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Date: November 10, 2016

To: Members of the Ethics Commission

Copy: Joel Warne, Nancy Sarieh, Victor Young

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

Subject: **Agenda Item 7: Staff's Report and Recommendation**
for handling Ethics Commission Complaint Nos. 1516-23 & 1516-24
Joel Warne v. Nancy Sarieh & the Sunshine Ordinance Task Force

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 send warning letters to Nancy Sarieh and the Sunshine Ordinance Task Force.

Introduction

On November 18, 2015, Joel Warne filed a complaint with the Ethics Commission alleging that Nancy Sarieh, Public Information Officer for the Department of Public Health (DPH), willfully violated the Sunshine Ordinance by failing to disclose public records or cite legally applicable exemptions justifying the withholding of certain records. On November 19, 2015, Mr. Warne filed a second complaint with the Ethics Commission alleging that the Sunshine Ordinance Task Force (SOTF) had mishandled Mr. Warne's complaint against Ms. Sarieh.

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. Neither Ms. Sarieh nor the SOTF are department heads or elected officials, so the Ethics Commission is not required to handle Mr. Warne's complaint. Staff, may, however initiate its own investigation of Mr. Warne's complaint under under Chapter Three(I)(A)(3) of the Enforcement Commissions Regulations for Handling Violations of the Sunshine Ordinance (Sunshine Regulations). In the future, Staff will refer this type of complaint to the SOTF for its review; however this matter is unusual because Mr. Warne is alleging that the SOTF itself violated the Sunshine Ordinance by mishandling his complaint against Ms. Sarieh. Therefore, Staff initiated its own complaint and investigation into Mr. Warne's allegations against Ms. Sarieh and the SOTF under Chapter Three(I)(A)(3) of the Sunshine Regulations. Because both

complaints involve the same set of underlying facts, Staff combined them and analyze them both below.

Background

A. Original Records Request to DPH

On September 8, 2015, Joel Warne made a 10-page public records request to San Francisco General Hospital (SFGH), the Sheriff, and the Clerk of the Board of Supervisors for 52 categories of documents related to the events of August 8 and 9, 2015, when Mr. Warne stated he voluntarily admitted himself to SFGH (hereafter "Original Records Request"). The following record requests are at issue here:

- "Item 8: A copy of any security camera footage, audio recordings, or any other electronic media captured at SFGH on or between August 8 and 9, 2015 from any corridor, room or other space at or in which my person was located or relocated during the course of treatment, e.g. security camera footage that shows me being restrained, bound and forcibly sedated and the events preceding the succeeding that activity..."
- Item 14: Copies of any and all documents, electronic or physical, that serve as justification for assessing patients with expenses at a rate of \$1,807 for [Drug A]. This may be satisfied by providing a copy of a wholesale pharmaceutical acquisition receipt or invoice by the SFGH Pharmacy Dept.
- Item 15: Copies of any and all documents, electronic or physical, that serve as justification for assessing patients with expenses at a rate of \$1,807 for [Drug B]. This item may be satisfied by providing a copy of a wholesale pharmaceutical acquisition receipt or invoice received or paid by the SFGH Pharmacy Dept.
- Item 16: Copies of any and all documents, electronic or physical, that serve as justification for assessing patients with expenses at a rate of \$134 for every available dosage of [Drug C] by method or route administered to me between August 8 and 9, 2015. This may be satisfied by providing a copy of a wholesale pharmaceutical acquisition receipt or invoice.
- Item 17: Copies of any and documents, electronic or physical, that serve, or may serve, as justification for assessing patients with expenses at a rate of \$134 for every available dosage of [Drug D] by method or route administered to me between August 8 and 9, 2015 at SFGH. This may be satisfied by providing a copy of a wholesale pharmaceutical acquisition receipt or invoice by the SFGH Pharmacy Dept.
- Item 18: Copies of any and documents, electronic or physical, that serve, or may serve, as justification for assessing patients with an expense at a rate of \$134 for every available dosage of [Drug E] by method or route administered to me between August 8 and 9, 2015 at SFGH. This may be satisfied by providing a copy of a wholesale pharmaceutical acquisition receipt or invoice by SFGH Pharmacy Dept."

