Protecting San Francisco's Open Government

Budget Analyst Short-Circuits Supervisor Wiener

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by Patrick Monette-Shaw

Supervisor Scott "The Tinkerer" Wiener is at it again, tinkering with San Francisco's Sunshine Ordinance, our local open government law that San Francisco voters adopted in November 1999 to supplement the California Public Records Act (CPRA) and the Brown Act covering open meetings. Readers may wish to see part one of this story in last month's *Westside Observer* at www.westsideobserver.com.

Sunshine Task Force members, its Deputy City Attorney, and Board of Supervisors clerk, May 2012.

Of the 41 City Departments that responded to the Board of Supervisors' Budget and Legislative Analyst *Survey of Costs of Compliance With the Sunshine Ordinance*, a preliminary analysis conducted by this author reveals that City Departments first claimed expenses of approximately $8.2 million. A follow-up records request resulted in the Department of Elections revising its initial submission on March 3, adjusting its initially claimed 28,013 hours down to just 3,886 hours, and removing un-recouped photocopying expenses — eliminating between the two areas $2 million in costs wrongly first asserted.

Of the remaining $6.16 million claimed across City departments, another $2.24 million to $3.36 million in costs were dubiously reported and were perhaps not justified, potentially reducing total costs to approximately just $2.8 million.

Luckily, the Budget Analyst released his analysis, which became publicly available on April 25, in which he concluded that the costs of compliance with Sunshine directly attributed as unique to the Sunshine Ordinance is less than a million dollars (of a $7 ***billion*** City budget), and just $4.2 million between complying with local and state open records laws.

Rose has short circuited Tinkerbelle Wiener's attack on Sunshine, if only temporarily.

Clearly the $8.2 million in piled-on costs were the result of City departments wildly over-estimating their costs. Rather than the more probable $2.8 million in costs — not all of which would have been unique to our local laws — Budget Analyst Harvey Rose let it stand at $4.2 million.

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Sunshine Ordinance Task Force member Richard Knee, a freelance journalist in San Francisco and a noted Sunshine activist, is deeply concerned about the Board of Supervisors' Budget and Legislative Analyst survey of the costs of sunshine law compliance being conducted at Wiener's surreptitious request.

Knee said, "There is a good deal of concern among Sunshine advocates that Wiener and/or at least one of his fellow supervisors might be planning a ballot measure that would abolish the Task Force and/or weaken the Sunshine ordinance in some other way."

Knee was appointed directly to Sunshine Task Force Seat #3 by the Board of Supervisors in 2002, and has served admirably on the Task Force for a decade. He was nominated by the Society of Professional Journalists–Northern California Chapter to succeed *San Francisco Bay Guardian* editor/publisher Bruce Brugmann in Seat #2 in 2004, 2006, 2008 and 2010; in all cases, Knee's nomination was confirmed by the Board of Supervisors, and he served as Task Force Chair in 2009–10 and 2010–11.

What gives rise to the sunshine advocates' worry is that Rose's survey instrument was deeply flawed. "The survey makes no attempt to discover how much our local Sunshine ordinance has saved the City by exposing or preventing backroom deals, and furthermore, it's difficult if not impossible to measure how much the Task Force has saved the City in legal expenses by eliminating the need to take Sunshine-related complaints to court," said Knee.

He's not alone. Ethics professional Allen Grossman notes, "Much of the data being fed to Harvey Rose in the Legislative Analyst's office was based on differing assumptions made by City departments and the lack of critical eyes when pulling their data together. They mixed apples and oranges, along with pears and bananas," Grossman notes.

As www.CitiReport.com publisher Larry Bush reported in March 2011, Grossman is a retired attorney noted for forcing the Ethics Commission to divulge its records of complaints referred for enforcement by the Sunshine Ordinance Task Force, which receives complaints when City agencies don't follow public records disclosure and open meeting laws. Grossman — recognized as highly knowledgeable on government transparency and open access laws, and a volunteer consultant to the Task Force — ultimately filed suit in Superior Court to force the Ethics Commission to comply with the California Public Records Act; Ethics eventually settled the case, provided the documents, and awarded attorney fees to Grossman, needlessly costing the City over $25,000.

The "Sunshine-Related" Misnomer

Are "public records" the same as "Sunshine-related information"? The answer is partly "Yes," but mostly "No."

Rose's flawed survey instrument started off on the wrong foot. In question 4a, he asked each City department to identify the job classification codes for each employee, and the estimated or actual number of regular and overtime hours involved in "providing Sunshine Ordinance-related information to the public, separate from responding to formal public information requests," which Rose claimed was "required" by Sunshine §67.21.

This question provided no guidance to City departments on what "Sunshine-related information" meant, separate from formal Sunshine requests, enabling City departments to simply pile on.

