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Date: November 20, 2017

To: Members of the Ethics Commission

From: Kyle Kundert, Senior Policy Analyst
Pat Ford, Policy Analyst

Re: **AGENDA ITEM 6 - Dave Maass, member of the San Francisco Sunshine Ordinance Task Force, request for a formal opinion of the San Francisco Ethics Commission.**

Summary: This memorandum introduces a request for a formal opinion from Dave Maass, member of the San Francisco Sunshine Ordinance Task Force, related to the applicability of Ordinance 001-17 to his duties as a member of the Sunshine Ordinance Task Force.

Action Requested: Staff recommends that the Commission adopt the formal opinion herein.

Background

Mr. Maass, a member of the Sunshine Ordinance Task Force, has asked the Commission for a formal opinion related to the applicability of Ordinance 001-17 specifically to his duties as a member of the Sunshine Ordinance Task Force.

Charter provision C3.699-12 provides that any person may request the Ethics Commission to issue a written opinion with respect to that person's duties under provisions of the charter or any ordinance relating to campaign finance, conflicts of interest, lobbying or governmental ethics. Sec. C3.699-12 requires an opinion proposed by the Ethics Commission to be transmitted to both the City Attorney and District Attorney, who "shall advise the commission whether they concur in the proposed opinion" and inform the Commission in writing concerning the basis for disagreement. No person who acts in good faith on an opinion issued by the commission and concurred in by the City attorney and district attorney shall be subject to criminal or civil penalties for so acting, provided that the material facts are as stated in the opinion request.

The attached formal opinion has been drafted by Staff for the Commission's review and potential adoption.

BEFORE THE SAN FRANCISCO ETHICS COMMISSION

In the Matter of:)
)
 Formal Opinion requested by) No. Op-17-001
 Dave Maass – Member,) November 27, 2017
 Sunshine Ordinance Task Force)
)
 _____)

BY THE COMMISSION: Dave Maass, member of the San Francisco Sunshine Ordinance Task Force, has requested a formal opinion of the San Francisco Ethics Commission (“Commission”).

Charter provision C3.699-12 provides that any person may request the Ethics Commission to issue a written opinion with respect to that person's duties under provisions of the charter or any ordinance relating to campaign finance, conflicts of interest, lobbying or governmental ethics. Sec. C3.699-12 requires an opinion proposed by the Ethics Commission to be transmitted to both the City Attorney and District Attorney, who “shall advise the commission whether they concur in the proposed opinion” and inform the Commission in writing concerning the basis for disagreement. The Charter section also provides that:

“No person who acts in good faith on an opinion issued by the commission and concurred in by the City attorney and district attorney shall be subject to criminal or civil penalties for so acting, provided that the material facts are as stated in the opinion request.”

As required by the Charter, the Ethics Commission's opinions shall be public records and may from time to time be published.

FORMAL ADVICE REQUEST

Mr. Maass asks whether new statutory language that takes effect January 1, 2018, requiring reporting by specified City board and commission members of certain payments they request from persons with matters pending before their board or commission (ORDINANCE NO. 001-17) is applicable to him as a member of the City’s Sunshine Ordinance Task Force. Mr. Maass additionally inquires about the scope of the required reporting as it relates to his job with a non-profit organization that works on open government issues.

BACKGROUND

The facts presented in this opinion were provided in an email sent to Ethics Commission staff by Mr. Maass on November 8, 2017, and are also based on publicly available information.

Mr. Maass serves in a volunteer capacity on the San Francisco Sunshine Ordinance Task Force and is also an employee of the Electronic Frontier Foundation (the "Foundation"), an international non-profit organization based in San Francisco. According to the Foundation's website, the organization "champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development." It advocates for and litigates on issues related to transparency, privacy, anonymity, free speech, and innovation. His role with the Foundation requires numerous activities, including fundraising for the Foundation. Mr. Maass, occasionally speaks at fundraising events or staff tables at conferences where donations to the Foundation are accepted. He also engages in significant social media activity, including 'retweeting' or communicating calls for donations to the Foundation posted by other employees of the Foundation.

The Sunshine Ordinance Task Force ("Task Force"), is a public body established by Chapter 67 of the San Francisco Administrative Code. The purpose of the Task Force is to protect the public's interest in open government and to carry out the duties enumerated in Chapter 67 of the San Francisco Administrative Code. The Task Force advises the Board of Supervisors and provides information to other City departments on appropriate ways in which to implement the Sunshine Ordinance (Chapter 67 of the Administrative Code) to ensure that deliberations of commissions, boards, councils and other agencies of the City and County are conducted before the people and that City operations are open to the people's review.

