CITY AND COUNTY OF SAN FRANCISCO

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TO: Honorable Members
Sunshine Ordinance Task Force

FROM: Paula Jesson
Deputy City Attorney

DATE: December 4, 2007

RE: Eighth Annual Report of the Supervisor of Records
October 1, 2006 – September 30, 2007

The Sunshine Ordinance (S.F. Admin. Code, Chapter 67) requires that the Supervisor of Records prepare a tally and report for the Sunshine Ordinance Task Force at least annually on each petition brought before the Supervisor of Records for access to records or information. (S.F. Admin. Code §67.21(h).) "The report shall at least identify for each petition the record or records sought, the custodian of those records, the ruling of the supervisor of public records, whether any ruling was overturned by a court and whether orders given to custodians of public records were followed. The report shall also summarize any court actions during that period regarding petitions the Supervisor has decided. At the request of the Sunshine Ordinance Task Force, the report shall also include copies of all rulings made by the supervisor of public records and all opinions issued." (*Id.*)

Please note that for the custodian of records, this report gives the name of the employee who responded to the request.

This is the eighth report of the Supervisor of Records. It covers all petitions brought before the Supervisor of Records between October 1, 2006 and September 30, 2007 (the "reporting period"). This report also includes one court action filed during the reporting period, although the action involves a matter for which the Supervisor of Records issued a determination in 2004.

I. Description of Petitions and Their Resolution

During the reporting period, the Supervisor of Records received nine petitions.

A. Petition of Kimo Crossman, seeking records of the Department of Technology and Information Systems ("DTIS")

In an email message sent January 17, 2007, Kimo Crossman appealed the response by the Department of Telecommunications and Information Services ("DTIS") to his request that DTIS post on the Internet or provide copies of documents relating to certain contract negotiations. Mr. Crossman and DTIS, and then Mr. Crossman and the Supervisor of Records, engaged in numerous and varied communications regarding the requested records. The request in its ultimate form, and as addressed by the Supervisor of Records, is set forth below:

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1. All documents exchanged between the City and County of San Francisco and Earthlink in the course of contract negotiations through January 5, 2007 concerning the San Francisco "TechConnect" project to provide free wireless access throughout the City.
2. Weekly "oral summaries" of the negotiating positions of the parties through January 5, 2007.
3. A statement pursuant to Section 67.21(c) of the Sunshine Ordinance as to the existence, form, and nature of any DTIS records relating to plans for the Police Department or Department of Emergency Management to use the proposed TechConnect WiFi or other wireless or fiber optic infrastructure for community safety or other cameras.
4. The draft feasibility study on a municipal fiber optic network.
5. The most recent Digital Inclusion Strategy document, as well as related comments received by DTIS and summaries prepared from comments.
6. Any public records in their original electronic format which describe plans or options for using wireless internet networks for the functioning of government in San Francisco (including specific examples, such as wireless internet access to City Hall and using surveillance cameras to monitor high crime areas).
7. Any public records provided by DTIS to the Mayor or the Mayor's Office regarding Earthlink's TechConnect proposal from December 1, 2006 through January 3, 2007.
8. Provide or post on the internet, as the case may be, the records described above in their original electronic formats containing "metadata."

The Supervisor of Records responded to Mr. Crossman on February 14, 2007. The determination on each request is set forth below.

1. <u>All documents exchanged between the City and County of San Francisco and Earthlink in the course of contract negotiations through January 5, 2007 concerning the San Francisco "TechConnect" project to provide free wireless access throughout the City</u>.

Mr. Crossman's request for documents exchanged between the City and Earthlink in the course of contract negotiations is governed under the Sunshine Ordinance by San Francisco Administrative Code Section 67.24(e)(3), which provides:

> During the course of negotiations for:
>
> (i) personal, professional, or other contractual services not subject to a competitive process or where such a process has arrived at a stage where there is only one qualified or responsive bidder;

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> (ii) leases or permits having total anticipated revenue or expense to the City and County of five hundred thousand dollars ($500,000) or more or having a term of ten years or more; or
>
> (iii) any franchise agreements,
>
> all documents exchanged and related to the position of the parties, including draft contracts, shall be made available for public inspection and copying upon request. In the event that no records are prepared or exchanged during negotiations in the above-mentioned categories, or the records exchanged do not provide a meaningful representation of the respective positions, the City Attorney or City representative familiar with the negotiations shall, upon a written request by a member of the public, prepare written summaries of the respective positions within five working days following the final day of negotiation of any given week. The summaries will be available for public inspection and copying. Upon completion of negotiations, the executed contract, including the dollar amount of said contract, shall be made available for inspection and copying. At the end of each fiscal year, each City department shall provide to the Board of Supervisors a list of all sole source contracts entered into during the past fiscal year. This list shall be made available for inspection and copying as provided for elsewhere in this Article.

In considering Mr. Crossman's appeal, the Supervisor of Records determined that DTIS had in fact posted the contract negotiation documents on the "TechConnect" website for the weeks during which the City held negotiations with EarthLink. The Supervisor of Records further determined that the website indicated those weeks during which no negotiations were held nor documents exchanged between EarthLink and the City. Accordingly, the Supervisor of Records determined that DTIS had complied with Mr. Crossman's request to inspect – by weekly posting on the Internet – the documents exchanged between the parties during contract negotiations relating to the positions of the parties. The response to Mr. Crossman set forth a list of the documents relating to the contract negotiations (for the response, see Exhibit A).

Finally, the Supervisor of Records determined that documents exchanged between EarthLink and the City that do not relate to the positions of the parties during contract negotiations do not fall within Section 67.24(e)(3), and do not have to be disclosed until after award of the contract under San Francisco Administrative Code Section 67.24(e)(1):

> (e)(1) Contracts, Bids and Proposals

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(1) *Contracts, contractors' bids, responses to requests for proposals and all other records of communications between the department and persons or firms seeking contracts shall be open to inspection immediately after a contract has been awarded.* Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. All bidders and contractors shall be advised that information provided which is covered by this subdivision will be made available to the public upon request. Immediately after any review or evaluation or rating of responses to a Request for Proposal ("RFP") has been completed, evaluation forms and score sheets and any other documents used by persons in the RFP evaluation or contractor selection process shall be available for public inspection. The names of scorers, graders or evaluators, along with their individual ratings, comments, and score sheets or comments on related documents, shall be made immediately available after the review or evaluation of a RFP has been completed. (Italics added).

2. Weekly "oral summaries" of the negotiating positions of the parties through January 5, 2007.

In the course of considering Mr. Crossman's appeal, the Supervisor of Records contacted DTIS and reviewed the summaries and documents exchanged by the parties relating to their positions on the contract negotiations. The summaries were posted on DTIS' "TechConnect" website and covered the weeks through January 5, 2007 during which contract negotiations with EarthLink were held. The Supervisor of Records determined that those summaries summarized the parties' positions that were not reflected in the documents exchanged between the parties.

Accordingly, the Supervisor of Records concluded that, having prepared the summaries required under Administrative Code §67.24(e)(3), DTIS' posting of the summaries on the internet complied with Mr. Crossman's request.

3. A statement pursuant to Section 67.21(c) of the Sunshine Ordinance as to the existence, form, and nature of any DTIS records relating to plans for the Police Department or Department of Emergency Management to use the proposed TechConnect WiFi or other wireless or fiber optic infrastructure for community safety or other cameras.