Importantly, Rose failed to remind City departments that §67.21 does not deal with "Sunshine-related information," it deals with access to public information — defined as the "content of public records" — and provides processes for administrative remedies and appeals when City departments fail to release contents of public records. More importantly, the Sunshine Ordinance indicates that "public information" is "public records defined in the California Public Records Act (CPRA)," but the survey introduced a misnomer, confounding public information as synonymous with public records.

Rose did not instruct City departments to itemize only public records costs resulting from the Sunshine Ordinance, separate and distinct from public records required for disclosure under CPRA. Rose simply called it "Sunshine-related information." So while public records must be disclosed (the "Yes" part of whether the two categories are the same), that does not mean "Sunshine-related information" is the same thing (the "No" part). With this barn door opened, boy did City Departments wrongly pile on, failing to distinguish between CPRA-required and Sunshine-required public records!

Grossman recommended that Rose start over by going back to each department with a set of standard directions about what was to be included or excluded, how data is to be identified within various categories, and how each dollar amount be supported by an appropriate schedule detailing the individual components that went into each claimed expense.

Of the 47 City departments asked to complete the survey, only 41 did (notably the Board of Supervisors itself did not respond to the survey by the initial February 3 deadline, apparently granted an extension; as this issue goes to press the Board appears to have failed responding to its own Legislative Analyst's survey). Initially, the 41 City departments asserted approximately $8.2 million in total costs to comply with Sunshine, including first asserting that providing public records information in Question 4a cost $1.687 million, just under the $1.740 million responding to formal, actual Sunshine requests asked in Question 4b.

The worst transgressor was Evan Kirk, a job class 1842 Management Assistant at the Elections Department, who first claimed on February 3 that he assumed "all activities that provide public records (information) are 'Sunshine-related tasks'." He claimed Elections had worked 28,013 hours, at a calculated cost of $1.159 million, to provide "Sunshine-related information" in response to Question 4a, and just 2.75 hours responding to formal Sunshine requests in Question 4b. He also initially claimed Elections had spent $1.046 million in un-recouped photocopying expenses.

Kirk coyly included that his first response was due to legal posting requirements, and voter education and outreach. In fact, Kirk lumped together reporting hours for voter "outreach" workers, precinct services employees, voter services employees, poll workers, and publications and warehouse staff to inflate his initial response.

In response to this reporter's question on February 19 for details about the reported 28,013 hours, Kirk submitted a revised response on behalf of the Elections Department on March 3 to the Budget analyst — to his credit and without being asked. His revised submission eliminated $996,223 in claimed expenses (24,127 fewer hours) spent for Question 4a (Sunshine-related information), and also eliminated the $1,048,853 he had first claimed in un-recouped photocopying charges, reducing the total cost of Sunshine compliance by $2.04 million in one fell swoop from $8.2 million to $6.2 million, even before Harvey Rose started asking questions.

Kirk rationalized his changes by indicating the revised submission belatedly recognized that the Elections Department's major function is to proactively provide public information, which he should have known all along wasn't a cost of Sunshine, but a cost of his department's proactive "mission."

Not so at the Recreation and Parks Department, and at the City Attorney's Office.

Rec and Park's Olive Gong — the secretary who unsuccessfully defended her boss, Phil Ginsberg, Recreation and Parks General Manager, in a Sunshine complaint filed by George Wooding eventually referred to the Ethics Commission for official misconduct — tried to muddy the waters, claiming a distinction between "formal" and "informal" records requests.

Gong, like Kirk, isn't alone. Over at the City Attorney's Office — which is designated in the Sunshine Ordinance as being the City's Supervisor of Records — senior Confidential Chief Attorney II Therese Stewart, who earned $214,390 in FY 2010-11, simply lumped together costs for responding to public records (in Question 4a) with the City Attorney's costs of responding to formal Sunshine requests (in Question 4b). Stewart's estimate claims 794 hours in City Attorney time, at a cost of $82,786, but doesn't stratify how much of that time was devoted to simple public record requests vs. formal Sunshine requests. Nor does she stratify how much of these costs are attributable to CPRA, rather than to Sunshine.

But these departments weren't alone; there were seven City departments who reported either no costs for providing "Sunshine-related information" (a.k.a., "public records") distinct from formal Sunshine requests, or they may have simply lumped those costs together with costs of responding to formal Sunshine requests, as the City Attorney had done. Rose's April 12 report analyzing Sunshine costs mentions nothing about this, although Rose did indicate in his report that "caution" should be considered in light of flawed reporting.

Rose threw out costs that smelled of double-reporting, particularly double-reporting potentially by the City Attorney.

Rose Selectively Corrects Flaws in the Glass

Rose concluded a total of $4.27 million is attributable to complying with local and state open records legislation. Of that $4.27 million, he claims $3.13 million is attributable to City department Sunshine costs reported from their five-page surveys. He then concluded just $997,676 of the costs were attributable "uniquely" to the Sunshine Ordinance and the balance would have been required under CPRA, even if San Francisco did not have its own local Sunshine Ordinance.

