

Pandora's Secrecy Box Part 2: Sunshine Opens Whistleblower Records

by Patrick Monette-Shaw

Hiding Routine Interagency Correspondence

The Sunshine complaint *Patrick Monette-Shaw vs. Controller's Office and Ethics Commission* (Case 11013) filed on March 6, 2011, sought to obtain any and all routine, but non-investigatory, correspondence between the City Controller's Office and the Ethics Commission regarding Drs. Kerr's and Rivero's Laguna Honda Hospital gift fund whistleblower complaint.

As the March 2010 whistleblower complaint by Doctor's Kerr and Rivera dragged on, in January 2011 a records request was made to the Controller's Office and the Ethics Commission for any communications showing that the Controller had been asked to suspend any investigation.

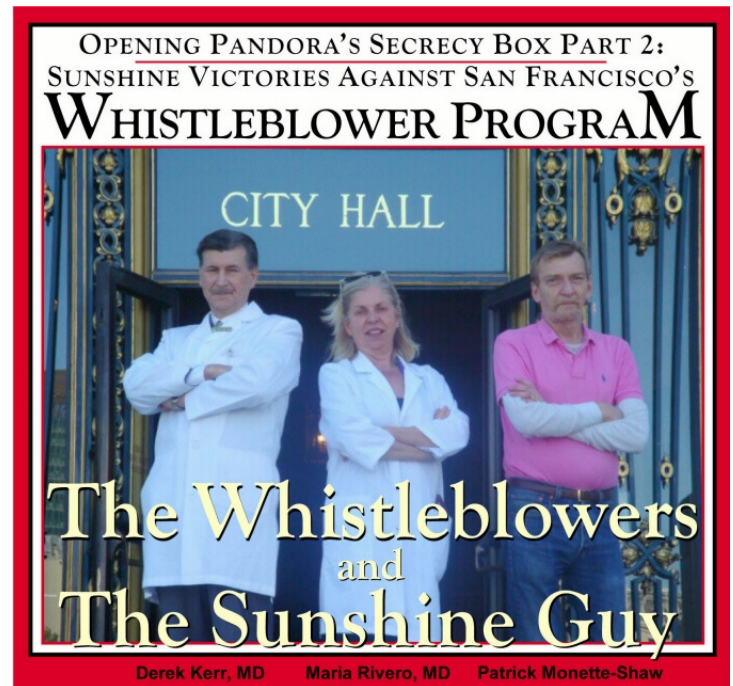
On January 13, 2011, the Controller's Office wrote refusing to provide any records. In an undated, four-page letter, the Controller's office claimed that all records were confidential, citing six references to San Francisco's Campaign and Government Code, Article 1 of the California Constitution, ten citations to San Francisco's City Charter, three citations to the Government Code, and for good measure a citation to Evidence Code Section 1040. The Ethics Commission also refused to provide records.

The Controller's Office and the Ethics Commission also won't release when it refers complaints to other City departments or the dates when action is taken. Without dates, complainants can't determine if action is being taken within a reasonable amount of time, or whether complaints are ignored.

Although Kerr and Rivero had signed confidentiality releases on their complaint on February 7 and April 3, both agencies still claimed the complaint was confidential.

After both agencies refused to provide the correspondence, a Sunshine complaint was filed on March 6 against both departments. The Controller's office subsequently provided another four-page, undated response to the Sunshine complaint with new citations to the California Government Code not initially included in their first four-page response.

"Too often complaints to the Controller's whistleblower program get referred to the Ethics Commission where they are buried," Dr. Kerr testified during a hearing before the Sunshine Ordinance Task Force. "They shouldn't be concealed under the pretense of whistleblower confidentiality, especially after we signed a release allowing for disclosure."



For its part, the Ethics Commission cited only San Francisco Charter Section C3.699-13, and its internal *Regulations for Investigations and Enforcement Proceedings* to claim that all of its records — including routine correspondence between the two agencies — are confidential.

When the first Sunshine complaint was heard by the Sunshine Task Force on April 26, Richard Mo, the Ethics Commissions' Chief Enforcement Officer, and Ms. Lediju, the City Controller's Director of Audits who also administers the Controller's Whistleblower Program, attempted to convince members of the Sunshine Task Force that all whistleblower records are confidential.