The Supervisor of Records determined that the Supervisor of Records lacks jurisdiction over this part of Mr. Crossman's petition and made no substantive determination regarding it. Section 67.21(d) of the Sunshine Ordinance defines the jurisdiction of the Supervisor of Records:

> (d) If the custodian [of a public record] refuses, fails to comply, or incompletely complies with a request described in (b), the person making

> the request may petition the supervisor of records for a determination whether the record requested is public. The supervisor of records shall inform the petitioner . . . of its determination whether the record requested, or any part of the record requested, is public . . . Upon the determination by the supervisor of records that the record is public, the supervisor of records shall immediately order the custodian of the public record to comply with the person's request.

To assist members of the public to make effective public records requests, Section 67.21(c) of the Sunshine Ordinance provides:

> A custodian of a public record shall assist a requester in identifying the existence, form, and nature of any records or information maintained by, available to, or in the custody of the custodian, whether or not the contents of those records are exempt from disclosure and shall, when requested to do so, provide in writing within seven days following receipt of a request, a statement as to the existence, quantity, form and nature of records relating to a particular subject or questions with enough specificity to enable a requester to identify records in order to make a request under (b). A custodian of any public record, when not in possession of the record requested, shall assist a requester in directing a request to the proper office or staff person.

Mr. Crossman's appeal alleged that DTIS violated Subsection (c) of Section 67.21 by not preparing "a detailed description of available public records (whether or not exempt) in the custody or control of [DTIS] in conjunction with the planned TechConnect WiFi project or any other wireless or Fiber infrastructure initiatives regarding (1) the use of Community Safety Cameras (or any other form of camera) or (2) other initiatives with San Francisco's Office of Emergency Services or Emergency Management or Police Departments." Mr. Crossman's initial request asked DTIS to prepare a written description pursuant to Subsection (c), and specifically stated that he was not asking to inspect or copy an existing public record. Moreover, Mr. Crossman wrote an email message to Ron Vinson, Chief Administrative Officer for DTIS, on January 28, 2007, stating that he was "only requesting the Summary of available records under 67.21 (c) . . . I am not asking for records."

Accordingly, the Supervisor of Records determined that under Administrative Code Section 67.21(d) this office lacks jurisdiction over this part of Mr. Crossman's petition and made no substantive determination regarding (1) the adequacy of Mr. Crossman's request to DTIS that it prepare a Section 67.21(c) statement or (2) the department's response to that request.

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4. The draft feasibility study on a municipal fiber optic network.

Mr. Crossman made an immediate disclosure request to DTIS on January 3, 2007 for the draft fiber optic network study. Upon receiving Mr. Crossman's petition, the Supervisor of Records contacted DTIS to determine whether the department had responded to the request. According to DTIS, it had not received the draft fiber optic network study from the consultant until after it received Mr. Crossman's January immediate disclosure request, and therefore it had no responsive records at that time.

The Supervisor of Records informed Mr. Crossman in response to his appeal that DTIS had posted the draft study entitled *Fiber Optics for Government and Public Broadband: A Feasibility Study* on the TechConnect website within a day or two of when it was received from the consultant. Accordingly, the Supervisor of Records determined that the draft study was currently available on DTIS' TechConnect website.

5. The most recent Digital Inclusion Strategy document, as well as related comments received by DTIS and summaries prepared from comments.

Mr. Crossman made an immediate disclosure request to DTIS on January 3, 2007 for the "most recent Digital Inclusion Strategy document." Upon receiving Mr. Crossman's petition, the Supervisor of Records contacted DTIS to determine whether the department had responded to the request. According to DTIS, it had not received the Digital Inclusion Strategy document from the consultant until after it received Mr. Crossman's January immediate disclosure request, and therefore it had no responsive records at that time.

The Supervisor of Records informed Mr. Crossman in response to his appeal that DTIS had posted the Digital Inclusion Strategy within a day or two of when it was received from the consultant. Accordingly, the Supervisor of Records determined that the document was currently available on DTIS' website.

6. Any public records in their original electronic format which describe plans or options for using wireless Internet networks for the functioning of government in San Francisco.

Mr. Crossman sent an email to DTIS on January 8, 2007 requesting:

> Any public records in their original electronic format which describe plans or options for using wireless internet networks for the functioning of government in San Francisco.

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The request included the following *nonexclusive* list of examples of categories of records concerning "plans or options for using wireless internet networks for the functioning of government in San Francisco":

- Wireless internet access in City Hall
- Running the Wireless internet network in the Library
- Using surveillance cameras to monitor high crime areas or red light enforcement
- Reading parking or utility meters
- Providing information to Police, Fire and other public safety
- Communications during or after a disaster
- Teaching
- Providing for wireless/roaming communications to city employees

The Supervisor of Records contacted DTIS to find out if it had responded to this request and was informed that, in response to Mr. Crossman's related request on December 27, 2006 for a written statement identifying the existence, form, and nature of any records concerning "plans for the Police Department or Department of Emergency Management to use the proposed TechConnect WiFi or other wireless or fiber optic infrastructure for community safety or other cameras," DTIS informed Mr. Crossman that "the department is unclear on what you are asking for" and asked that Mr. Crossman provide more specific information.

The Supervisor of Records instructed the department to provide a response to the January 8, 2007 request to the best of its ability based on its understanding of the request and any clarifying information that Mr. Crossman may have provided in response to the request for more specific information. DTIS complied with the Supervisor of Records' direction in an email from Mr. Ron Vinson dated February 5, 2007. That correspondence informed Mr. Crossman that DTIS did not have responsive records in any of the first six descriptive categories, and sought clarifying information concerning the last two categories ("Teaching" and "Providing for wireless/roaming communications to city employees"). DTIS informed the Supervisor of Records that it received no clarifying information in response to an email from Mr. Vinson (on January 5, 2007) stating, "I'm not sure what you are requesting here. Please be more specific."

Mr. Crossman informed the Supervisor of Records (by a February 12, 2007 email message) that this item "has received a partial response from Mr. Vinson but he claims to not understand categories and is not providing me any assistance in finding records requested. I request that assistance (see attached)."

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For the reasons discussed in part 3 above, the Supervisor of Records determined that this office lacks jurisdiction over a request for assistance under San Francisco Administrative Code Section 67.21(c), as well as under Government Code Section 6253.1, which provides:

> 6253.1. (a) When a member of the public requests to inspect a public record or obtain a copy of a public record, the public agency, in order to assist the member of the public make a focused and effective request that reasonably describes an identifiable record or records, shall do all of the following, to the extent reasonable under the circumstances: (1) Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated. (2) Describe the information technology and physical location in which the records exist. (3) Provide suggestions for overcoming any practical basis for denying access to the records or information sought.
> (b) The requirements of paragraph (1) of subdivision (a) shall be deemed to have been satisfied if the public agency is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester that will help identify the record or records.
> (c) The requirements of subdivision (a) are in addition to any action required of a public agency by Section 6253.
> (d) This section shall not apply to a request for public records if any of the following applies: (1) The public agency makes available the requested records pursuant to Section 6253. (2) The public agency determines that the request should be denied and bases that determination solely on an exemption listed in Section 6254. (3) The public agency makes available an index of its records.

Accordingly, the Supervisor of Records made no substantive determination on this part of the appeal. With respect to the six categories of records for which DTIS informed Mr. Crossman that it has no responsive records, the Supervisor of Records denied Mr. Crossman's petition due to the lack of any evidence or information indicating that DTIS was improperly withholding nonexempt responsive records.

7. Any public records provided by DTIS to the Mayor or the Mayor's Office regarding Earthlink's TechConnect proposal from December 1, 2006 through January 3, 2007.