In effect, Rose acknowledges that 76.7% of open records costs for San Franciscans to know what their government is doing on their behalf is attributable to the State's CPRA laws, and just 23.3% are attributable to our local Sunshine Ordinance. But even those cost allocations may be wildly mis-estimated by Rose's staff.

First, Rose acknowledges in footnote number 2 that he "assumes" 10% of public records requests and 20% of "other costs" were unique to the Sunshine Ordinance. His assumptions are not provable.

His analysis acknowledges that the Sunshine Ordinance includes just a handful for expanded access requirements not provided by CPRA, including draft documents and draft memos; litigation records; certain personnel information; certain law enforcement information; contracts, bids, proposals and other communications from those seeking City contracts; and budgets and other financial information. But Rose provides no analysis about how many of the purported 5,833 formal Sunshine requests had actually requested information provided by the expanded categories covered under our local requirements not required by CPRA, nor did Rose analyze whether the 99 official Sunshine ***complaints*** filed with the Sunshine Task Force had focused on records unique to our local open records expanded categories. Without such an analysis, Rose's guesswork that 10% of costs should be attributable solely to the Sunshine Ordinance is, well, just guesswork, when not another faulty assumption.

Second, while Rose acknowledges, "it is likely that without the Sunshine Task Force, some portion of complaints would be directed to other public bodies, such as the [Superior] courts, which would in turn incur costs" [read: increase costs], he failed to estimate what increased City legal costs might look like. Rose is using code words to obfuscate that without the Sunshine Task Force, the City would likely face significantly higher costs from lawsuits against the City, which potential costs he made no effort to quantify or include.

As I reported last month, Wiener didn't ask for — nor did Rose bother to consider and include — any benefits (as in a cost-benefit analysis) of either CPRA or our local Sunshine Ordinance, including the "benefit" of restoration of $350,000 in misappropriated funds to Laguna Honda Hospital's patient gift fund (which would not have happened were it not the result of records requests having been placed by Drs. Kerr and Rivero), nor the benefit of the City pursuing Superior Court recovery of $70 million in "change orders" related to the $183,000 million cost overrun to rebuild Laguna Honda Hospital, which change orders were also uncovered via the "benefit" of public records requests this reporter had placed.

Rose did toss out over $3 million in unsupported costs, including a $640,102 "typo" wrongly reported by the Children and Families Commission (which was actually zero dollars) since it did not submit a revised survey, $1.2 million the City Attorney wrongly claimed, and $812,692 Muni (MTA) tried to tack on, among other City department's over-reporting.

To his credit, Rose indicates his office reviewed costs submitted on the initial 5-page forms, and "returned them to departments for clarification" when the reported amounts didn't seem reasonable or were well above or below costs submitted by other Departments.

The Mayor and His Misguided Managers

Some City departments noted in personal communications that they had contacted the Mayor's Office regarding responses to the survey instrument. Elsewhere, there is news the Mayor's Office was involved placing follow-up calls to City departments about their survey responses. Many City managers labor under the misbelief that the Sunshine Ordinance is far broader than CPRA requirements, which isn't true. These managers assume that when records requests are placed that invoke neither the Sunshine Ordinance nor CPRA, that the records sought are magically and automatically assumed to be Sunshine requests, when more often than not, they aren't and may be CPRA requests.

They labor under this misconception from City Attorney Dennis Herrera's so-called "***Good Government Guide***," which mistakenly fails to instruct City managers and all City employees that in 76.7% of records requests, they must still comply with CPRA, even while they attempt to obstruct Sunshine requests.

Sunshine Trumps Secrecy

Where would we be without an administrative appeal route? The Sunshine Ordinance is a non-judicial enforcement mechanism to comply with open government requirements. If Supervisor Wiener attempts to weaken or eliminate it, City officials will still be required to comply with the Brown Act and California's Public Records Act. In addition, Section (b)(1) of Article 1 of California's constitution stipulates that "people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."

By tinkering with, or eliminating the Sunshine Ordinance, Wiener would deprive complainants alleging public records and public meeting violations of any administrative remedy other than Superior Court lawsuits. The Ordinance is the only available administrative forum San Franciscans have to resolve public access disputes and to deter City bureaucrats from obstructing public access. The only comparable alternative offered by CPRA and the Sunshine Ordinance is filing lawsuits in Superior Court, which few citizens have access to, or can afford.

Grossman may be right: We may be being fed fruit salad — apples and oranges, pears and bananas — in a bald attempt by Wiener, emboldened by Harvey Rose, to obfuscate the true costs and benefits of our local Sunshine laws. The price we pay for transparent government may include the price of eternal vigilance over Supervisor Scott "Tinkerbelle" Wiener, to short circuit whatever motives he may be up to.

Monette-Shaw is an open-government accountability advocate, a patient advocate, and a member of California's First Amendment Coalition. He received the Society of Professional Journalists–Northern California Chapter's **James Madison Freedom of Information Award** *in the* **Advocacy** *category in March 2012.* ***Feedback****: mailto:monette-shaw@westsideobserver.*