MEMORANDUM

TO: Honorable Members
Sunshine Ordinance Task Force

FROM: Paula Jesson
Deputy City Attorney

DATE: March 18, 2013

RE: Thirteenth Annual Report of the Supervisor of Records
October 1, 2011 to September 30, 2012

The City Attorney's Office submits this report to the Sunshine Ordinance Task Force under Section 67.21(h) of the San Francisco Sunshine Ordinance (S.F. Admin. Code §67.21(h)). That section requires the Supervisor of Records to prepare an annual tally and report for the Sunshine Ordinance Task Force on each petition brought before the Supervisor of Records for access to records. Section 67.21(h) includes the following requirements:

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.

Reporting period: This report covers petitions brought before the Supervisor of Records between October 1, 2011 and September 30, 2012 (the "reporting period").

Custodian of Records: For the custodian of records, the report generally gives the name of the employee who responded to the request.

Court actions: No court decisions issued regarding determinations by the Supervisor of Records for the reporting period.

Orders issued: No order from the Supervisor of Records issued to any City department whose records were the subject of a petition.

DESCRIPTION OF PETITIONS AND THEIR DISPOSITION

1. Petitioner: Brett Joshpe
   Department: San Francisco Employees Retirement System
   Records sought: Records of alternative investment agreements
   Custodian of Records: Norm Nickens
TO: Honorable Members
Sunshine Ordinance Task Force
DATE: March 18, 2013
PAGE: 2
RE: Thirteenth Annual Report of the Supervisor of Records
October 1, 2011 to September 30, 2012

Determination: Denied - withholding permitted under statute governing disclosure of alternative investments of public retirement systems (Gov. Code §6254.26).

A copy of the determination is included on pages 1-9 of the Appendix.

2. Petitioner: Larry Bush
Department: Office of the District Attorney
Records sought: Disposition of domestic violence cases for 2011
Custodian of Records: Cristine Soto De Berry
Determination: Denied because moot – records provided.

The petitioner, Larry Bush, asked the District Attorney’s Office for records for calendar year 2011 of the disposition of all cases it received or initiated involving domestic violence. The District Attorney’s Office informed the petitioner that it did not have responsive records and the petitioner appealed to the Supervisor of Records.

We discussed the appeal with the District Attorney’s Office and staff told us that they had since provided the records to the petitioner.

3. Petitioner: JC Rowen
Department: Department of City Planning
Records sought: Emails to and from Planning Commissioner Antonini, including those concerning stadiums for the SF 49ers; emails to and from the City of Santa Clara and certain individuals; letters to and from the Commissioner and Santa Clara
Custodian of Records: Linda D. Avery-Herbert
Determination: Denied – the records, which were on the Commissioner’s personal computer, included (1) those that were not “public records” and therefore not subject to disclosure and (2) those for which it was not clear whether they were “public records,” but the Commissioner agreed to disclose them.

A copy of the determination is included on pages 10-12 of the Appendix.

4. Petitioner: Gerald Cauthen
Memorandum

TO: Honorable Members
Sunshine Ordinance Task Force

DATE: March 18, 2013
PAGE: 3
RE: Thirteenth Annual Report of the Supervisor of Records
October 1, 2011 to September 30, 2012

Department: Municipal Transportation Agency
Records sought: General Provisions and Special Conditions of the Central
Subway Tunneling Contract
Custodian of Records: Caroline Celaya
Determination: Denied because moot – records provided.

The petitioner, Gerald Cauthen, filed a petition with the Supervisor of Records regarding
his request to the Municipal Transportation Agency ("MTA") for copies of the General
Provisions and Special Conditions of the Central Subway Tunneling Contract (#1252)). The
petitioner said that he had difficulty obtaining the requested records.

After discussing the request with counsel for the MTA, the Supervisor of Records
informed the petitioner that the MTA would provide the records to him.

5. Petitioner: Kimo Crossman
Department: City Attorney’s Office
Records sought: Records of legal advice to Mayor Lee regarding the
Mirkarimi matter
Custodian of Records: Jack Song
Determination: Denied – records properly withheld under attorney-client
privilege.

A copy of the determination is included on pages 13-16 of the Appendix.

6. Petitioner: Joe Eskenazi
Department: Assessor’s Office
Records sought: Communications to, from and within office in 2010 – 2012
regarding 27 Athens Street and/or parcel No. 5946-040
Custodian of Records: Matthew Thomas
Determination: Denied - withholding permitted under statute governing
the disclosure of records of county assessors (Rev. & Tax.
Code §408(a)).