On September 23, 2015, Public Information Officer Nancy Sarieh, on behalf of SFGH, informed Mr. Warne that DPH was working to fulfill his public records request, but the request was voluminous. According to Ms. Sarieh, DPH could only provide responsive information on a rolling basis.

That same day, on September 23, 2015, Mr. Warne filed a complaint with the SOTF against DPH for allegedly violating Sunshine Ordinance sections 67.21 (10-day response deadline) and 67.25 (immediate disclosure response deadline).

On October 13, 2015, DPH, on behalf of SFGH, provided its response to Mr. Warne's Original Records Request. The response included the following exemption language:

"8. The security camera videos are for security and law enforcement purposes and are not public records...

14 - 18. SFGH purchases pharmaceuticals through a group purchasing organization called the University Health System Consortium or "UHC." All pricing information for pharmaceuticals is proprietary to the UHC."

On November 17, 2015, Mr. Warne appeared before the SOTF Complaint Committee for a hearing regarding his complaint against Nancy Sarieh and DPH. No representative from DPH attended the SOTF Complaint Committee meeting.

The SOTF Complaint Committee, on November 17, 2015, referred consideration of the merits of Mr. Warne's complaint to the full SOTF with no recommendation. However, the SOTF Complaint Committee deemed DPH in violation of Sunshine Ordinance section 67.21(e) for failing to attend the meeting.

The full SOTF never heard evidence supporting Mr. Warne's Original Complaint because Mr. Warne requested a continuance of his January 6, 2016, hearing before the full SOTF and then withdrew his complaint in February 2016.

B. Mr. Warne's Complaints to the Ethics Commission

On November 18, 2015, Mr. Warne filed a complaint with the Ethics Commission alleging that Nancy Sarieh, Public Information Officer at the Department of Public Health, committed a willful violation of the Sunshine Ordinance by failing to disclose public records or cite legally applicable exemptions justifying the withholding of certain records in her response to Mr. Warne's public records requests.

On November 19, 2016, Mr. Warne filed a complaint with the Ethics Commission alleging that the SOTF violated its own internal rules and timelines for handling complaints as follows:

1. "SOTF violated Sunshine Ordinance section 67.21(e) for failing to render an Order of Determination on File No. 15129 by November 2, 2015;
2. SOTF violated Sunshine Ordinance section 67.21(e) for failing to render an Order of Determination on File No. 15134 by November 7, 2015;
3. SOTF violated Sunshine Ordinance section 67.21(e) when the SOTF's Complaint Committee authorized a continuance for File No. 15129 on November 17, 2015;
4. SOTF violated Sunshine Ordinance section 67.21(e) when the SOTF's Complaint Committee authorized a continuance for File No. 15134 on November 17, 2015;

5. SOTF violated Sunshine Ordinance sections 67.14, 67.15, 67.21, 67.30, and 67.31 during its November 17, 2015 Complaint Committee meeting when Mr. Young ‘was permitted to provide substantive ‘advisements’ on actions the members of the Committee should or not should not [sic] take;’
6. SOTF violated Sunshine Ordinance section 67.30 ‘because a representative of the City Attorney was not present at its November 17, 2015 [Complaint Committee] meeting.’”

C. Records Requested after filing Ethics Commission Complaints

After making his complaints to the Ethics Commission, Mr. Warne continued to make a series of public records requests to DPH, copying the Ethics Commission on each request while indicating that the responses from the agencies were not responsive. Although unclear, it appears that Mr. Warne wished to include responses to each subsequent request as part of his original November 18, 2015, complaint. Staff reviewed the records requests and responses referenced and provides summary below:

- On November 18, 2015, Mr. Warne made a records request to DPH. DPH requested an extension for its response and responded on February 29, 2016.
- On February 5, 2016, Mr. Warne made an Immediate Disclosure Request (IDR) to DPH. DPH responded on February 8, 2016, in a timely manner.
- On March 12, 2016, Mr. Warne made three IDRs to DPH. After requesting extensions for its responses, DPH responded to one IDR on March 30, another one on April 7, and the third on April 8.
- On March 21, 2016, Mr. Warne made an IDR to DPH. DPH responded on March 23, 2016 in a timely manner.
- On April 28, 2016, Mr. Warne made an IDR to DPH. DPH requested an extension to provide a response and responded on May 3, 2016, in a timely manner.
- On June 21, 2016, Mr. Warne made two IDRs to DPH and one IDR to the Board of Supervisors. Both the Board and DPH responded in a timely manner on the same date.
- On June 22, 2016, Mr. Warne made four IDRs to DPH. DPH requested an extension to provide a response and did not respond in a timely manner.

Analysis

A. Public Information Officer Nancy Sarieh and the Department of Public Health violated section 67.21(b) of the Sunshine Ordinance.

Sunshine Ordinance section 67.21(b) provides:

A custodian of a public record shall, as soon as possible and within ten days following receipt of a request for inspection or copy of a public record, comply with such request...If the custodian believes the record or information requested is not a public record or is exempt, the custodian *shall justify withholding any record* by demonstrating, in writing as soon as possible and within ten days following receipt of a request, that the record in question is exempt *under express provisions* of this ordinance.

Sunshine Ordinance § 67.21(b) (emphasis provided) (see generally Sunshine Ordinance § 67.27 for a list of categorical exemptions from disclosure). Ethics Commission Staff reviewed hundreds

of pages of correspondence and public records between Mr. Warne and Ms. Sarieh. In response to Mr. Warne's Original Records Request, on October 13, 2015, Ms. Sarieh offered the following language to justify the withholding of certain records that would have otherwise been responsive to Mr. Warne's request:

"8. The security camera videos are for security and law enforcement purposes and are not public records..."

14 - 18. SFGH purchases pharmaceuticals through a group purchasing organization called the University Health System Consortium or "UHC." All pricing information for pharmaceuticals is proprietary to the UHC."

Neither of these justifications comply with the requirements of section 67.21(b) because Ms. Sarieh failed to identify the express provisions of the ordinance justifying disclosure. Mr. Warne raised this issue with Ms. Sarieh via email, and Ms. Sarieh responded by providing the applicable exemption citations. Staff concludes that Ms. Sarieh failed to provide express citations to categorical exemptions invoked to justify the withholding of certain records, as required by section 67.21(b). However, Staff also concludes that Ms. Sarieh immediately corrected this violation upon request from Mr. Warne.

In addition to her failure to immediately include citations for exemption justifications, Ms. Sarieh failed to respond to Mr. Warne's November 18, 2015, records request to DPH until February 29, 2016, more than three months after Mr. Warne's records request. Three months exceeds the ten-day maximum deadline under section 67.21(b).

B. Public Information Officer Nancy Sarieh and the Department of Public Health violated section 67.25 of the Sunshine Ordinance.

Section 67.25 of the Sunshine Ordinance requires city agencies to respond to Immediate Disclosure Requests (IDRs) "no later than the close of business on the day following the day of the request." Sunshine Ordinance § 67.25. If the voluminous nature of information requested in an IDR, its location in a remote storage facility, or the need to consult with another interested department warrants an extension of 10 days, the agency must notify the requester by the close of business on the following business day. *Id.* at § 67.25(b).

Ms. Sarieh failed to timely respond to two of Mr. Warne's records requests within the maximum deadline of ten days, as required by section 67.25. On March 12, 2016, Mr. Warne made IDRs to DPH for three categories of information. After requesting extensions for its responses, DPH responded with responsive records on March 30, April 7, and April 8. All three response dates exceed the 10-day maximum extension for responses to IDRs under § 67.25. Similarly, on June 22, 2016, Mr. Warne made IDRs to DPH for four categories of information. DPH timely requested an extension to provide a response but did not meet the ten-day deadline when it provided responsive records to Mr. Warne in violation of § 67.25.