In the course of reviewing Mr. Crossman's appeal, the Supervisor of Records contacted DTIS to determine whether it had responded to the request for "any public records provided by DTIS or PUC from 12/1/06 to 1/3/07 to the Mayor's Office or to the Mayor regarding the EarthLink proposal." According to DTIS, it had no records responsive to the request; however, it had not responded to Mr. Crossman to so inform him. The Supervisor of Records directed the department to respond to the request, which the department did through an email message to Mr.

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Crossman from Mr. Vinson. The Supervisor of Records therefore sustained Mr. Crossman's appeal to the extent that the department failed to respond; however, no order to disclose records was made because DTIS had no records responsive to Mr. Crossman's request.

8. Provide or post on the internet, as the case may be, the records described above in their original electronic formats containing "metadata."

In the course of reviewing Mr. Crossman's appeal, the Supervisor of Records determined that DTIS had posted most of the records that Mr. Crossman had requested that it post on the Internet in electronic file formats containing metadata as Microsoft Word documents. For those documents that were posted on the internet or otherwise provided to Mr. Crossman in Portable Document Format (PDF), the Supervisor of Records declined to order the reproduction of such records in Word or other electronic formats that disclose metadata for the reasons set forth in the September 19, 2006 memorandum issued by the City Attorney entitled "Providing Electronic Records in PDF Rather than Word Format When Responding to a Public Records Request."

Custodian of Records: Ron Vinson

Attached as Exhibit A is:
Response of the Supervisor of Records

Note: The Supervisor of Records has numerous email communications regarding this matter. If the Task Force would like a copy of these communications, please let our office know.

B. Petition of James Nunemacher, seeking records of the Department of City Planning

On June 4, 2007, James Nunemacher, of M-J SF Investments, LLC, sent a petition to the Supervisor of Records concerning a public records request he had made to the Department of City Planning ("Department"). The request, dated March 22, 2007, was 14 pages long with 72 numbered paragraphs (in form similar to interrogatories used in civil litigation), with each paragraph generally specifying a different employee or officer who may have made or received a type of record. The request primarily sought records regarding 901 Bush Street, applications for subdivision maps for existing buildings comprising seven or more residential units, and records of the Department's policy on the use and maintenance of communications regarding matters under consideration by the Department.

In his petition to the Supervisor of Records, Mr. Nunemacher asserted that "[t]o date Mr. Macris has not responded."

Upon review of the petition, the Supervisor of Records determined that the Department was in the process of gathering documents responsive to the request. Upon being informed that

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the Department had responded, the Supervisor of Records sent a letter to Mr. Nunemacher dated June 28, 2007, stating that the Department had provided notice that it had responded to Mr. Nunemacher's request in full. Accordingly, the Supervisor of Records determined that Mr. Nunemacher's petition had become moot.

Custodian of the records requested: Linda Avery, Planning Commission Secretary and Chief of Operations

Attached as Exhibit B are copies of:
Mr. Nunemacher's request to the Department
Mr. Nunemacher's petition to the Supervisor of Records (without attachment)
The Department's response (without enclosed records)
The response of the Supervisor of Records

C. Petition of Kimo Crossman, seeking records of the City Attorney's Office (records submitted by Ed Jew)

On or about June 8, 2007,[1] Kimo Crossman made an immediate disclosure request to the City Attorney's Office asking for a copy of records submitted in response to a letter from Deputy City Attorney Chad Jacobs to Mr. Jew asking that he provide information in connection with questions that had arisen regarding Mr. Jew's residence in District Four.

On June 8, 2007, Mr. Jacobs responded in relevant part as follows:

> The documents in our possession responsive to your request are exempt from disclosure pursuant to California Government Code Section 6254(f) and San Francisco Charter section 6.102. In addition, exemptions related to privacy concerns (California Government Code sections 6254(c) and 6254(k)) might preclude disclosure of some of these documents. Although we are still researching these privacy issues, the conclusion of this research was unnecessary in order to respond to your request because of California Government Code section 6254(f) and San Francisco Charter section 6.102.

On June 12, 2007, Mr. Crossman sent a petition to the Supervisor of Records, stating that "the citations provided by Mr. Jacobs are not applicable – these Ed Jew submitted documents are surely 'communications' and must be provided with minimal redactions and should be produced immediately."

On June 18, 2007, the City Attorney initiated legal proceedings (*quo warranto*) before the Attorney General to challenge Mr. Jew's right to hold office and made the documents relating

[1] The email of the initial request that Mr. Crossman sent to the Supervisor of Records does not show its date. Deputy City Attorney Chad Jacobs responded on June 8, 2007, beginning his comments with "Matt and Lexi are out of the office today so I am responding to your immediate disclosure request."

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to the proceedings publicly available, including the records submitted in response to Mr. Jacobs' letter to Mr. Jew. Mr. Jacobs informed the Supervisor of Records that he had explained to Mr. Crossman at that morning's press conference that the records had been posted on the City Attorney's website.

On June 18, 2007, the Supervisor of Records sent a letter to Mr. Crossman informing him that the matter had become moot because the requested records had been made public.

On June 18, 2007, Mr. Crossman sent a message to the Supervisor of Records, stating that he believed the records were withheld incorrectly and requesting a ruling on the matter, notwithstanding the records having been made public, on the ground that the dispute may occur in the future.

On June 28, 2008, the Supervisor of Records responded to Mr. Crossman's request for a ruling. The response again advised Mr. Crossman that the issue had become moot. Under Section 67.21(d) of the Sunshine Ordinance, the function of the Supervisor of Records is to effectuate the disclosure of documents that an official unlawfully withholds. The need for such a ruling no longer exists where the records have already been produced.

Nonetheless, the Supervisor of Records included an analysis of the legal basis for the decision to withhold the records at the time that Mr. Crossman made the request. As noted above, in declining to produce the records submitted by Mr. Jew, Mr. Jacobs cited Charter Section 6.102 and Government Code 6254(f) ("Section 6254(f)"). Mr. Jacobs also noted that various laws protecting the right to privacy might also provide a basis for non-disclosure. The Supervisor of Records found it sufficient to address only Section 6254(f), concluding that the department properly relied on that section in withholding the records.

Section 6254(f) permits the withholding of records of "investigations conducted by . . . any other state or local agency for . . . law enforcement . . . purposes." Mr. Jew submitted the records in issue in response to a letter from the City Attorney's Office stating that significant questions had arisen regarding whether Mr. Jew had remained a resident of District Four during his incumbency, that the City Attorney's Office was obligated to investigate these matters, and that Mr. Jew was requested to provide certain information and records to this office. At the time that the City Attorney's Office received Mr. Crossman's request for the records (on or about June 8), the investigation was not yet complete. The District Attorney did not file criminal charges until June 12. The Supervisor of Records concluded that the department could reasonably rely on Section 6254(f) because disclosure may have endangered the successful completion of the investigation.

On July 1, 2007, Mr. Crossman raised certain objections to the determination of the Supervisor of Records: (1) that he did not believe the City Attorney's Office was any of the agencies delineated in Section 6254(f), (2) "disclosable records created in the normal course of business cannot be later be treated as exempt" and "[w]hat legally permitted balancing test has your office use to allow the production of <u>some communications</u> with Supervisor Ed Jew but withholding of others? Also, your office . . . has already asserted to Supervisor Jew that a

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compelling Public Interest allowed disclosure of the PUC water usage information," and (3) Government Code Section 67.24(b)(1)(iii) "has the phrase 'any communications" How does your office respond to that requirement? You did not address this in your letter."

On July 6, 2007, the Supervisor of Records replied to this communication, stating that it had been reviewed but no basis was found for revising the determination.