Mo and Lediju ignored Kerr's and Rivero's waiver of confidentiality and State law. Lediju acknowledged on January 21 that interagency communications routinely occur, but claimed because accused wrongdoers are "afforded the [same confidentiality] protections" as a whistleblower, any routine non-investigatory correspondence is confidential and not disclosed.

The Task Force reminded Lediju and Mo that they had to provide the correspondence requested, even if an entire sheet of paper was completely redacted.

That principle was clarified in the *Allen Grossman vs. San Francisco Ethics Commission* when the Superior Court ruled in February 2010 that none of the citations offered by the City Controller and the Ethics Commission provided a valid exemption to the California Public Records Act permitting withholding of records.

The *Grossman* settlement represented a complete reversal of the Ethics Commission's assertion of exemptions for its investigative records and future Ethics Commission investigative files.

The Task Force members voted unanimously on April 26 that both agencies violated the Sunshine Ordinance regarding untimely response from the Controller, that withholding of records must be kept to a minimum, and that materials not exempt should be redacted rather than withheld entirely.

Blocking Access to Investigative Files

The second Sunshine complaint, *Patrick Monette-Shaw vs. Ethics Commission* (Case 11014), sought to obtain from the Ethics Commission its closing memo of the patient gift fund whistleblower complaint and the Ethics Commission's investigative file.

The City Attorney's office appears to have concluded that the City Charter exempts the Ethics Commission from the Sunshine Ordinance, although there is nothing in the Sunshine Ordinance that exempts *any* City department, board, or commission from requirements for open-government records, or the public's right-to-know.

The second Sunshine hearing took up the issue of the Ethics Commission's refusal to comply with disclosure laws. The Commission's position was that it could neither confirm nor deny that Kerr and Rivero had even submitted a whistleblower complaint at all. At the same hearing, Kerr and Rivero testified publicly about their complaint.

The Ethics Commission dug in with its position, refusing to disclose whether the investigation was ongoing or closed, or if closed, what date it concluded its investigation.

Task Force member David Snyder introduced a motion finding that the Ethics Commission had violated California's Public Records Act. Snyder attempted to limit the issue to just a violation of State law in

CPRA, because he didn't want to muddy the waters over a jurisdictional dispute between the Sunshine Ordinance and the City Charter, and which law takes precedence if there are conflicting provisions in the two local laws.

If each local jurisdiction were permitted allowing their city charters — or their local Ethics Commissions' internal policy manuals — to trump CPRA, State public records access laws would be rendered meaningless.

Synder's motion passed unanimously resulting in a second Sunshine victory.

Preventing Setting a Bad Precedent

Task Force member Hope Johnson introduced a second motion, asserting that the Sunshine Ordinance simply expands CPRA by requiring information withholding be kept to a minimum — which isn't addressed in CPRA — and that the Ethics Commission was in violation for that reason. She noted that in addition to State law violation, local law that permits broader disclosure had also been violated.

The effect of Johnson's motion was to underscore that the Ethics Commission is subject to San Francisco's open government laws. Ethics responded that it believes that all its records are confidential, and rejected the legal standard of a case-by-case test that balances competing public interests to evaluate disclosures. It relied on an absolute standard of non-disclosure regardless of public interest.

Task Force members appeared shocked that the balancing test apparently wasn't applied on a case-by-case basis to the patient gift fund whistleblower investigation. While an exemption from disclosure is in the law, the Ethics Commission lacks authority to claim the exemption since the Ethics Commission doesn't have police or penal authority, which is a requirement for agencies to use that exemption.

Ms. Johnson's May 18 motion also passed, finding that the Ethics Commission had additionally violated **local** open records law. "Since the Task Force agreed in the first motion that the Ethics Commission had not appropriately cited a CPRA exemption for withholding records, my second motion provides direction to the Ethics Commission of San Francisco's expectations for disclosure," Ms. Johnson says.

"The Task Force is to be commended for putting the Sunshine into the back rooms of City Hall," said Lynn Carman, an accomplished lawyer who handles public interest, public health and public-right-to-know cases.

These two Sunshine victories may help open the lid of San Francisco's Pandora's Secrecy Box approach to Ethics Commission and Whistleblower investigations.

Patrick Monette-Shaw is an open government accountability advocate, a patient advocate and a member of California's First Amendment Coalition.

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