C. The Sunshine Ordinance Task Force violated section 67.21(e) of the Sunshine Ordinance.

Mr. Warne alleges that the Sunshine Ordinance Task Force itself violated myriad provisions of the Sunshine Ordinance as well as its own internal rules and policies for the handling of complaints. The Ethics Commission does not have authority to enforce the SOTF's internal rules and policies, so Staff

addresses each of Mr. Warne's allegations of the Sunshine Ordinance only and ultimately concludes that the SOTF committed one violation of section 67.21(e).

1. Alleged violation of Sunshine Ordinance section 67.21(e)

Section 67.21(e) requires the SOTF to "inform the petitioner, as soon as possible...but in no case later than 45 days from when a petition in writing is received" of its determination whether the record requested or any part of the record requested is public. Mr. Warne filed one complaint with the SOTF on September 16, 2015, and another on September 23, 2015. The complainant asserts therefore that his complaints should have been heard by SOTF no later than November 2, 2015, and November 9, 2015, respectively. The SOTF did not hold its first hearing on Mr. Warne's complaints until November 17, 2015, at which point the SOTF continued Mr. Warne's hearing until January 2016. In January, the SOTF continued Mr. Warne's hearing again. Mr. Warne then withdrew his complaint before the SOTF and filed it with the Ethics Commission.

Per the SOTF Administrator and Staff's review of SOTF's agendas from June 1, 2014, to March 31, 2016, SOTF rarely complies with the 45-day rule for hearing complaints as required by Sunshine Ordinance section 67.21(e). As a result, complaints take approximately 2-3 months to be resolved. The SOTF acknowledges these "wait times" are a problem.¹ In its Annual Report covering the same period, the SOTF handled 325 complaints. *Id.* at p. 4. The SOTF responded by setting up a Complaint Committee to hear backlogged complaints "in an effort to reduce . . . wait times." *Id.* at p. 8. The SOTF also called upon the Board of Supervisors to fill two vacant seats on the SOTF to improve efficiencies. *Id.* Staff concludes that the SOTF violated section 67.21(e) of the Sunshine Ordinance by failing to make a determination regarding Mr. Warne's complaints within 45 days, but Staff also concludes that the SOTF did not intentionally disregard its deadline. Indeed, the SOTF appears to recognize the delays and is taking steps to deal with them.

2. Alleged violation of Sunshine Ordinance section 67.14

Section 67.14(a) permits any person attending an open and public meeting to record the proceedings with an audio or video recorder or a still or motion picture camera. Sunshine Ordinance section 67.14(b) relates to the audio recording requirements of certain boards and commissions. Sunshine Ordinance section 67.14(c) requires every policy body to audio or video record every noticed regular or special meeting or hearing held in a City Hall hearing room that is equipped with those facilities. None of these provisions appear to have been violated by SOTF or Mr. Young on November 17, 2015. Mr. Warne has not asserted that he was prohibited from recording the November 17, 2015, meeting or that SOTF or its committees do not record their open and public meetings. Staff confirmed that SOTF records its open and public meetings. Therefore, staff found no evidence indicating a violation of section 67.14.

3. Alleged violation of Sunshine Ordinance section 67.15

Section 67.15(a) requires an opportunity for members of the public to address the policy body during its regular meetings. Sunshine Ordinance section 67.15(b) provides for public testimony requirements at a special meeting. Sunshine Ordinance section 67.15(c) allows a policy body to adopt regulations to

¹ See SOTF 2014/2016 Annual Report, p. 8, available at <http://sfgov.org/sunshine/sites/default/files/FileCenter/Documents/56321-SOTF%20Annual%20Report%2020142016%20%20Final%2006.30.2016.pdf>.

ensure the intent of subdivisions (a) and (b) are carried out. Sunshine Ordinance section 67.15(d) prohibits a policy body from abridging or prohibiting public criticism of the policy, procedures, programs or services of the City, or various other things. Sunshine Ordinance section 67.15(e) requires an opportunity for members of the public to address the policy body.

Mr. Warne has not provided any information or evidence that any subdivision of Sunshine Ordinance section 67.15 was violated. Staff found no evidence indicating that SOTF or Mr. Young violated section 67.15 during the November 17, 2015 Complaint Committee meeting.