Custodian of records requested: Deputy City Attorney Chad Jacobs.

Attached as Exhibit C are copies of:
Email containing the following: Mr. Crossman's request to the City Attorney's Office, the response by Deputy City Attorney Jacobs, and Mr. Crossman's appeal to the Supervisor of Records
Initial response of the Supervisor of Records, that the matter was moot
Mr. Crossman's request for a ruling notwithstanding mootness (email)
Response of the Supervisor of Records (email with attachment)
Message from Mr. Crossman (email)
Reply to Mr. Crossman (email)

D. Petition of Ed Martinez, seeking records of the San Francisco Police Department (personnel file)

On July 2, 2007, Ed Martinez sent an immediate disclosure request to Heather Fong, Chief of Police, with a copy to the City Attorney, requesting a complete copy of his personnel file. On July 11, 2007, Mr. Martinez sent an email message to the City Attorney's Office, with a copy to Chief Fong and Deputy Chief Charles Keohane, describing his July 2 email message and saying that he had not received the requested materials or a response from the San Francisco Police Department ("Department"). Mr. Martinez stated further that as a former employee of the Department, he was entitled to a copy of his personnel file and he asked this office to intervene and compel the Department to comply with the City's Sunshine Ordinance.

Upon review of the petition, the Supervisor of Records was advised that the Department had provided Mr. Martinez with a copy of his personnel file. Accordingly, on July 20, 2007, the Supervisor of Records informed Mr. Martinez of the determination that his petition had become moot.

Custodian of requested records: Lieutenant Michael Stasko.

Attached as Exhibit D are copies of:
Email containing Mr. Martinez's request to the Department (with attachment) and his petition to the Supervisor of Records (includes communication regarding a separate records request that was not the subject of a determination by the Supervisor of Records)
Response of the Supervisor of Records (email with attachment)

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E and F. Petitions of Kimo Crossman, seeking records of the City Attorney (Section 67.21(c) statement and calendars)

On July 21, 2007, Kimo Crossman sent an email to Matt Dorsey and Alexis Truchan, the Press Secretary and Deputy Press Secretary for the City Attorney's Office, asking that they "confirm that you have provided all calendars maintained by or for Mr. Herrera." Mr. Crossman sent email messages renewing his request to Mr. Dorsey and Ms. Truchan on July 23 and 24, 2007. In the July 24, 2007 message, Mr. Crossman asked for "a written statement within seven days of all calendars used by or created for Mr. Herrera." This message further asked for "all named staff who may answer oral public information and named departments that can provide additional information on this matter." On July 30, Mr. Crossman sent another message: "To clarify this request – We are asking for every different type of calendar used by Mr. Herrera – for example, a detailed working calendar in addition to a Prop G calendar would be a quantity of Two with additional appropriate descriptions. We are not interested in the number of daily or weekly calendars of the same type created for the period of Jan 1st to Present."

On August 2, 2007, Mr. Crossman sent a request to the Supervisor of Records regarding this matter, appealing "the non-response by the City Attorney office for information about information statement we have requested under 67.21(c). No statement has been provided by your office."

On August 8, 2007, Mr. Crossman sent a further message to the Supervisor of Records stating: "I wanted to clarify that we also request the withheld calendar records in addition to the seven day written statement below [the message then copies the August 2 message described in the preceding paragraph].

On August 13, 2007, the Supervisor of Records responded to Mr. Crossman's August 2, 2007 message in which he complained of the "non-response" by this office for a statement under Section 67.21(c). The Supervisor of Records declined to address the complaint of a violation of Section 67.21(c).

Section 67.21(c) requires departmental custodians of public records to assist requesters "in identifying the existence, form, and nature of any records or information maintained by, available to, or in the custody of the custodian, whether or not the contents of those records are exempt from disclosure and shall, when requested to do so, provide in writing within seven days following receipt of a request, a statement as to the existence, quantity, form and nature of records relating to a particular subject or questions with enough specificity to enable a requester to identify records in order to make a request under (b) . . . ."

The role of the Supervisor of Records is set forth in San Francisco Administrative Code Section 67.21(d):

> (d) If the custodian [of a public record] refuses, fails to comply, or incompletely complies with a request described in (b), the person making the request may

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> petition the supervisor of records for a determination whether the record requested is public. The supervisor of records shall inform the petitioner, as soon as possible and within 10 days, of its determination whether the records requested, or any part of the records requested, is public. Where requested by the petition, and where otherwise desirable, this determination shall be in writing. Upon the determination by the supervisor of records that the record is public, the supervisor of records shall immediately order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order within 5 days, the supervisor of records shall notify the district attorney or the attorney general who shall take whatever measures she or he deems necessary and appropriate to insure compliance with the provisions of this ordinance.

The role of this office as Supervisor of Records is thus limited to determining whether a record that has been requested is public, not whether a department has failed to comply with other provisions of the Sunshine Ordinance, including Section 67.21(c).

With respect to the petition to the Supervisor of Records submitted by Mr. Crossman on August 8 – regarding the calendars of the City Attorney – Ms. Thompson (formerly Ms. Truchan) sent a letter to Mr. Crossman on August 23, 2007. The following sets forth the substance of Ms. Thompson's response regarding the calendar issue.

> The office had already provided Mr. Crossman with the City Attorney's "Prop G" calendar, as required by Section 67.29-5 of the Sunshine Ordinance, with redactions as permitted by law. The Prop G calendar contains entries pertaining to the City Attorney's activities that generally are not privileged and must be disclosed in response to a request for the City Attorney's calendar. For the City Attorney, the function of the Prop G calendar is to record non-privileged meetings he has attended that pertain to his official duties.
>
> The office would not provide another calendar maintained by the City Attorney's Office for the City Attorney that is in fact the basis for the public Prop G calendar. This other calendar contains private information about the City Attorney's personal activities; private phone numbers and addresses of others; identities of constituents who meet with the City Attorney to petition their elected representative; identities of whistleblowers or other persons complaining about violations of law; information acquired in confidence from others; information pertaining to pending investigations; and information protected by the attorney-client privilege or attorney work product privilege. In addition, the calendar contains entries for events not attended by the City Attorney.
>
> These entries are protected from disclosure under Section 6254(k) of the Public Records Act and a host of laws, including Cal. Const., Art. I §1 (privacy); Cal. Const., Art. I, §3 (right to petition elected representatives); Cal. Gov. Code § 6254(c) (privacy) [see also Cal. Gov. Code § 6250, indicating that in adopting the Public Records Act, the Legislature was "mindful of the rights of individuals to privacy," and S.F. Admin Code § 67.1 (g), recognizing that "Private entities and individuals and employees and officials

of the City and County of San Francisco have rights to privacy that must be respected"]; S.F. Admin Code Chapter 12M (privacy as to personal information) ; Cal. Evid. Code §1040 (official information privilege, protecting information acquired in confidence by the City); Cal. Evid. Code §1041 (identity of informant privilege, protecting identity of individuals who report violations of law); Cal. Evid. Code §954 (attorney-client privilege); Cal Code Civ. Procedure § 2018.030 (attorney work product privilege). Further, for purposes of maintaining the City Attorney's schedule, some information appears on the calendar that does not pertain to City business, and that information does not constitute a public record within the meaning of the Public Records Act or Sunshine Ordinance.

The Prop G calendar provides information as to time, date and subject matter of meetings attended by the City Attorney, without providing privileged information, such as the information described above. The Prop G calendar is essentially the equivalent of the other calendar properly redacted. Under these circumstances, disclosure of the Prop G calendar is all that the Public Records Act and Sunshine Ordinance require.