A copy of the determination is included on pages 17-18 of the Appendix.
7. Petitioner: Ray Hartz, Jr.
   Department: San Francisco Police Department
   Records sought: A Police Department complaint and all documents produced in relation to it
   Custodian of Records: Sergeant Richard Goss and Maureen Confrey
   Determination: Denied because moot – records provided.
   A copy of the determination is included on page 19 of the Appendix.

   Department: City Attorney’s Office
   Records sought: Communications between a Library Commissioner and a Deputy City Attorney
   Custodian of Records: Jack Song
   Determination: Denied – records properly withheld under the attorney work product doctrine.
   A copy of the determination is included on pages 20-24 of the Appendix.

   Department: Public Library
   Records sought: Records relating to the Friends of the Public Library
   Custodian of Records: Maureen Singleton
   Determination: Denied - The Library had provided, and was continuing to provide, responsive records; as to requests for assistance, the Supervisor of Records does not generally determine a department’s compliance with the requirement but, in any event, the Library had demonstrated its willingness to assist.
   A copy of the determination is included on pages 25-28 of the Appendix.

10. Petitioner: Larry Bush
    Department: District Attorney’s Office
Memorandum

TO: Honorable Members
Sunshine Ordinance Task Force
DATE: March 18, 2013
PAGE: 5
RE: Thirteenth Annual Report of the Supervisor of Records
October 1, 2011 to September 30, 2012

Records sought: Records of payments for expenses relating to the investigation of Ross Mirkarimi in 2012
Custodian of Records: Cristine Soto DeBerry
Determination: Denied - State law authorizes the District Attorney to withhold records of investigation, even after a case is closed, and State law supersedes contrary provisions of the Sunshine Ordinance.

A copy of the determination is included on pages 29-31 of the Appendix.

11. Petitioner: Ed Martinez
Department: Sheriff's Department
Records sought: Records relating to authorization to work overtime, rate of pay and duties for a civilian employee classified as an 8109 in the position of a 8108
Custodian of Records: Captain Kathy Gorwood
Determination: Denied because moot – records provided.

The petitioner, Ed Martinez, asked the Supervisor of Records to review the response by the Sheriff's Department to a request for the following records:

1. Any and all documents that authorize a civilian member classified as an 8109 to work overtime in the position of a 8108 whether the overtime available is "regular overtime or Holiday overtime."

2. The rate of pay the member, classified as an 8109, receives when working in the position of a 8108 whether the overtime is "regular overtime or Holiday overtime."

3. The duties of the member classified a 8109 is required to perform when working in the position of a 8108.

The petitioner said that the Sheriff's Office had not responded to his request. After we discussed the matter with Sheriff's Department staff, the Department responded to the request. Accordingly, the Supervisor of Records found the petition moot.

12. Petitioner: Christopher Peak
Department: District Attorney's Office
Records sought: Records relating to domestic violence prosecutions
Custodian of
Memorandum

TO: Honorable Members
Sunshine Ordinance Task Force

DATE: March 18, 2013

PAGE: 6

RE: Thirteenth Annual Report of the Supervisor of Records
October 1, 2011 to September 30, 2012

Records: Cristine Soto De Berry

Determination: Two petitions denied because of the Office’s response to the petitioner’s clarified requests and in light of petitioner’s seeking a court decision on the issue; the third denied because the Supervisor of Records does not generally consider appeals under Section 67.21(c) for requests for assistance.

A copy of the determination is included on pages 32-34 of the Appendix.

13. Petitioner: Deron J. van Hoff
Department: Municipal Transportation Agency

Records sought: Records relating to enforcement of transit violations

Custodian of Records: Caroline Celaya

Determination: Denied – Department reasonably requested narrowing of three categories of records requested and responded to the fourth.

A copy of the determination is included on pages 35-39 of the Appendix.

P.J.
APPENDIX
THIRTEENTH ANNUAL REPORT OF THE SUPERVISOR OF RECORDS

<table>
<thead>
<tr>
<th>Petition Number</th>
<th>Petitioner</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Brett Joshpe (S.F. Employees Retirement System)</td>
<td>1-9</td>
</tr>
<tr>
<td>3</td>
<td>JC Rowen (Department of City Planning)</td>
<td>10-12</td>
</tr>
<tr>
<td>5</td>
<td>Kimo Crossman (City Attorney’s Office)</td>
<td>13-16</td>
</tr>
<tr>
<td>6</td>
<td>Joe Eskenazi (Assessor’s Office)</td>
<td>17-18</td>
</tr>
<tr>
<td>7</td>
<td>Ray Hartz, Jr. (Police Department)</td>
<td>19</td>
</tr>
<tr>
<td>8</td>
<td>Ray Hartz, Jr. (City Attorney’s Office)</td>
<td>20-24</td>
</tr>
<tr>
<td>9</td>
<td>Ray Hartz, Jr. (Public Library)</td>
<td>25-28</td>
</tr>
<tr>
<td>10</td>
<td>Larry Bush (District Attorney’s Office)</td>
<td>29-31</td>
</tr>
<tr>
<td>12</td>
<td>Christopher Peak (District Attorney’s Office)</td>
<td>32-34</td>
</tr>
<tr>
<td>13</td>
<td>Deron J. van Hoff (Municipal Transportation Agency)</td>
<td>35-39</td>
</tr>
</tbody>
</table>
March 13, 2012

