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Date: November 10, 2016

To: Members of the Ethics Commission

Copy: Alvin Johnson, Angella Calvillo

From: Jessica Blome, Deputy Director, Enforcement & Legal Affairs

Subject: **Agenda Item 9: Staff's Report and Recommendation**
for handling Ethics Commission Complaint No. 1516-59
Alvin Johnson v. Angela Calvillo, Clerk of the Board of Supervisors

Summary This memorandum serves as Staff's Report and Recommendation for how the Ethics Commission should handle a complaint alleging violations of the Sunshine Ordinance.

Action Requested Staff recommends that the Commission find that the Board of Supervisors did not willfully or non-willfully violate the Sunshine Ordinance.

Introduction

On April 26, 2016, Alvin Johnson forwarded an email to Ethics Commission Staff with a subject line of "Willful Violation of Sunshine Ordinance." The original email had been sent to Clerk of the Board of Supervisors Angela Calvillo on April 18, 2016. The e-mail he sent to Ms. Calvillo listed 41 numbered items that appeared to reference instances where Ms. Calvillo (or others within the Clerk of Board's offices) had not properly responded to Mr. Johnson's records requests. Many of the items had the words "NOTHING PROVIDED" next to the file numbers. Staff requested clarification from the Complainant on April 27, 2016, as it was unclear whether Mr. Johnson alleged that the Clerk of the Board violated the Sunshine Ordinance by not providing the 41 items listed in his e-mail.

The Ethics Commission has jurisdiction to handle complaints alleging willful violations of the Sunshine Ordinance by a department head under section 67.34 of the Sunshine Ordinance. Ms. Calvillo is neither a department head nor elected official, so the Ethics Commission is not required to handle Mr. Johnson's complaint. Staff, may, however initiate its own investigation into Mr. Johnson's complaint under Chapter Three(I)(A)(3) of the Ethics Commission's Enforcement Regulations for Handling Violations of the Sunshine Ordinance (Sunshine Regulations). In the future, Staff will decline to initiate its own investigation into complaints, such as Mr. Johnson's, absent extraordinary circumstances. Going forward, Staff will forward

original complaints to the Sunshine Ordinance Task Force for its review, pursuant to Sunshine Ordinance section 67.21.

Background

In conjunction with its investigation, Staff reviewed all of Mr. Johnson's requests and correspondence with the Board, as well as responsive records provided to Mr. Johnson. Staff also contacted the Wilson Ng, Records Manager for the San Francisco Board of Supervisors. Mr. Ng informed Staff that his office has spent a significant amount of time and resources responding to hundreds of requests and interrogatories from Mr. Johnson. Given the voluminous nature of Mr. Johnson's requests, on February 29, 2016, Clerk of the Board Angela Calvillo invoked the "rule of reason" to limit the time Board staff spent responding to Mr. Johnson's requests as necessary to allow Board staff to perform the core functions of the Board of Supervisors.

According to the City Attorney's Office, the "implied rule of reason" is well established in California case law. *Bruce v. Gregory* (1976) 65 Cal.2d 666, 673 (law governing public access to records are not absolute, but are subject to an implied rule of reason); *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754, 761 (construing the California Public Records Act under the rule of reason set forth in *Bruce*). Under this doctrine, City departments may limit the time spent responding to public records requests where a requestor has made numerous requests that take significant time to respond to and where compliance within otherwise applicable time requirements would interfere with the ability of the department's staff to perform their other duties—or to respond to records requests made by other officials. *Id.* To hold a City department to strict time requirements irrespective of the burdensome nature of an individual's requests would create a situation allowing a single individual to monopolize the resources of a City department. *Id.* Such a construction would violate the "rule of reason" that applies to law governing the public's access to public records. *Id.* Per Mr. Ng, other City departments have invoked the rule as well, with respect to Mr. Johnson's requests.¹

Analysis

Sunshine Ordinance section 67.21(a) provides that a custodian of a public record shall, without unreasonable delay, permit a public record (or any segregable portion of a record) to be inspected and examined by any person and copied. Sunshine Ordinance section 67.21(b) further requires a custodian of a public record to comply with a request for inspection or copy of a public record within ten days following receipt of the request, although some exceptions may apply.

Staff reviewed all 41 records requests and responses from the Board of Supervisors. Invocation of the "rule of reason" notwithstanding, Board Staff responded to all of Mr. Johnson's requests. Board Staff properly provided the documents, indicated where the records were available on their website or other departments' websites, advised when no responsive documents were found, and/or provided contact information for other departments where he could find potentially responsive records. Board Staff worked diligently to order records from offsite storage and scan documents for Mr. Johnson, as staffing resources would allow. No evidence was presented that Ms. Calvillo or any member of the Board of Supervisors deleted or withheld responsive records or even directly participated in the Board's responses to Mr. Johnson's records requests.

Staff's Recommendation

Staff recommends that the Commission find that the Board of Supervisors did not willfully or non-willfully violate the Sunshine Ordinance.

¹ On June 14, 2016, Executive Director Pelham informed Mr. Johnson that the Ethics Commission invoked the rule of reason regarding his voluminous requests for Commission records.