

Correspondence to the SRTF Regarding Public Records and Technology Subcommittees

Email 1: Kimo Crossman – San Francisco Sunshine Activist 11/23/07

Email 2: Kimo Crossman – San Francisco Sunshine Activist 11/23/07

Email 3: Kimo Crossman – San Francisco Sunshine Activist 11/28/07

Email 1

From: Kimo Crossman [mailto:kimo@webnetic.net]
Sent: Friday, November 23, 2007 9:47 PM
To: sunshine_reform_task_force@sanjoseca.gov
Subject: San Jose: Public Records Subcommittee: Comments on the waiving Attorney Client privilege & other memos (from San Francisco Experience)

Comments on the memo re waiving Attorney Client privilege for Open Government matters based on agenda for 11/26 meeting

<http://www.sanjoseca.gov/clerk/TaskForce/SRTF/pdf/Subcommittees/PublicRecords/112607/Agenda112607.asp>

I would encourage the Public Records committee to send questions to the San Francisco Sunshine Taskforce and speak with their counsel specifically rather than the general San Francisco City Attorney's office.

Their email address is sotf@sfgov.or and their counsel is Ernest.Llorente@sfgov.org

Waiving the privilege on this narrow set of communications was added to the ordinance when it was found that the City Attorney was frequently advising department how and why to not provide access to information. The City Attorney hates this provision because they are not used be being second guessed, but they brought it on themselves acting as counsel for the city government rather than defending the people's right to know. It has served as a good check on some abuses that had been occurring. Additionally if the advice is given verbally there is no written record of it and unfortunately that is often the approach of a city employee who is concerned about getting candid advice.

And of course one has to ask why should candid advice about Open Government be secret?

Also with this in effect it provides a means to monitor costs of supporting Open Government which otherwise are more difficult to track. Consistently, one of the top complaints about Open Government is the alleged cost – even ignoring that a large majority of this is already required under CPRA, Brown, Prop 59 already and not taking into account the cost of deals that squander the public trust revealed by public records.

The concern stated that this provision would waive the attorney-client privilege for all other communications has not been the case in San Francisco. It's not true, it's just a scare tactic.

Regarding public records of contract negotiations – in SF, there is an enhanced provision – again added due to problems that says for large or long or single source contracts the communications must be available in real-time ***and*** verbal positions summarized one week in arrears. This is very important for following the progress of complex and long contracts since it is very difficult to quickly come up to speed if only the final one is

available for adoption in 15 days. Also it allows the and council to have hearings on parts of the contract that are going poorly to influence the terms being negotiated before they are presented with Take it or Leave It at the end of the negotiation.

Here's an excellent example of the ongoing progress of the Wi-Fi contract San Francisco worked on:

http://www.sfgov.org/site/tech_connect_page.asp?id=40515

And here's the actual SF language to make public Open Government Advice – notice it also prohibits the City Attorney from helping to prevent access to information – this was added due to problems and notice that advice include PRA below so it is really advice on any Good Government matters rather than just Open Government.

- (i) The San Francisco City Attorney's office shall act to protect and secure the rights of the people of San Francisco to access public information and public meetings and shall not act as legal counsel for any city employee or any person having custody of any public record for purposes of denying access to the public. The City Attorney may publish legal opinions in response to a request from any person as to whether a record or information is public. All communications with the City Attorney's Office with regard to this ordinance, including petitions, requests for opinion, and opinions shall be public records.
- (ii) A record previously received or created by a department in the ordinary course of business that was not attorney/client privileged when it was previously received or created;
- (iii)(iii) Advice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act, any San Francisco governmental ethics code, or this Ordinance.

On the Draft language – San Francisco had to strengthen it because departments were using it as a big loophole and always saying a report was not complete – still draft – so they took that away completely. One question that has come up though is Are email normally kept on file or retained? Departments have tried to claim that they were transitory discussions until they were department policy so you should deal clearly with email here. Also this is related to the Deliberative process privilege invented by the Supreme Court – San Francisco removed this exemption – again due to abuse by agencies and it has turned out nothing bad has happened – people said oh you won't be able to get good advice from staff and that just did not turn out to be a problem.

Email 2

From: Kimo Crossman [mailto:kimo@webnetic.net]

Sent: Friday, November 23, 2007 10:52 PM

To: sunshine_reform_task_force@sanjoseca.gov

Subject: San Jose: Public Records Subcommittee: Comments on the 6255 Balancing test

Comments on the memo re 6255 balancing test on agenda for 11/26 meeting

<http://www.sanjoseca.gov/clerk/TaskForce/SRTF/pdf/Subcommittees/PublicRecords/112607/Agenda112607.asp>

Don't adopt the Clear and Convincing test – Lawyers are paid to write arguments – that basically leaves 6255 intact They'll write it and say if you don't think it's clear and convincing then take us to court. If you must adopt the additional exemptions, the Personal Info, and Security ones should be framed in a narrowly construed manner – you would be amazed at how Security/Safety and Personal info exemptions can and are stretched. Especially after 9/11, they are usually stories like if we reveal this and a terrorist reads it and they are really determined then they this might help them. For example a floor plan of city hall.