Re: Petition to Supervisor of Records – San Francisco Employees Retirement System

Dear Mr. Joshpe:

You have filed a petition with the Supervisor of Records regarding your public records request for records about certain investments of the San Francisco Employees Retirement System ("SFERS" or "the Department").

For the reasons set forth below, we conclude that the Department properly declined to disclose the requested records under the San Francisco Sunshine Ordinance ("Sunshine Ordinance") and California Public Records Act ("Public Records Act"), which authorize a public retirement system to decline to disclose alternative investment agreements and related documents. (Government Code Section 6254.26 ("Section 6254.26").)

An alternative investment agreement is typically comprised of a limited partnership agreement and, in some cases, a side letter. For convenience here, we sometimes refer to such an agreement as a "contract."

Background Information

You filed a public records request with the Department for a copy of the contract between the Department and Trinity Ventures X. In response, the Department provided a redacted copy of the Trinity Ventures X contract and an associated side letter. The Department informed you that the redacted materials constitute "proprietary financial information or trade secrets," citing San Francisco Administrative Code Section 67 and Gov. Code Section 6255.

You then filed a second request for "a copy of all documents that together comprise the contract or contracts governing SFERS' investment in Apollo Investment Fund VII ("Apollo VII")." Your request further stated:

Specifically, please provide any 'limited partnership agreement(s)' and/or 'side letter(s)' accompanied therewith pertaining or relating to Apollo. Disclosure of this contract is required pursuant to the explicit language of [Section 67.24 of the San Francisco Sunshine Ordinance]. [!] Moreover, references to the limited partnership agreement and/or side letter should in no way be construed as limiting my request to documents that are only so-labeled if there are additional documents that, alternatively or additionally, govern the SFERS investment in Apollo VII.

The Department responded to this request by declining to provide records relating to the Apollo Investment Fund VII, stating as follows:
As noted in my e-mail of last week, these types of documents are not subject to disclosure under relevant State and local law, specifically California Government Code Section 6254.26 and Sec. 67.27 of the Sunshine Act ("A withholding on the basis that disclosure is prohibited by law shall cite the specific statutory authority in the Public Records Act or elsewhere"). Based on the provisions cited above, SFERS does not maintain any documents that are responsive to your request.

On December 14, 2011, you again wrote to the Department, raising several concerns. You asserted that:

- The Department had previously provided the Trinity X contract and side letter, which caused you to question whether the Department's statement that "SFERS does not maintain any documents [regarding Apollo]" was correct.
- The Department improperly relied on Government Code Section 6255 ("Section 6255"), a provision of the Public Records Act, in withholding the requested records, citing Section 67.24(g) of the Sunshine Ordinance (providing that the City may not assert Section 6255 of the Public Records Act or any similar provision as the basis for withholding records).
- The Department improperly redacted information from the Trinity X contract and side letter, citing 67.24(e)(1) of the Sunshine Ordinance (relating to the disclosure of certain information regarding City contracts and contracting procedures).
- The Department could not rely on Section 6254.26, a provision of the Public Records Act, to withhold records of alternative investments. You argued that Section 6254.26 applies to public records requests made under the Public Records Act, but not to a request – like yours – made under the City's Sunshine Ordinance.

As we discuss below, Section 6254.26 authorizes public retirement systems to withhold certain records of alternative investments. Section 6254.26 defines "alternative investment" to include investment in a private equity fund and a private venture fund. Bob Shaw, Acting Deputy Director for Investments for the Department, has informed this office that Trinity Ventures X is a private venture fund and Apollo Investment Fund VII is a private equity fund.

For convenience, this letter refers to Trinity Ventures X as "Trinity" and to Apollo Investment Fund VII as "Apollo."

