's April 20, 2011 instructional memo to the SOTF regarding Sunshine Complaint #11013, Threet cites Dr. Kerr's ***Complaint for Damages*** filed in Superior Court, but Threet wrongly claims that Kerr's whistleblower complaint regarding LHH's patient gift fund had alleged a conflict of interest. Threet is confounding — mixing up — Kerr's gift fund whistleblower complaint, in which he did **not** allege conflicts of interest, with two other completely unrelated whistleblower complaints in which Kerr may have raised conflict-of-interest allegations.

Because the gift fund whistleblower complaint — the subject of my complaints before the SOTF — did **not** raise conflict of interest allegations, Appendix C3-699-13 does not apply, and should not have been used as a rationale by Ethics, or the City Controller, or Mr. Threet to bring the investigation within Charter Appendix C3.699-13.

Further, the initial gift fund complaint filed by Drs. Kerr and Rivero asserted violation or activity ***other than*** a violation of "local campaign finance, lobbying, conflicts of interest or governmental ethics laws"; therefore, because their complaint did not involve campaign finance, lobbying,

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5 *Allen Grossman vs. San Francisco Ethics Commission,* "Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate," October 5, 2009, page 4.

6 *Allen Grossman vs. San Francisco Ethics Commission,* "Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate," October 5, 2009, page 4.

conflicts of interest, or ethics laws, the investigation of their complaint should not have been conducted pursuant to procedures in Charter Section C3.699-13. An investigation may have emulated those procedures, but the confidentiality provision does not apply. That removes any "trumping" aspect of the Charter §C3.699-13 from the analysis — leaving relevant provisions of the Sunshine Ordinance to apply.

Herrick all but ignores Campaign and Governmental Conduct Code §4.105. **§4.105(b)** states:

> (b) ETHICS COMMISSION COMPLAINT PROCEDURES. The Ethics Commission shall investigate complaints filed under this Section that allege violations of **local campaign finance lobbying, conflicts of interest and governmental ethics laws** pursuant to the procedures specified in Charter Section C3.699-13 and the regulations adopted thereunder. [Emphasis added.]

However, **§4.105(a)** states:

> (a) COMPLAINTS. Any person may file a complaint with the Ethics Commission, Controller, District Attorney or City Attorney, or a written complaint with the complainant's department alleging that a City officer or employee has engaged in improper government activity by: **violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws, regulations or rules**; violating the California Penal Code by misusing City resources; creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's City position; or abusing his or her City position to advance a private interest. [Emphasis added.]

Note the difference. Complaints can be filed under §4.105(a) alleging many different violations or improper activities. But, under §4.105(b) not all of them are investigated "pursuant to procedures specified in Charter Section C3.699-13 and the regulations adopted thereunder." Herrick then proceeded to assert that the California Public Records Act exempts from disclosure "official information." She cites California Evidence Code 1040 that defines "official information":

> §1040. (a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.
>
> (b) **A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and:**
>
> (1) ***Disclosure is forbidden*** by an act of the Congress of the United States or a statute of this state; or
>
> **(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding.** In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered. [Emphasis added.]

As far as anyone can tell, there has been no showing or other indication — neither by Herrick nor by anyone else — of what there is (or may be) in the Ethics Commission's LHH patient gift fund investigative file that warrants the application of any "official information" privilege to the ***entire*** file. The only way this privilege could be applied is by looking at each claimed piece of "information acquired in confidence" by the investigator and testing whether each piece satisfies the public interest test in subdivision §1040(b)(2). The privilege can't be applied to the whole file, *carte blanche*.

Invocation of the "*Interests of Justice*" exemption under the Official Information exemption has been ruled[7] by the California Supreme Court to be the same as the *Public Interest Balancing* test — which is clearly prohibited by the Sunshine Ordinance. Since Sunshine Ordinance §67.24(i)

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[7] *CBS, Inc. v Block, 42 Cal. 3d 646.656 (1986)*.

eliminates that test as an exemption, this means that Evidence Code 1040 is not an available exemption to any San Francisco respondent, including not an available exemption to either the Ethics Commission, the City Controller's Office, or to Ms. Lediju and Mr. St. Croix.

Herrick all but ignores that no "official information" exemption is available to the Ethics Commission or the City Controller, because Sunshine Ordinance §67.24(i) provides:

> "Neither the City, nor any office, employee, or agent thereof, may assert an exemption for withholding for any document or information based on a finding or showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of this ordinance providing for withholding of the specific type of information in question or on an express and specific exemption provided by California Public Records Act that is not forbidden by this ordinance."