On August 27, 2007, the Supervisor of Records responded to Mr. Crossman's petition, stating that, having reviewed Ms. Thompson's August 23, 2007 message, the Supervisor of Records had determined that the analysis set forth in that communication was correct and that the petition was denied.

Custodian of records requested: Deputy Press Secretary Alexis Thompson

Attached as Exhibit E are copies of:
Email containing the following: Mr. Crossman's request for records from the City Attorney's Office, additional communications regarding the request, Mr. Crossman's appeal to the Supervisor of Records regarding the Section 67.21(c) issue, and the response by the Supervisor of Records to the Section 67.21(c) issue (with attachment)

Attached as Exhibit F are copies of:
Message from Mr. Crossman clarifying that the appeal regarding Section 67.21(c) was intended to include the issue of the withheld calendars (email)
Response from the City Attorney's Office to the request for calendars (email)
Response of the Supervisor of Records regarding the calendars (email with attachment)

G. Petition of Christian Holmer, seeking records of the District Attorney

On August 8, 2007, Christian Holmer made an immediate disclosure request to District Attorney Kamala Harris stating that he was still waiting for a signed copy of the District Attorney's Record Retention and Destruction Schedule and that all that had been received to date was a blank unsigned template. This message further stated that if the formal, signed schedule were not received by August 9, the matter would be referred to the Supervisor of Records.

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On August 10, 2007, Mr. Holmer sent a message to the Supervisor of Records stating that a formal, signed copy of the District Attorney's Record Retention and Destruction Schedule had been requested, and that after two months the only record received in response to this request was a blank, unsigned document template, and petitioning the Supervisor of Records for a determination on whether the requested record is public.

Upon review of the petition, the Supervisor of Records determined that the District Attorney's Office ("Department") was in the process of searching for the requested record. By letter dated August 17, 2007, Assistant District Attorney Paul D. Henderson informed Mr. Holmer that the District Attorney's Office recognized that it is required to have a formal signed copy of the schedule for the retention and destruction of records under San Francisco Administrative Code Section 8.3; that the office intended to comply with the request and was in the process of locating the document; that if he were unable to locate the original, signed copy of the schedule, the office would be sure to have a new one generated and forward a copy of it to Mr. Holmer.

Accordingly, on August 17, 2007, the Supervisor of Records informed Mr. Holmer of the determination that his petition had become moot.

Custodian for the requested records: Assistant District Attorney Paul Henderson

Attached as Exhibit G are copies of:
Email containing the request to the Department and the petition to the Supervisor of Records (without attachments)
Department's response to the request
Response of the Supervisor of Records (email with attachment)

H. Petition of the Sunshine Posse, seeking records of the City Attorney's Office (communications regarding Ed Jew)

On July 11, 2007, the "Sunshine Posse" sent a request to Deputy City Attorney Chad Jacobs and Press Secretary Matt Dorsey for "all internal and external communications and other public records that your office has produced or handled regarding the investigation of Supervisor Ed Jew regarding his Official Residence or any allegations of Official Misconduct."

The City Attorney's Office produced thousands of pages of records in response to the request over a period of time, with a final production on July 26, 2007. Most were sent electronically, although the last production was on cd rom.

As to documents withheld from disclosure, the response cited the work product privilege (Cal. Code Civ. Pro. Sec. 2018.030; Cal. Bus. & Prof. Code Sec. 6068(e)) and the attorney-client privilege (Cal. Evidence Code Sec. 950, *et seq.*; Cal. Bus. & Prof. Code Sec. 6068(e)), as permitted by Government Code Section 6254(k), and the pending litigation exception under

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Government Code Section 6254(b). In describing the types of records withheld, the response stated:

> These documents include attorney and investigator handwritten, typewritten and recorded notes, internal emails and internal memoranda, which constitute work product and fall within the exception created by section 6254(b); and communications with City officials and employees covered by the attorney client privilege and section 6254(b).

On August 13, 2007, the Sunshine Posse sent a petition to the Supervisor of Records stating that the Department had made a "deficient production of records and public information." The petition provided examples of the incomplete response: "for example, No billing records, emails, voicemails or calendars have been produced when it is clear that many of these were created before there was litigation between your office and Supervisor Jew." Addressing the withholding of a portion of the records based on the work product doctrine, the petition set forth several arguments challenging the office's reliance on this doctrine. Petitioners also argued that the withholding of records covered by the request was improper under Proposition 59 (Cal. Const., Art. I, §3(b)).

On August 23, 2007, the Supervisor of Records responded to the petition, starting the analysis with an overview of the statutes that authorize the City Attorney to withhold records relating to the Ed Jew litigation. The attorney-client privilege, set forth in the California Evidence Code, protects from disclosure confidential communications between attorneys and their clients and applies whether or not the matters discussed are in litigation or, indeed, whether they are ever litigated. The attorney work product doctrine, set forth in the Code of Civil Procedure, provides (1) an absolute protection for an attorney's impressions, conclusions, opinions, or legal research or theories and (2) a qualified privilege for other work product of an attorney. Like the attorney-client privilege, the work product doctrine applies whether or not the party involved litigates a matter. Finally, the Public Records Act protects from disclosure records pertaining to pending litigation to which a public agency is party until the pending litigation has been finally adjudicated or settled. The pending litigation exemption is not limited to records protected under the attorney-client privilege or the attorney work product doctrine, but applies more generally to records prepared for use in litigation.

The response then addressed each category of record that was the subject of the petition, as petitioners requested:

Billing Records. Petitioners had requested time billing records relating to the legal proceedings to remove Mr. Jew from office for failure to comply with Charter-imposed residence requirements. The Supervisor of Records determined that the City Attorney properly relied on three statutory provisions to withhold billing records.

First, State law provides that "[a]ny writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances." CCP §2018.030(a) State law further provides that "[t]he work product of an attorney, other than a writing [described in the previous sentence] is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in

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preparing that party's claim or defense or will result in an injustice." CCP §2018.030(b). The policy governing the attorney work-product doctrine is to "[p]reserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases" and to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts." CCP §2018.020(a) and (b).

Second, Evidence Code Section 954 protects from disclosure information transmitted in confidence between attorney and client. California Evidence Code Section 955. Attorneys have an obligation to maintain the confidences of clients. Cal. Bus. & Prof. Code Sec. 6068(e)(1) ("It is the duty of an attorney to do all of the following . . . . (e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.")

Third, Government Code Section 6254(b) protects from disclosure "[r]ecords pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810), until the pending litigation or claim has been finally adjudicated or otherwise settled." This provision protects documents prepared for use in litigation and is not limited to documents protected by the attorney-client privilege or the attorney work product doctrine. *Board of Trustees of California State University,* 132 C.A.4th 889 (2005), at 897, 898. The attorney work product doctrine also applies to work undertaken by an attorney in a non-litigation capacity. *County of Los Angeles, supra,* 82 C.A.4th at 833 (2000).

The Supervisor of Records determined that the time billing information in issue (1) reflects the impressions, conclusions, opinions, legal research and theories of attorney working on the matter, (2) describes actions taken by and at the direction of the attorneys in preparation for the litigation, (3) reflects confidential communications with clients, and (4) is prepared for possible use in litigation (for example, if necessary to obtain attorneys fees). Accordingly, the attorney work product doctrine, the attorney-client privilege and the provisions of Section 6254(b) relating to records pertaining to pending litigation authorized the withholding of these records.