QUESTIONS PRESENTED

Mr. Maass asks the following questions related to the applicability of Ordinance 001-17 specifically to his duties as a member of the Sunshine Ordinance Task Force:

1. *Is the Sunshine Ordinance Task Force subject to the behested ordinance?*
2. *Does the Sunshine Ordinance Task Force engage in proceedings regarding administrative enforcement, licensing, permits, or other entitlement under the Behested Payment Ordinance?*
3. *Are parties with complaints and other matters before the Sunshine Ordinance Task Force "participants" and "parties" as described in the Behested Payment ordinance?*

In addition, Mr. Maass posed five additional broad and non-specific questions of general interpretation. As such, these questions are not addressed in this formal opinion. The questions, shown below, will be addressed by Commission Staff through informal advice and informational compliance guidance materials:

4. *To what extent do opinions, rulings, and other advice from the California Fair Political Practices Commission apply to commissioner's subject to the San Francisco behested payment ordinance?*
5. *Do solicitations or requests made by a commissioner in an external professional capacity on behalf of their employer require disclosure under the behested payment ordinance?*
6. *Are mass mailings or social media posts that include solicitation and are broadcast to a broad audience require disclosure under the behested payment ordinance?*

7. *How does the behested payment ordinance apply to an employee of a nonprofit who either does not have access to donor data or is prohibited by the employer from disclosing such information?*
8. *How does the behested payment ordinance apply when the commissioner is unaware that a party/participant had donated in response to a solicitation or the commissioner cannot draw a direct link between a mass communication (social media post, mass mailing, blog post) and a donation?*
9. *How does the behested payment ordinance apply if a commissioner shares on a social media a donation link made by a charity with which the commissioner has no direct connection. For example: after an earthquake, a commissioner retweets a call for donations to the Red Cross. The commissioner has no relation to Red Cross and therefore no access to donor information, nor is the commissioner aware that a party/participant saw the commissioner's retweet and consequently donated to Red Cross.*

ANALYSES AND CONCLUSIONS

1. Is the Sunshine Ordinance Task Force subject to the behested ordinance?

No, members of the Task Force are not subject to the reporting requirement established in ORDINANCE NO. 001-17 contained in Campaign and Governmental Conduct Code (the "Code") Section 3.610. Code Section 3.610 provides that:

"If a Commissioner directly or indirectly requests or solicits any Charitable Contribution(s), or series of Charitable Contributions, from any party, participant or agent of a party or participant involved in a proceeding regarding *administrative enforcement, a license, a permit, or other entitlement for use* before the Commissioner's board or commission, the Commissioner shall file a Behested Payment Report with the Ethics Commission [. . .]" *(emphasis added)*.

To determine whether the members of the Task Force will be subject to the reporting requirements in Code Section 3.610, we must determine whether the Task Force has been endowed with powers to preside over proceedings involving "administrative enforcement, a license, a permit, or other entitlement for use."

Section 67.35 of the Sunshine Ordinance establishes the Task Force and enumerates the instances under which the Sunshine Ordinance may be enforced. The Task Force has been empowered via the Sunshine Ordinance with the following authority:

- "develop appropriate goals to ensure practical and timely implementation of this chapter;"
- "propose to the Board of Supervisors amendments to this chapter;"
- "report to the Board of Supervisors at least once annually on any practical or policy problems encountered in the administration of this chapter;"
- "make referrals to a municipal office with enforcement power under this ordinance;" and

- "issue public reports evaluating compliance with this ordinance."¹

The Sunshine Ordinance does not vest the Task Force with authority over any proceedings regarding a "license, a permit, or other entitlement for use." While Section 67.30 empowers the Task Force to make referrals to a "municipal office with enforcement power *under this ordinance*" whenever it concludes that any person has violated any provisions of the Sunshine Ordinance,² the Sunshine Ordinance withholds enforcement power from the Task Force and defers enforcement decisions to other bodies.

As a general matter, administrative enforcement is limited to those proceedings which 1) impact the rights and duties of a particular party, 2) are subject to appeal or other judicial review, and 3) result in deterrent or punitive action that carries the force and effect of law. The Sunshine Ordinance gives the Task Force no authority to conduct such proceedings.³ The purpose of the Task Force is to protect the public's interest in open government and open records. The Task Force's role in pursuing this purpose is advisory. The Task Force's primary function is to advise the Board of Supervisors and provide information to other City departments on appropriate ways in which to implement the Sunshine Ordinance.

Because the Task Force cannot have before it a proceeding regarding "administrative enforcement, a license, a permit, or other entitlement for use," Mr. Maass, as a member of the Task Force, is not subject to the new behested payments reporting provisions of Code Section 3.610.

2. *Does the Sunshine Ordinance Task Force engage in proceedings regarding administrative enforcement, licensing, permits, or other entitlement under the Behested Payment Ordinance?*

No. See response to Question 1 above.

3. *Are parties with complaints and other matters before the Sunshine Ordinance Task Force "participants" and "parties" as described in the Behested Payment ordinance?*

No. See response to Question 1 above.

As a member of the San Francisco Sunshine Task Force, therefore, Mr. Maass is not subject to the reporting requirements in Campaign and Governmental Conduct Code Section 3.610.

This response constitutes a formal opinion by the Ethics Commission concerning the application of the Campaign and Governmental Conduct Code and Commission regulations to the specific transactions or activities set forth above. Reliance on this opinion is limited to the facts presented here. Any change in material facts presented may alter the analysis and conclusions reached in this opinion, and the analysis or conclusions reached in this formal opinion may be affected by subsequent developments in the law including, but not limited to, statutes, ordinance, regulations, formal opinions, and case law.