You aren't writing this ordinance for when the city attorney is helpful, you are writing it for when they don't want to provide the information and are looking for every possible loophole which always happens sooner or later for some information.

On b.1 Personal e-mail you list as redactable – since it is not redactable under CPRA, that controls and this is invalid. How does one ascertain a personal email rather than a nonpersonal email? Seriously if the email is joe@gmail.com is that personal or not? They may use this email for their business. There is already a California case (San Diego Reader) in which email addresses were produced on appeal. Also are cell phone numbers redactable?

In general, on redactions I would suggest a provision that requires a consistent identifier be used so that the references to Person XX can be traced in a document consistently even if you can't know their name.

San Francisco took away the Deliberative process exemption again due to abuse and all the concerns about free flow of info turned out to be untrue. Unfortunately when people are doing stuff they don't want to get out they never put it on paper in the first place.

It's unfortunate that your attorney's analysis on Deliberative Process ignores that Prop 59 the constitutional amendment took away this court created privilege in 2004 and therefore these cases are no longer relevant.

You should consider having a whole session on Prop 59 See this Top ten list here:

https://www.calaware.org/downloads/Top10_Proposition59.pdf

An area you have not addressed is records created by a public official not with city equipment – like personal email that pertained to city business or a city official that used their own pencil and paper to take minutes of a meeting.

Email 3

From: Kimo Crossman [mailto:kimo@webnetic.net]
Sent: Wednesday, November 28, 2007 5:18 AM
To: sunshine_reform_task_force@sanjoseca.gov
Subject: San Jose Sunshine 12/6 meeting: Should is not Shall, cost for PDF/FAX, metadata?, text searchable content

San Jose Sunshine Taskforce members:

Please be aware that legally the word Should is a recommendation while Shall is a requirement. I bring this up in the context of the language below:

*[Referred to the Technology Subcommittee] To the extent that it is technologically and economically possible, forms and computer systems used by the City relating to the conduct of the public's business should be designed to ensure convenient, efficient, and economical access to public information, including making public information easily accessible over public networks such as the Internet. Specifically, forms and computer systems **should** be designed to:*

- 1. Segregate exempt information from non-exempt information.*
- 2. Reproduce electronic copies of public information in a format that is generally recognized as an industry standard format.*

Regarding fees for duplication, I hope that the taskforce has language requiring the option to convert paper documents to FAX, Scanned PDF or posting on Website at NO Charge. The CPRA does not require this and there have been big battles over this.

Here's SOTF draft language:

Converting Records to Electronic Format

When responding to Sunshine Ordinance or public record requests, every Department and Policy Body shall, if requested, and if necessary technology and equipment are available, to transfer documents that are otherwise only available in hard copy/paper form into an electronic format that is searchable and electronically archivable for delivery via electronic mail or other electronic means and posting on the Department or Policy Body's Web site.

It appears the Technology Subcommittee has made no effort to require departments/agencies to develop policies to defaultly store information online (So information requests are not needed, hello archive.org ?) nor to accept, store, deliver and post information in text engine/ada compliant for screen reading/more easily translatable formats. Basically we're talking about not converting perfectly good electronic documents to non searchable PDFs in meeting packets and not requesting submissions electronically where possible.

In 2006, San Francisco had a huge battle with the City Attorney over metadata - access to Word Docs and Excel Spreadsheets vs converted to unusable PDF formats where formulas cannot be examined. The City Attorney wrote a Clear and Convincing Case – in their opinion on why to withhold original formats, Eventually this went to the Board of Supervisors who unanimously rejected the City Attorney Advice – yet the City Attorney even today will not remove their opinion stating that PDF formats are acceptable substitutes for original formats. This is a cautionary tale about the Clear and Convincing standard. It's also a suggestion that you should address this issue if you can now.

Here's the City Attorney's spurious opinion written by Paul Zarefsky their top Sunshine expert filled with Red Herrings and "What –If" Scenarios and poor logic that CNPA.com, CALAWARE.org, CFAC.org and Activists all opposed.

<http://www.sfgov.org/site/uploadedfiles/cityattorney/opinions/METADATA.pdf>

4 San Francisco Bay Guardian stories on the Metadata battle

The devil in the metadata

San Francisco struggles with a different kind of public record

http://www.sfbg.com/entry.php?entry_id=2135

http://www.jusnhlado.sfbg.com/entry.php?entry_id=2276&catid=4

http://www.sfbg.com/blogs/politics/2007/04/disapproving_characterization.html

<http://www.sfbg.com/blogs/politics/2007/04/metawha.html>