The response to petitioners also addressed the scope of the attorney work product doctrine. The City Attorney may withhold information protected under the attorney work product doctrine in order to preserve the right of its lawyers to prepare for litigation without others taking unfair advantage of their work. Insofar as the billing records reflect the impressions, conclusions, opinions, or legal research or theories of the attorneys in this office, such documents are absolutely protected under Code of Civil Procedure Section 2018.030(a). *American Mut. Liab. Ins. Co. v. Superior Court,* 38 C.A.3d 594 (1974). Insofar as they are prepared for the Ed Jew litigation but do not reflect the impressions, conclusions, opinions or legal research or theories of the attorneys, they are entitled to qualified protection under work product doctrine. Code of Civil Procedure Section 2018.030(b); *American Mut. Liab., supra.* The Code of Civil Procedure allows a court to determine that the withholding of records that are entitled to qualified protection would unfairly prejudice a party in preparing a claim or defense or result in an injustice. In deciding whether to disclose billing records that are entitled to the qualified protection under the work product doctrine, this office was required to consider whether the withholding of the records in this matter would unfairly prejudice Ed Jew's ability to defend himself in the *quo warranto* action or result in injustice to any other person affected by

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the litigation. The City Attorney's Office concluded that no such prejudice or injustice would occur. As Supervisor of Records, we concurred in that determination.

Petitioners argued that the attorney work product doctrine does not apply because of "67.24 b i iii ." Apparently, petitioners were referring to San Francisco Administrative Code Sections 67.24(b)(i) and (iii). Under these Sections, pre-litigation claims against the City and records of advice, analysis or opinions of this office on specified matters are public. These provisions do not apply to the time billing records requested by petitioners. They are not pre-litigation claims against the City. Nor do the records contain 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 the Sunshine Ordinance.

Petitioners also cited a Massachusetts court decision, *General Electric Company v. Department of Environmental Protection*, 429 Mass. 798, 711 N.E.2d 589 (1999). The Massachusetts case was decided under a different statutory scheme than that adopted by California and is therefore irrelevant. In California, the Public Records Act authorizes public agencies to withhold records under the attorney work product doctrine. *County of Los Angeles v. Superior Court,* 82 C.A.4th 319 (2000) (directing the trial court to review records to determine whether the attorney work product doctrine, applicable under Government Code Section 6254(k), applies).

Petitioners also argued that records, including billing records, were improperly withheld because "it is clear that many of these were created before there was litigation between your office and Supervisor Jew." Petitioners were apparently referring to San Francisco Administrative Code Section 67.24(b)(1)(ii), which provides that a department may not decline to disclose 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." This provision addresses the concern that a department may improperly attempt to treat a record that is public as if it were exempt from disclosure merely because the record may be relevant in litigation or has been transmitted to an attorney.

But because this office serves as attorney for the City, records created or obtained in the performance of this office's duties are typically covered by the attorney-client privilege and/or the attorney work product doctrine. For example, if an attorney in this office prepares a legal memorandum, it constitutes work product and/or an attorney-client communication at the time it is created. If the attorney receives a document from a City department as part of a confidential communication, the fact that this office has received the document is privileged. If the attorney clips an article so that it can be considered in the context of giving legal advice or representing the City, the fact that the attorney kept the article is protected by the work product doctrine (and if the article is communicated in confidence to a client, that communication is covered by the attorney-client privilege as well). Because the records withheld by this office in response to the petition are protected – and have always been protected – by these doctrines, the provisions of Section 67.24(b)(1)(ii) do not apply.

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Inter- and intra-office emails. The City Attorney produced some, but not all, email covered by petitioners' request. Many of the communications withheld reflect the impressions, conclusions, opinions, legal research and theories of the attorneys working on the matter. Such documents are absolutely protected under the attorney work product doctrine. Other communications were prepared for the Ed Jew litigation but do not reflect the impressions, conclusions, opinions or legal research or theories of the attorneys. As discussed above, these records are entitled to qualified protection under the attorney work product doctrine. As noted, above, this office was required to consider whether the withholding of the communications subject to qualified protection would unfairly prejudice Ed Jew's ability to defend himself in the *quo warranto* action or result in injustice to any other person affected by the litigation. This office concluded that no such prejudice or injustice would occur. As Supervisor of Records, we concurred in that determination.

Insofar as the communications reflect confidential communications with clients, the Supervisor of Records determined that the City Attorney may not disclose them because of attorneys' obligations under the attorney-client privilege.

Finally, whether or not the communications are protected under the attorney-client privilege and attorney work product doctrine, we determined that they were prepared for use in litigation and were therefore protected from disclosure under Government Code Section 6254(b) (records pertaining to pending litigation).

Notes of meetings. In some cases, records of meetings regarding the Ed Jew litigation reflect the impressions, conclusions, opinions, or legal research or theories of the lawyers in this office. As described above, such documents are absolutely protected by the work product doctrine. In other cases, the notes were prepared for the Ed Jew litigation but do not reflect the impressions, conclusions, opinions, or legal research or theories of the attorneys in this office. These notes are entitled to a qualified protection, as described above. Accordingly, the City Attorney's Office was required to consider whether the withholding of the meeting notes that were entitled to qualified protection would unfairly prejudice Ed Jew's ability to defend himself in the *quo warranto* action or result in injustice to any other person affected by the litigation. This office concluded that no such prejudice would occur. As Supervisor of Records, we concurred in that determination.

Finally, whether or not the meeting notes are protected under the attorney-client privilege and attorney work product doctrine, they were prepared for use in the litigation and are therefore protected under Government Code Section 6254(b) (records pertaining to pending litigation).

Voice mails. This office had no voice mail messages responsive to the request. Therefore, it could produce no such records.

Calendars. To the extent that calendar entries reflect the impressions, conclusions, opinions, legal research and theories of the attorneys working on the matter, they are absolutely privileged under the work product doctrine. To the extent that they reflect matters relating to the Ed Jew litigation but do not reflect the impressions, conclusions, opinions or legal research or theories of

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the attorneys, they are entitled to qualified protection under the attorney work product doctrine. As noted above, this office was required to consider whether the withholding of the calendar entries entitled to qualified protection would unfairly prejudice Ed Jew's ability to defend himself in the *quo warranto* action or result in injustice to any other person affected by the litigation. This office concluded that no such prejudice or injustice would occur. As Supervisor of Records, we concurred in the determination.

All relevant records on backups or archives or local hard drives. The Supervisor of Records determined that any records not produced in response to the request were properly withheld for the reasons set forth in this determination.

Proposition 59

The response also addressed petitioners' argument that the withholding of records in this matter was improper under Proposition 59. But Proposition 59 states that it does not limit or repeal existing laws providing for exemptions for disclosure: "This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of [Proposition 59], including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records." (Cal. Const., Art. I, §3(b)(5).) All of the legal bases for withholding records in response to petitioners' public records request were in existence at the time Proposition 59 was enacted. Further, nothing in Proposition 59 supports what appears to be petitioners' argument that Proposition 59 has a greater impact on a public entity's right to invoke a permissive exemption as compared to a mandatory exemption.

The rule of construction stated in Proposition 59 cited by petitioners ("A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access") merely restates the legal standard that courts had articulated prior to the enactment of Proposition 59. (Cal. Const., Art. I, §3(b)(2); *BRV, Inc. v. Superior Court*, 143 C.A.4th 742, 750-51 (2006).) The Supervisor of Records disagreed with any implication that this office's response to petitioners' public records request was inconsistent with that rule of construction.

Finally, petitioners noted that "[a] statute, court rule, or other authority adopted after the effective date of [Proposition 59] that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest." (Cal. Const., Art I, §3(b)(2).) This provision applies to the creation of a new legal authority, such as a statute, enacted after Proposition 59. It has no bearing on a public agency's response to a public records request.