¹ San Francisco Sunshine Ordinance § 67.30(c).

² *Id.* Section 67.35(d) further clarifies which bodies can enforce the Sunshine Ordinance: "any court of competent jurisdiction" or "the Ethics Commission."

³ See *Id.*

Approved by the Ethics Commission on _____.

Members CONCURRING:

Members DISSENTING:

From: [Hickey, Jacqueline \(ETH\)](#)
To: [Kundert, Kyle \(ETH\)](#)
Cc: [Ford, Patrick \(ETH\)](#)
Subject: FW: Request for a Formal, Written Opinion: Behested Payment Ordinance
Date: Wednesday, November 8, 2017 9:38:03 AM

From: Dave Maass [REDACTED]
Sent: Wednesday, November 8, 2017 9:23 AM
To: Ethics Commission, (ETH) <ethics.commission@sfgov.org>
Subject: Request for a Formal, Written Opinion: Behested Payment Ordinance

Good morning,

My name is Dave Maass, and I serve on the San Francisco Sunshine Ordinance in a volunteer capacity. My professional, day job is as an activist for the Electronic Frontier Foundation, a non-profit based in San Francisco that advocates and litigates on issues related to transparency, privacy, anonymity, free speech, and innovation.

As you know, a new "Behested Payment" ordinance is set to go into effect on January 1, 2018. The ordinance requires the members of certain boards and commissions to file disclosures regarding certain charitable donations made by certain third parties with business before the commission. I request a formal written opinion regarding how this ordinance applies to the Sunshine Ordinance Task Force and to non-profit workers in my position.

For background, as an activist for a non-profit, my role entails a certain amount of fundraising. For example, a newsletter I send to our hundreds of thousands of members and subscribers may contain a "Donate" button. This "Donate" button may also appear on some blog posts I write. In addition, on occasion I may speak at fundraising events or staff tables at conferences where donations are accepted. I also often retweet or share calls for donations posted by my employer on social media.

As an organization specializing in privacy, my employer maintains strict privacy protections for releasing donor information, including allowing for anonymous donations. I generally do not have access to donor data, nor do I have the ability to know whether a donor contributed to the organization after reading a mass email, blog post, or social media posting I have made.

As a result, I need to determine whether my service on the Sunshine Task Force will become an incompatible activity with my employment when the behested payment ordinance goes into effect. I seek guidance and answers from the Ethics Commission regarding the following questions and issues:

1. Is the Sunshine Ordinance Task Force subject to the behested ordinance?
2. Does the Sunshine Ordinance Task Force engage in proceedings regarding administrative enforcement, licensing, permits, or other entitlement under the Behested Payment Ordinance
3. Are parties with complaints and other matters before the Sunshine Ordinance Task Force

"participants" and "parties" as described in the Behested Payment ordinance? Please note that both definitions refer to California Government Code Section 84308, which explicitly mentions "a license, permit, or other entitlement for use," but does not include administrative enforcement.

4. To what extent do opinions, rulings, and other advice from the California Fair Political Practices Commission apply to commissioners subject to the San Francisco behested payment ordinance?

5. Do solicitations or requests made by a commissioner in an external professional capacity on behalf of their employer require disclosure under the behested payment ordinance?

6. Are mass mailings or social media posts that include solicitation and are broadcast to a broad audience require disclosure under the behested payment ordinance?

7. How does the behested payment ordinance apply to an employee of a nonprofit who either does not have access to donor data or is prohibited by the employer from disclosing such information?

8. How does the behested payment ordinance apply when the commissioner is unaware that a party/participant had donated in response to a solicitation or the commissioner cannot draw a direct link between a mass communication (social media post, mass mailing, blog post) and a donation?

9. How does the behested payment ordinance apply if a commissioner shares on a social media a donation link made by a charity with which the commissioner has no direct connection. For example: after an earthquake, a commissioner retweets a call for donations to the Red Cross. The commissioner has no relation to Red Cross and therefore no access to donor information, nor is the commissioner aware that a party/participant saw the commissioner's retweet and consequently donated to Red Cross.

I am proud to serve on the Sunshine Ordinance Task Force, but it is important to note that it was precisely my experience at the Electronic Frontier Foundation that qualified me for the seat on the task force. My appointment does not expire until mid-2018, however when I volunteered to sit on the committee, there was no behested payment ordinance. I hope that the ethics commission takes into consideration that the behested payment ordinance may affect many commissioners in a similarly situated position, many of whom may not have applied for the role if the behested payment ordinance had been in effect at the time of application.

Due to the ordinance taking effect on January 1, 2018, I would appreciate a timely response to this request for a formal written opinion so that commissioners, board and task force members may take appropriate steps before the end of the year.

Thank you for time and consideration of this matter. I would appreciate confirmation of receipt of this request.

Sincerely,

Dave Maass