Analysis

A. Relevant Laws Governing Investments of Public Retirement Systems

To determine whether the Department properly withheld the records regarding alternative investments that you requested, we begin by reviewing the provisions of the San Francisco City Charter governing the powers of the Retirement Board. Charter Section 12.100 provides in relevant part:

... In accordance with Article XVI, Section 17, of the California Constitution, the Retirement Board shall have plenary authority and fiduciary responsibility for investment of monies and administration of the Retirement System.
The Board shall be the sole authority and judge, consistent with this Charter and ordinances, as to the conditions under which members of the Retirement System may receive and may continue to receive benefits under the Retirement System, and shall have exclusive control of the administration and investment of such funds as may be established.

The Retirement Board shall discharge its duties with respect to the system with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims . . . .

The Charter makes the Retirement Fund "a trust fund to be administered by the Retirement Board in accordance with the provisions of this Charter solely for the benefit of the active members and retired members of the Retirement System and their survivors and beneficiaries . . . ." (Charter Section 12.103.)

We next consider the relevant provisions of the Public Records Act. In 2005, the Legislature added an exemption to the Public Records Act allowing state and local agencies to decline to disclose records of alternative investments maintained by public pension and retirement funds. (Section 6254.26, added by Chapter 258, Stats. 2005, §2 (SB 439).) Section 6254.26 defines "alternative investment" to mean "an investment in a private equity fund, venture fund, hedge fund, or absolute return fund." (Section 6254.26(c)(1).) In enacting this section, the Legislature adopted findings, including the following:

(b) Public pension and retirement systems and public endowments and foundations have a fiduciary duty to invest the assets of these funds with care, skill, prudence, and diligence. This fiduciary duty includes diversifying the investment of assets in a manner so as to minimize the risk of loss and maximize the rate of return. Investment in high performing alternative investments is a component of diversifying the pension assets and maximizing the rate of return.

(c) At the same time, a certain narrow class of public investments, alternative investments, involves some information that historically has been kept confidential because confidentiality is essential to their success. The disclosure of certain information pertaining to alternative investments could be harmful to generating sustainable and profitable rates of return for the investments of the pension or retirement system and of the public endowment or foundation. Public pension systems desire to invest a portion of their portfolio in alternative investments to boost return.

(d) Following recent litigation seeking to require public pension funds and retirement systems and public endowments or foundations to disclose certain information about alternative investments, the funds risk being excluded from participation in certain alternative investments. Exclusion from investing pension or retirement system assets in alternative investments may impose substantial costs on state public pension funds and the public employees who are their beneficiaries.

* * *

(f) . . . . It is . . . the intent of this legislation to establish predictability about what should and should not be disclosed regarding private equity funds so that public pension funds will be able to continue to invest in private equity funds.
Finally, we consider the relevant provisions of the San Francisco Sunshine Ordinance. Section 67.21(k) provides that the "[r]elease of documentary public information . . . shall be governed by the California Public Records Act (Government Code Section 6250 et seq.) in particulars not addressed by this ordinance and in accordance with the enhanced disclosure requirements provided in this ordinance." (S.F. Admin. Code §67.21(k).) Section 67.27(a) provides that the withholding of information "under a specific permissive exemption in the California Public Records Act, or elsewhere, which permissive exemption is not forbidden to be asserted by this ordinance, shall cite that authority. . . ." (S.F. Admin. Code §67.27(a).)

In addition, you cite Section 67.24(e)(1) in support of your petition. That section provides in relevant part:

Notwithstanding a department's legal discretion to withhold certain information under the California Public Records Act, the following policies shall govern specific types of documents and information and shall provide enhanced rights of public access to information and records:

*****

(e)(1) Contracts . . . 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 . . . .

B. Discussion

We turn now to the Department's responses to your public records requests. The Department provided several grounds for withholding the requested records. For reasons discussed below, we find that the Department, in the exercise of its fiduciary duty for investment of monies and administration of the Retirement System, properly relied on Section 6254.26 as a basis for its decision. We need not address the validity of the other grounds provided by the Department.

Section 6254.26 addresses the type of record at issue here, records of alternative investments of public retirement systems. Section 6254.26(a) provides that "... the following records regarding alternative investments in which public investment funds invest shall not be subject to disclosure pursuant to this chapter, unless the information has already been publicly released by the keeper of the information . . . ." (Mr. Shaw has informed this office that the Department is responsible for maintaining the Retirement Board's records of alternative investments and has not publicly released the Apollo contract or an unredacted version of the Trinity contract.) Among the records protected from disclosure are "[a]lternative investment agreements and all related documents." (Section 6254.26(a)(6).) As noted above, Section 6254.26(c)(1) defines "alternative investment" to include private equity funds and private venture funds. As also noted above, you are seeking contract information about Trinity and Apollo, which are, respectively, a private venture fund and a private equity fund.