For the reasons set forth above, the Supervisor of Records denied the petition.

Custodian of the requested records: Deputy City Attorney Chad Jacobs

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Attached as Exhibit H are copies of:

Email containing the following: request for records to the City Attorney's Office, petition to Supervisor of Records, and request to put the appeal on hold

Final message responding to the request for records (email without attachments)

Renewed petition to Supervisor of Records with acknowledgement of receipt (email)

Response of Supervisor of Records (email with attachment)

Note: As noted above, the transmission of thousands of pages of records occurred over a series of days. During that time, and for some time thereafter, there were numerous communications between petitioners and the City Attorney's Office regarding this matter. If the Task Force would like a copy of these communications, we would be happy to provide them.

I. Petition of Ed Martinez, seeking records of the San Francisco Police Department (Police Department personnel roster)

On August 2, 2007, Ed J. Martinez made an immediate disclosure request to the San Francisco Police Department ("Department") for the departmental roster of sworn personnel for the years 2001-2007 with the following fields: full name, star number, current assignment, start date, and separation date. He asked that the document be provided in "PDF" format. By letter dated August 7, 2007, Lieutenant Michael Stasko of the Department's Legal Division informed Mr. Martinez that "Alice Villagomez, Director of Human Resources for the Department, advises that after a diligent search, the San Francisco Police Department does not have any documents responsive to your request."

On August 19, 2007, Mr. Martinez asked this office as the Supervisor of Records for assistance in obtaining the records that he had requested.

By letter dated September 10, 2007, Maureen Conofrey of the Department's Legal Division responded to Mr. Martinez's immediate disclosure request, stating: "Enclosed please find documents responsive to your specific request."

On September 12, 2007, the Supervisor of Records responded to Mr. Martinez's petition, noting that the Supervisor of Records had been informed that the department had responded to the request and that the appeal appeared to be moot, but inviting Mr. Martinez to let her know if the office could be of further assistance.

On September 13, 2007, Mr. Martinez sent an email message to the Supervisor of Records stating that the department had not complied with the request because it had not provided the documents in "PDF" format.

On September 24, 2007, the Supervisor of Records responded to Mr. Martinez's complaint that he had not received the records in PDF format. The response began by noting the provisions of the Public Records Act and the Sunshine Ordinance addressing this issue.

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San Francisco Administrative Code Section 67.21(l) provides:

> Inspection and copying of documentary public information stored in electronic form shall be made available to the person requesting the information in any form requested which is available to or easily generated by the department, its officers or employees, including disk, tape, printout or monitor at a charge no greater than the cost of the media on which it is duplicated. Inspection of documentary public information on a computer monitor need not be allowed where the information sought is necessarily and unseparably intertwined with information not subject to disclosure under this ordinance. Nothing in this section shall require a department to program or reprogram a computer to respond to a request for information or to release information where the release of that information would violate a licensing agreement or copyright law.

California Government Code Section 6253.9 provides:

> INFORMATION IN AN ELECTRONIC FORMAT; COSTS; APPLICATION; AVAILABILITY.
> (a) Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following:
> (1) The agency shall make the information available in any electronic format in which it holds the information.
> (2) Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. The cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format.
> (b) Notwithstanding paragraph (2) of subdivision (a), the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when either of the following applies:
> (1) In order to comply with the provisions of subdivision (a), the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals.
> (2) The request would require data compilation, extraction, or programming to produce the record.
> (c) Nothing in this section shall be construed to require the public agency to reconstruct a record in an electronic format if the agency no longer has the record available in an electronic format.
> (d) If the request is for information in other than electronic format, and the information also is in electronic format, the agency may inform the requester that the information is available in electronic format.
> (e) Nothing in this section shall be construed to permit an agency to make information available only in an electronic format.

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(f) Nothing in this section shall be construed to require the public agency to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.

(g) Nothing in this section shall be construed to permit public access to records held by any agency to which access is otherwise restricted by statute.

With respect to the San Francisco Police Department's roster of sworn personnel that was the subject of the request, the response set forth the understanding of the Supervisor of Records with respect to the form in which the records were maintained:

> The Police Department has some of the requested information only on paper (for the earlier time periods) and some in electronic form (for the later time periods, including the most current information). As to the portion stored electronically, it is on the Department's HRMS System, which is part of a PeopleSoft program. The HRMS System does not allow data to be exported into any other software program (for example, Excel, Word or PDF), or transferred to disk, tape or any other medium. The Department can run and print out reports. The HRMS System contains personal information about the individuals listed. Only a limited number of personnel are allowed to view the material on the computer screen and even fewer allowed to alter it.

The Supervisor of Records determined that as to that part of the records that the Department has only in paper form, it has no obligation to provide this information in electronic form. As to the portion that is in electronic form, under the facts here, the Department has no obligation to provide the information in electronic form. Nothing in the Sunshine Ordinance or the Public Records Act requires the Department to do other than provide the printout of the information in paper form. Section 67.21(l) of the Sunshine Ordinance provides that public agencies must provide information stored in electronic form "in any form requested which is available to or easily generated by the department, its officers or employees." Similarly, Government Code Section 6253.9 requires agencies that have information in an electronic format to "make that information available in an electronic format when requested by any person . . . ." The requirement in both provisions assumes that the electronic information is capable of being generated in the form requested. In this situation, where the Department is unable, as a technical matter, to transfer the information in PDF or any other electronic format, the situation is substantially the same as the Department's only having the records in paper form. Under these facts, the Department complied with the requirements of the Sunshine Ordinance and the Public Records Act by printing out hard copies of the information it had in electronic form and producing these copies.

Accordingly, the Supervisor of Records continued to consider Mr. Martinez's appeal to the Supervisor of Records to be moot.

The Supervisor of Records also noted that, although we did not know if this were the case, it might be possible for the Department to reprogram its HRMS System to provide information in PDF form. The response informed Mr. Martinez that if he were interested in the Department's exploring that possibility, and if he would be willing to pay the necessary costs, he should let our office know.

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Custodian of the requested records: Lieutenant Michael Stasko.

Attached as Exhibit I are copies of:
Mr. Martinez's request for records
Department's response
Mr. Martinez's petition to the Supervisor of Records
Department's further response
Response of the Supervisor of Records (email with attachment)
Mr. Martinez's complaint regarding receipt of records in paper, not PDF form (email)
Response of the Supervisor of Records (email with attachment)

II. Court Actions Regarding Petitions decided by the Supervisor of Records

One court action has been filed regarding a public records request for which the Supervisor of Records issued a determination, although the matter is still pending and the court has issued no decision.

The action, brought by Peter Warfield, concerns records of the San Francisco Public Library relating to repetitive stress injuries ("RSI"). As discussed below, in 2004 Mr. Warfield made a number of public records requests concerning these records.

Mr. Warfield's Requests and the Library's Responses

On February 13, 2004, Mr. Warfield asked the Library for "information about the nature, form, quantity etc. of records related to RSI problems and injuries at the library (for employees) – last 5 years." In responding, the Library informed Mr. Warfield that "records that may contain information about RSI injuries suffered by Library employees" consisted of "personnel records, (eg. the Cal OSHA Log, and the Claim Log Summary) which containing [sic] personal information are confidential under State medical privacy laws and the California State Constitution." The Library also suggested that Mr. Warfield consult with the Department of Human Resources ("DHR"), noting that "the Workers Compensation Division of [DHR] may compile nonconfidential statistical reports that may contain information responsive" to his request.