Ms. Herrick also ignores the "*Summary of the California Public Records Act 2004*[8]" published by the California Attorney General's Office, which reads, in relevant part, that the Attorney General has advised that only traditional penal and law enforcement agencies may use this evidence code exemption:

> **Investigative Records**
>
> Records of complaints, preliminary inquiries to determine if a crime has been committed, and full-scale investigations, as well as closure memoranda are investigative records.
>
> In addition, records that are not inherently investigatory may be covered by the exemption where they pertain to an enforcement proceeding that has become concrete and definite.
>
> Investigative and security records created for **law enforcement, correctional or licensing purposes** also are covered by the exemption from disclosure. The term "**law enforcement agency**" refers to **traditional criminal law enforcement agencies**.

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8 "*Summary of the California Public Records Act 2004,"* accessed on-line September 15, 2012 at http://ag.ca.gov/publications/summary_public_records_act.pdf , Section XII-A, *Investigative Records*.

> Records created in connection with administrative investigations unrelated to licensing are **not** subject to the exemption.

State law, as such, does not apply at all to the Ethics Commission's "investigation" files. CPRA §6254(f) provides, in part:

> 6254. Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:
>
> (f) **Records of** complaints to, or **investigations conducted by**, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, **and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes**…"

The Ethics Commission is not a "local agency" whose "investigatory" files are compiled "for correctional, law enforcement or licensing purposes."

It is clear, then, that Section 6254(f) — which creates an exemption for investigatory records — does not apply to any official or agency whose investigatory files are not "compiled by any state or local agency for correctional, law enforcement, or licensing purposes." This includes the Ethics Commission and the City Controller's Office, neither of which have correctional, law enforcement or licensing functions, and are not law enforcement agencies.

After all, the courts have limited the §6254(f) exemption to offices and agencies that have police investigative power, which the Ethics Commission and City Controller's Office do not have. The Ethics Commission and the City Controller are just other agencies, as far as CPRA is concerned.

In addition, Ms. Herrick ignored my previous testimony that §67.24(g) of the Sunshine Ordinance specifically indicates City agencies and employees may NOT assert CPRA Section 6255 or similar provisions as the basis for withholding documents. §67.24(h) of the Sunshine Ordinance prohibits the use of the "deliberative process" exemption of CPRA as an exemption for withholding. And §67.24(i) of the Sunshine Ordinance prohibits claiming an exemption for withholding based on whether the public interest in withholding information outweighs the public interest in disclosure.

Since Ms. Herrick's conclusion appears to be based solely on the application of Evidence Code §1040, her conclusions and recommendation do not appear to be valid.

Moreover, Ms. Herrick — like Deputy City Attorney Jerry Threet before her — cleverly tried to assert (by turning State law inside out), that the City Charter deems "confidential" records of investigations by the Ethics Commission provided by state law. Herrick asserts that City Charter Section F1.110(b) provides:

> "… **except to the extent required by state or federal law**," drafts, notes, preliminary reports of Controller's benchmark studies, audits, investigations and other reports shall be confidential:

Importantly, the central issue — which Mr. Threet's April 20, 2011 instructional memo tried to confuse — is **not** whether State or federal law ***requires*** disclosure of the records requested; if State or federal law requires disclosure, San Francisco's City Charter may not make them confidential and the records must be produced. Threet noted CPRA makes most government

documents public records, and if no CPRA exemption applies, the records are ***not*** subject to confidentiality protections of the Charter and must be disclosed.

The issue that Threet and Herrick confound is whether State law ***requires*** or ***permits*** disclosure, when in fact the controlling issue is whether State or federal law ***forbids*** or ***prohibits*** disclosure. Herrick and Threet all but ignore the provisions in 1040(b)(1) that disclosure must be forbidden by an Act of Congress or a State statute (see page 5 of this Rebuttal).

The "official information privilege" applies to disclosure of information exempted or **prohibited** by State or federal law, or by an act of the Congress of the United States, not what is "permitted" for disclosure. When Herrick noted that "The City's Charter deems confidential records of investigations by the Ethics Commission to the extent **provided** by state law," what she (and Mr. Threet) wrongly ignored was that these records may be confidential and subject to the official information privilege exemption **only** when disclosure is frobidden by State or federal law, and there is no State or federal law that actually prohibits such disclosure.

Herrick wrongly noted that "there is no federal or state law that … **compels** disclosure of whistleblower information," but again she ignores that the issue is not whether there are laws to ***compel*** disclosure, but whether there are laws that **forbid** disclosure, and indeed, there are no laws that prohibit release of the information I have requested.

Since the City Charter cannot make nondisclosable what is disclosable under State law, Ms. Herrick's recommendation to dismiss this complaint is without merit.

It is not the Sunshine Ordinance Task Force that did not apply the law correctly, as Ms. Herrick wrongly asserts. It is Ms. Herrick, herself, who has incorrectly applied the law in her analysis and recommendation to dismiss my Complaint # 08-110816.

Any **communications** between the Ethics Commission and any other agencies — the focus of this complaint — is **not** "official information" at all, which must be disclosed.

Sincerely,

[Signed]

Patrick Monette-Shaw

cc: Lisa Herrick, Senior Deputy City Attorney, City of San Jose