Like the Legislature, which adopted Section 6254.26, the Retirement Board has recognized that the inclusion of alternative investments in the Retirement Fund's portfolio is necessary for diversifying the fund's assets and maximizing its rate of return. The Retirement Board has adopted a policy governing the disclosure of records that is consistent with Section 6254.26. (See, San Francisco Employees' Retirement System Policy on Public Disclosure of
Information Regarding Alternative Investment Vehicles ("the Policy"), a copy of which we enclose. The Policy authorizes the disclosure of specific types of information in response to public records requests, such as the names of partnerships in which the Retirement Board currently invests and the vintage year for each investment. The Policy does not authorize the disclosure of contracts for alternative investments.

You argue that the Department may not rely on Section 6254.26 for two reasons. Your first is based on the language in Section 6254.26(a) that records of alternative investments "shall not be subject to disclosure pursuant to this chapter ...." The phrase "this chapter" means Chapter 3.5, Inspection of Public Records, which contains the Public Records Act. You argue that you made your public records request "pursuant to" the Sunshine Ordinance, not the Public Records Act. We respectfully disagree with this argument.

There is no legal significance to a requester's referring to the Sunshine Ordinance in the request. Even if a public records request does not refer to the Sunshine Ordinance, the City must treat the request as if made under that ordinance. But a request made to a City department cannot be completely divorced from the provisions of the Public Records Act. State and local laws together form a framework of requirements governing the disclosure of public records. Neither the requester nor the local agency responding to the request operates outside the legal framework established by the Public Records Act.

The Public Records Act lists dozens of exemptions that reference "this chapter." It is universally understood that these exemptions, like the rest of the Public Records Act, apply to local governments as well as state agencies. The Legislature did not intend the phrase "pursuant to this chapter" in Section 6254.26(a) to empower a public records requester to preclude a local public retirement system from relying on an exemption that the section otherwise would allow by simply stating that he was not making the request "pursuant to" the Public Records Act. To construe the statute so narrowly would eviscerate Section 6254.26 and defeat the Legislature's intent to protect the ability of public retirement systems to make alternative investments in order to generate "sustainable and profitable rates of return for investments of the pension or retirement system ...." A court would not interpret section 6254.26 to produce this absurd result. (Goldman v. Cal. Franchise Tax Bd., 202 Cal.App.4th 1193, 1199 (2012) (courts construe statutes so as to "avoid an interpretation that would lead to absurd consequences." [Citation omitted.]))

Therefore, we conclude that your asserting that you made your records requests "pursuant to" the Sunshine Ordinance does not preclude the Department, in the exercise of its fiduciary duty for investment of monies and administration of the Retirement System, from relying on Section 6254.26 to decline to disclose the requested records.

Your second argument against the Department's reliance on Section 6254.26 arises under Section 67.24(e)(1) of the Sunshine Ordinance ("Section 67.24(e)(1)"), which states in part:

Notwithstanding a department's legal discretion to withhold certain information under the California Public Records Act . . . [c]ontracts . . . 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 . . .

If Section 67.24(e)(1) were intended to apply to the Retirement Board's alternative investment contracts, we would confront a substantial question regarding its validity. The question would arise because of a potential conflict between a requirement that the Retirement Board disclose the investment contracts and a determination by the Retirement Board that
disclosure would harm the Board's ability to make these investments in order to secure prudent and fair returns on Retirement Fund assets. If the ordinance were in conflict with the Charter provisions giving the Retirement Board plenary power over Retirement Fund investments, the ordinance would be unlawful. The provisions of the City Charter supersede those of a conflicting ordinance. Brown v. City of Berkeley, 57 Cal.App.3d 223, 231 (1976) ("... The charter of a municipality is its constitution .... To be valid, an ordinance must harmonize with the charter. An ordinance can no more change or limit the effect of the charter than a statute can modify or supersede a provision of the state Constitution." [Citations omitted.]).

Courts have adopted a rule of statutory construction for interpreting laws that potentially conflict with those adopted by a higher legislative authority. The court in People v. Superior Court (Romero), 13 Cal.4th 497, 509 (1996) discussed the rule in the context of a state law that potentially conflicted with the State Constitution:

If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers. [Compare] Crowell v. Benson (1932) 285 U.S. 22, 62 [76 L.Ed. 598, 619, 52 S.Ct. 285] ["When the validity of [an] act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (Fn. omitted.)] [Quotation marks and some citations omitted.]

Guided by the analysis of this issue in Romero, we consider whether Section 67.24(e)(1) can be reasonably construed to permit the Retirement Board to assert the exemption in Section 6254.26. If so, we would avoid the need to determine whether the ordinance is in conflict with the City Charter.