Mr. Warfield made a further request for records on February 25, 2004, asking the Library for a "sample blank page for each one of the documents referenced in your February 17, 2004 letter describing what information is available on the subject of RSI related employee problems/injuries. If a sample blank page is not available for any of the available documents, then one record of each type with redaction of any personally identifying information." The Library responded that it had identified no documents responsive to the request, repeating that personnel records contained confidential medical information and could not be disclosed. The response also suggested that Mr. Warfield contact DHR to see if it had disclosable records concerning RSIs suffered by Library employees.

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Later in 2004 (no later than October), the Library made available to Mr. Warfield additional records responsive to his February 25, 2004 request, including (1) blank copies of the workplace injury forms that are completed to document and report each individual injury, entitled "Employee's Claim for Worker's Compensation Benefits" (designated as Form DWC-1) and "Employer's Report of Occupational Injury or Illness (OSHA)" (designated as Form 5020) and (2) summary documents and statistical reports of injuries sustained by Library employees, with employee names and identifying information redacted, and (2) summary documents and statistical reports of injuries sustained by Library employees, with employee names and identifying information redacted, including Workers Compensation statistical reports, which Mr. Warfield had received by June 2004, as well as copies of the Library's OSHA logs - designated Cal/OSHA Form 300 and more Workers' Compensation statistical reports, with information identifying specific employees redacted from both.

In November 2004, the Library again made available to Mr. Warfield redacted copies of its Cal-OSHA Summaries of Work-Related Injuries and Illnesses (designated as Form 300A), and redacted copies of its Cal-OSHA Logs of Work-Related Injuries and Illnesses.

On April 23, 2004, Mr. Warfield made another request, asking the Library to disclose records containing "information that was used as the basis for, or supports, Library's public statements, and your 2004 prepared documents concerning RSI problems of employees, excluding personally identifiable information." His request further stated: "Such statements include, I believe, that there were 36 RSI cases from Jan. 2001 to Jan. 2004 as well as specific numbers of work days and hours lost and a $265,000 cost to the Library." The Library responded by providing Mr. Warfield with a February 18, 2004 Library staff memo, which the Library had already provided earlier to Mr. Warfield, and by providing a Powerpoint projection that a DHR employee had made to the Library Commission concerning RSI costs. The response further informed Mr. Warfield that any other responsive records had already been provided to him in response to his other requests.

Determination of the Supervisor of Records

On September 13, 2004, this office, as Supervisor of Records, issued a determination on the issue of "whether the Public Library must disclose records and information [requested by Mr. Warfield] about repetitive stress injuries experienced by library employees, or whether the Public Library may withhold such records and information based on its position that disclosure would infringe on the privacy of its employees."

The Supervisor of Records concurred in the Library's determination that it may not release medical information about identifiable employees because disclosure would violate state law protecting employee medical information and laws protecting the privacy rights of the employees. Cal. Civil Code § 56.20; Government Code §§ 6254(k) (exempting "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law") and 6254(c) (exempting "personnel, medical and similar files the disclosure of which would constitute an unwarranted invasion of personal privacy"); S.F. Admin. Code § 67.1(g) ("employees and officials of the City and County of San Francisco have rights to privacy that must be respected");

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Art. I, Sec. 1 of the California Constitution (protecting the right of privacy); and *El Dorado Savings & Loan Assoc. v. Superior Court* (1987) 190 C.A.3d 342, 344.

Actions of the Sunshine Ordinance Task Force

Mr. Warfield filed a complaint with the Sunshine Ordinance Task Force on March 5, 2004, alleging that the Library had failed to provide information on "RSI related employee injuries/problems." The Sunshine Ordinance Task Force issued an Order of Determination dated April 22, 2004, finding that the Library was in violation of Sunshine Ordinance Sections 67.21(c) (must provide assistance in providing records in the department's control) and 67.24(i) (must provide statutory provisions which would exempt documents from disclosure).

On May 4, 2004, Mr. Warfield filed a complaint with the Sunshine Ordinance Task Force alleging that the Library had not provided any documentation in response to his request for "information that was used as the basis for, or supports, publicly stated problems and specific statistics on RSI (repetitive stress injuries) costs, excluding any personally identifiable information." This complaint also alleged that the Library "did not cite any specific statute(s) as its reason" for nondisclosure. At its June 22, 2004 meeting, the Sunshine Ordinance Task Force issued an Order of Determination finding "the Public Library in violation of Sunshine Ordinance Section 67.24, Public Information That Must Be Disclosed, and Section 67.24, Withholding Kept to a Minimum; (2) The Sunshine Ordinance Task Force requests a response to this Order of Determination form the Public Library within three weeks."

The Library's Custodian of Records appeared at the Sunshine Ordinance Task Force hearings of April 22, 2004 and June 22, 2004 on Mr. Warfield's complaints and explained that the Library had withheld certain records from disclosure because of the laws protecting employee medical information. In addition, following the Task Force's two Orders of Determination, letters to the Task Force dated October 18, 2004 and October 20, 2004 from, respectively, the City Attorney's Office and the Acting City Librarian addressed the status of the Library's compliance with the Task Force orders. These letters set forth the Library's position that it had provided redacted copies of information sought by Mr. Warfield and that any records not provided to him were protected from disclosure by law. More specifically, these letters stated that the Library had provided Mr. Warfield with the statutory justification for withholding of records (which justifications were supported by the determination of the Supervisor of Records, described above); had assisted Mr. Warfield by providing statistical records of its workplace injuries (redacted to protect the identity of the injured individuals); and had directed Mr. Warfield to, or learned that he had already contacted, the City's Workers Compensation Division and the Department of Public Health's Division of Occupational and Health Safety, both of which the Library believed would have non-exempt or redactable records responsive to the requests.

The October 18, 2004 letter from the City Attorney's Office also stated that the Library maintains copies of California OSHA logs and Workers Compensation statistical reports and that Mr. Warfield acknowledged that he possessed redacted versions of the latter but it was not clear

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whether he had inspected or obtained copies of the former. The letter offered to arrange an inspection of such records, in redacted form.

On October 26, 2004, the Sunshine Ordinance Task Force, concurring with the recommendation of its Compliance & Amendments Committee, voted to refer to the Ethics Commission and the San Francisco District Attorney its April 22, 2004 Order of Determination, finding the Library in violation of San Francisco Administrative Code Sections 67.21(c) (must provide assistance in providing records in the department's control) and 67.24(i) (must provide statutory provisions which would exempt documents from disclosure).

Mr. Warfield's Lawsuit

On August 6, 2007, Mr. Warfield filed a Verified Complaint/Petition for Writ of Mandate against the San Francisco Public Library and the City and Count of San Francisco seeking an order requiring the Library and the City to "produce records, with personally identifiable information redacted, and aggregate data reflecting repetitive stress injuries ("RSIs"), incurred by the San Francisco Public Library employees during the five-year period from February 13, 1999 through February 13, 2004." *Peter Warfield v. San Francisco Public Library*, San Francisco Superior Court No. CGC-07-465870.

The Library and the City filed an answer on September 4, 2007. On September 24, 2007, the Library and the City filed opposition papers to the Petition for Writ of Mandate, asking that the court deny the Petition on the grounds that the Petition is barred by the statute of limitations and by laches and, in any event, fails on the merits because the Library provided Mr. Warfield with all the records to which he is entitled.

The parties agreed to have a court hearing on October 11, 2007 on the opposition to the Petition, but it was later agreed that the matter be taken off calendar. At this time, no other hearing date has been scheduled.

P.J.