4. Alleged violation of Sunshine Ordinance section 67.30

Section 67.30 outlines the establishment and membership of the SOTF. It also states that the City Attorney "shall serve as legal advisor" to SOTF and that the SOTF shall have an attorney assigned to it to serve solely as a legal advisor and advocate to the Task Force. Mr. Warne alleges that the SOTF requested advice from its administrator on a matter and that the SOTF relied "heavily" on advice from the City Attorney assigned to advise the SOTF. In addition, the complainant stated that SOTF had violated section 67.30 as a "representative of the City Attorney as not present at its November 17, 2015 meeting." Staff confirmed with the City Attorney's Office that SOTF has an attorney assigned to it from within the City Attorney's Office. Staff also confirmed that the Deputy assigned to the SOTF is not required to attend the entirety of SOTF or its committees' meetings. Staff listened to the portions of the November 17, 2015 Complaint Committee meeting where the complainant's SOTF complaints were considered. On November 17, 2015, Mr. Young provided information to the members of the Complaint Committee regarding a continuance and other administrative matters, which are part of his duties as Administrator. Therefore, staff has found no evidence that SOTF or Mr. Young violated Sunshine Ordinance section 67.30.

5. Alleged violation of Sunshine Ordinance section 67.31

Section 67.31 requires the Clerk of the Board of Supervisors to provide a full-time staff person to perform administrative duties for the SOTF and to assist any person in gaining access to public meetings and information. Victor Young is the current SOTF Administrator, serving pursuant to Section 67.31. Mr. Warne alleges that Mr. Young advocated for Mr. Sarieh during his November 17, 2015 hearing before the SOTF Complaint Committee. Staff reviewed the recording of Mr. Warne's complaint during the subject meeting and found no evidence that Mr. Young acted outside the scope of his duties during the meeting. Mr. Young did not violate section 67.31.

Staff's Recommendation

If the Commission determines that a respondent has committed a violation of the Sunshine Ordinance, whether under Chapter Two or Chapter Three, the Commission may issue an order requiring any or all of the following:

- A. The respondent to cease and desist the violation and/or produce the public records;
- B. The Executive Director to post on the Commission's website the Commission's finding that the Respondent violated the Sunshine Ordinance;
- C. The Executive Director to issue a warning letter to the respondent and inform the respondent's appointment authority of the violation.

The Commission should issue a warning letter to Nancy Sarieh and the Department of Public Health for minor violations of the Sunshine Ordinance. As outlined above, Staff concludes that Nancy Sarieh, Public Information Officer for the Department of Public Health, violated Sunshine Ordinance sections 67.21(b) and 67.25 by failing to provide express justification for the withholding of documents from public disclosure and by failing to timely respond to three public records requests. Staff also concludes that Ms. Sarieh remedied her violations prior to Mr. Warne filing his complaint with the Ethics Commission. Accordingly, relief under (A) above does not apply.

Staff also Staff observes that Ms. Sarieh was dealing with several records requests, received on multiple days throughout 2015 and 2016. Staff has no evidence that Ms. Sarieh intended to violate the Sunshine Ordinance but rather appeared to have trouble keeping up with the voluminous and comprehensive nature of Mr. Warne's requests. Accordingly, relief under (B) is in appropriate. Staff, therefore, recommends that the Commission issue a warning letter to Ms. Sarieh and the Department of Public Health, pursuant to (C), advising them to put protocols in place that would assist Ms. Sarieh with Sunshine Ordinance compliance for future voluminous records requests.

The Commission should issue a warning letter to the Sunshine Ordinance Task Force. As outlined above, Staff concludes that the Sunshine Ordinance Task Force violated Sunshine Ordinance section 67.21(e) by failing to issue a determination within forty-five days of Mr. Warne filing his complaint against Nancy Sarieh and the Department of Public Health. Staff recommends that the Commission issue a warning letter to the SOTF encouraging its members to continue working on solutions for its complaint backlog and wait time issues.