As noted above, the Sunshine Ordinance makes clear that City departments may withhold records under express provisions of the Public Records Act. (See, S.F. Admin. Code Sections 67.21(k) and 67.27(a).) While Section 67.24(e)(1) articulates in general terms the principle that the City must make its contracts public, it does not express a clear intent that this general requirement should prevail over specific exemptions in the Public Records Act or other specific legal provisions protecting the confidentiality of certain types of information. Section 67.24(e)(1) contains no language acknowledging well-established protections for confidential information, like attorney work product and trade secrets. A court would likely conclude that the voters did not intend that Section 67.24(e)(1) sweepingly override those protections and invariably require disclosure of such information simply because it is present in a City contract.

Two additional considerations further support this conclusion under the facts at issue here. First, the Legislature added Section 6254.26's legal protection for records of alternative investments to the Public Records Act well after Section 67.24(e)(1) of the Sunshine Ordinance was adopted. This chronology makes it impossible to argue that Section 67.24(e)(1) was enacted with the specific intent to override the exemption contained in Section 6254.26. Second, in this case the City's supreme law, the Charter, gives the body with custody of the records, the Retirement Board, the power to determine whether that disclosure would interfere with its
fiduciary duty to protect Retirement Fund investments on behalf of City employees and other beneficiaries.

For all of these reasons, a court would likely construe Section 67.24(e)(1) to allow the Department to withhold records of alternative investments under Section 6254.26. This interpretation avoids the legal infirmity attending an interpretation that would render Section 67.24(e)(1) in conflict with the provisions of the Charter governing the Retirement Board.

We note a potential issue that could arise if the Retirement Board's policy on disclosure of alternative investment information conflicted with requirements of Section 6254.26. The California Constitution gives broad power to charter cities to regulate their internal affairs, commonly referred to as "municipal affairs." As noted in Pipoly v. Benson, 20 Cal.2d 366, 369 (1942), "As to such matters [that is, municipal affairs] local regulations are superior to the provisions of a state statute if there is conflict between the two. [Citations.]" We do not need to determine whether San Francisco's municipal affairs powers would prevail over those of the Legislature in this matter because, as discussed above, we do not face a conflict between the Retirement Board's position and state law. The state law and the Policy both permit nondisclosure.

We address two final issues that you raise. First, we consider whether the Department properly redacted portions of the Trinity X contract and side letter. We conclude that the redactions were lawful. Under Section 6254.26, the Department could have withheld the complete contract. Therefore, providing a portion of the contract is lawful.

Second, you have questioned the Department's statement that it does not maintain any records of alternative investment contracts for Apollo. Norm Nickens, Executive Assistant for the Department, has informed this office that the statement is inaccurate. The Department does maintain records relating to all its alternative investment contracts, including an Apollo alternative investment contract. But, as we have discussed, the Department properly declined to disclose the contract in response to your request.

* * * * *

For the reasons discussed above, the Supervisor of Records has determined that, in response to your request, the Department properly withheld records of alternative investment contracts. Accordingly, your petition is denied.

Very truly yours,

DENNIS J. HERRERA
City Attorney

Paula Jesson
Deputy City Attorney
San Francisco Employees' Retirement System
Policy on Public Disclosure of Information
Regarding
Alternative Investment Vehicles

Purpose

The Retirement System receives numerous requests under the California Public Records Act and the San Francisco Sunshine Ordinance ("public records disclosure laws") for information related to Alternative Investment vehicles. As a public entity, SFERS has an obligation to be as transparent as possible in all investment activities. However, as fiduciaries to the Retirement Trust Fund, there is also an obligation to ensure that the fund has the continued ability to invest assets to maximize return for given levels of risk. This policy outline is developed for the purpose of guiding Staff in response to requests for information in the Alternative Investment asset class under Public Records Disclosure laws.

It is expected that this policy will be updated and amended as industry practices, practical investment concerns, and legal opinions change over time.

Objectives:

The objectives of this Policy are:

a. To attempt to create a balance between the Public’s right to know and the need to maintain confidentiality of certain information.
b. To provide guidance to Staff in response to Public Records requests for these asset classes.
c. To define the type of information appropriate for disclosure, and
d. To define the timeframes for creation of reports to be used in responding to public record requests.

Definitions

"Alternative Investments vehicles" shall mean any limited partnership, limited liability company, or similar legal structure through which the SFERS invests in portfolio companies.

Roles and Responsibilities

The role of the Retirement Board with respect to disclosure of information is to:

a. Establish appropriate parameters for information to be disclosed in response to Public Records Requests
b. Monitor compliance with the law and this policy
c. Periodically review with the City Attorney recent court decisions related to disclosure

The role of the City Attorney with respect to disclosure of information is to:
a. Keep informed regarding developments in the law related to public disclosure issues
b. Assist Staff in responding to requests that fall outside the parameters approved in this policy
c. Provide guidance to the Retirement Board and Staff regarding amendments to this policy

The role of the Retirement System Staff with respect to disclosure of information is to:

a. Respond to all requests for information on a timely basis and consistent with the law.
b. Maintain records of requests for information under public disclosure laws and the SFERS responses.
c. Recommend amendments to this policy based on industry developments and advice from the City Attorney
d. Prepare semiannual reports for public disclosure as articulated in this policy
e. Inform general partners of the existence of this policy
f. Cooperate with general partners in preventing the disclosure of confidential information and to promptly notify general partners of any requests for disclosure not covered by this policy so that the general partners may seek a protective order

Format of Reports

Staff will prepare semiannual reports for use in disclosure of information for Alternative Investment vehicles. The Retirement Board finds it to be in the public interest to disclose:

a. The names of Partnerships in which SFERS currently has investments
b. The Vintage Year for each such investment
c. The total amount of capital approved by the Board for commitment in each vehicle
d. The dollar amount of capital contributed to each vehicle since inception
e. Net distributions since inception for each vehicle
f. Current value (NAV) of remaining partnership assets plus distributions since inception
g. Investment multiple of each vehicle since inception
h. Net IRR to date for each vehicle after the fifth year

(Note: IRR information for funds less than five years old should be noted as NM – Not Meaningful, as these funds typically are still in the "J" curve of their investment activities and performance calculations may be misleading).

Policy Review

The Retirement Board will review this policy at least every three (3) years to ensure that it remains relevant and appropriate.

Policy History

The Retirement Board adopted this policy on September 14, 2004, and revised on January 10, 2006
May 15, 2012

Re: Petition to Supervisor of Records – Department of City Planning

Dear Mr. Rowen:

You asked the Department of City Planning ("Department") for the following records:

All emails from and to Planning Commissioner Michael Antonini, and or, wordweaver21@aol.com from January 2010 to present to and from the City of Santa Clara, Mr. William F Bailey, Deborah Bress, and all emails to and from Michael Antonini concerning stadiums for the San Francisco 49ers during that time period [and] all letters to and from Michael Antonini and the city of Santa Clara.

After receiving the Department's response to your request, you submitted a petition to the Supervisor of Records asking this office to determine whether the Department had failed to provide all records that are responsive to your request. Your petition states that City Planning Commissioner Michael Antonini "is refusing to cooperate." We understand from your petition and from discussions with Commissioner Antonini, described below, that your concern is that the Commissioner may have records on his personal computer that are responsive to your request but that the Department has not provided to you.

The role of the Supervisor of Records is limited. The San Francisco Sunshine Ordinance provides that "the person making the [public records] request may petition the supervisor of records for a determination whether the record requested is public." (San Francisco Administrative Code section 67.21(d).) The role of the Supervisor of Records is to determine whether a city department is lawfully relying on a claimed exemption permitting or requiring non-disclosure of the requested record. It is not to rule on the adequacy of a department's search for records. For this reason, the Supervisor of Records does not generally decide the issue raised in your petition, the adequacy of a department's search for records.

When a petitioner complains of an inadequate search, however, our practice is to inform the department of the complaint and discuss it with staff. In this matter, we discussed your complaint with Commissioner Antonini. He agreed to do a further review of his records. His review caused him to question whether some of the records that are responsive to your request may be private – rather than public – records. In this regard, he refers to records that fall within the following parameters of your request (hereafter called the "first part" of your request): E-mails to and from Commissioner Antonini and (1) William F. Bailey, (2) Deborah Bress, or (3) the City of Santa Clara, and letters to and from the Commissioner and the City of Santa Clara.
We consider first, then, whether the records responsive to the first part of your request are "public records" within the meaning of the California Public Records Act and the San Francisco Sunshine Ordinance ("Sunshine Ordinance"). As we will see, the Public Records Act and the Sunshine Ordinance recognize the distinction between the public and private roles of those who hold public office. These laws do not include within the definitions of "public record" and "public information" every communication that a public official sends or receives. Rather, as key definitions from these laws make clear, they have a narrower focus.

The California Public Records Act defines "public records" as follows:

(e) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics . . .

(Cal. Gov't Code §6252(e).)

The Sunshine Ordinance adopts the definition of "public records" in the Public Records Act. Section 67.20 of the Sunshine Ordinance defines "Public Information" as follows:

(b) "Public Information" shall mean the content of "public records" as defined in the California Public Records Act (Government Code Section 6252), whether provided in documentary form or in an oral communication . . .

(S.F. Admin. Code §67.20(b).)

Thus, an essential element of a "public record" under both the Public Records Act and the Sunshine Ordinance is that the writing be "prepared, owned, used, or retained by any state or local agency . . ." (Emphasis added.)

As noted above, Commissioner Antonini has characterized the records in question as personal communications. He informs us that he made them in his capacity as a private citizen. He did not make them in his capacity as a member of the Planning Commission and did not hold himself out as speaking on behalf of the City and County of San Francisco. Under these circumstances Commissioner Antonini did not prepare, own, use, or retain them in his official capacity, nor did any City department do so.

Based on our understanding of the nature of the communications, as described above, we conclude that they constitute communications of a private citizen, not different in kind – or in legal status – from communications that any private citizen who is not on the Planning Commission might send or receive. Accordingly, they do not fall within the definition of "public records." As a private citizen, Commissioner Antonini has no obligation to disclose his private records to anyone.

We now turn to the second part of your request: all emails to and from Michael Antonini concerning stadiums for the San Francisco 49ers from January 2010 to the present. The City Planning Commission has considered certain matters related to the San Francisco 49ers stadium. As noted above, the Commissioner has made a further review of his records. He searched for records for the time period and category of records sought that the Department might not have produced and that arguably involved his work as a commissioner. In the course of this review, he has located several such e-mail messages. It is not clear whether these e-mails constitute
"public records" or "public information" as defined in the Public Records Act and Sunshine Ordinance. But we do not need to decide the issue here because the Commissioner does not object to providing copies to you.

Linda Avery-Herbert, Director of Commission Affairs for the Department (415 558-6407), will provide you with a copy of these e-mail messages. Please feel free to call her to obtain the records.

Very truly yours,

DENNIS J. HERRERA
City Attorney

Paula Jesson
Deputy City Attorney
Dear Mr. Crossman,

Thank you for your March 29, 2012 petition to the Supervisor of Records regarding your March 28, 2012 Immediate Disclosure Request to the City Attorney for "all City Attorney legal advice communications to Mayor Lee regarding the present M [irk]arimi matter."

The Supervisor of Records has reviewed your petition, including the March 29 response provided by the Public Information Officer of the City Attorney’s Office to your public records request (printed below).

Based on a review of the records at issue and the response provided by the Public Information Officer (including the documents made available through the City’s website), the Supervisor of Records has concluded that the Public Information Officer provided you with the responsive public records and properly withheld the documents that were not subject to disclosure.

Thank you for your petition.

Best regards,

Adine Varah (Acting Supervisor of Records)  
Deputy City Attorney  
City and County of San Francisco  
City Hall, Room 234  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4689  
(415) 554-4670 (tel)  
(415) 554-4747 (fax)  
Adine.Varah@sfgov.org

From: Kimo Crossman <kimocrossman@gmail.com>  
To: Jack Song <Jack.Song@sfgov.org>, SF City Attorney Supervisor of Records Adine Varah <adine.varah@sfgov.org>, Paula Jesson <Paula.Jesson@sfgov.org>  
Date: 03/29/2012 06:35 PM  
Subject: Appeal to Supervisor of Records: Immediate disclosure request - CA advice memo to Mayor Lee  
Sent by: kimocrossman@gmail.com

Clearly this matter is related to Ethics - that is why they are hearing it, Sunshine refers to ANY San Francisco governmental ethics code.

Additionally the Sunshine ordinance adopted by the voters explicitly waves the privilege city-wide on ethics related matters - The City Attorney does not hold that privilege.

The CA has already agreed that Sunshine requires this disclosure - see your office’s own good government guide which recommends providing advice verbally because otherwise this information according to Mr. Herrera is discloseable.
Finally, City officers and employees should be aware that legal advice on ethics laws and open government laws may not be confidential for another reason. The Sunshine Ordinance provides that notwithstanding any exemption provided by law, any written legal advice about conflicts or open government laws may not be withheld from disclosure in response to a public records request.

Accordingly, the practice of the City Attorney's Office Part one: Serving on a board or commission is to inform any officer or employee who requests such advice in writing that the advice may be subject to disclosure upon request by a member of the public.

On Thu, Mar 29, 2012 at 4:54 PM, Jack Song <Jack.Song@sfgov.org> wrote:

elating to the charges. Charter section 6.102 creates the Office of the City Attorney and requires the city attorney to represent and advise city officers, employees, offices departments and agencies. This section essentially creates a attorney-client relationship between our office and the City acting through its officers and employees. In creating this relationship the Charter imports the duties and privileges, discussed above, that state law confers on clients and their lawyer

Dear Mr. Crossman:

On March 28, 2012, our office received your Immediate Disclosure Request: "Please provide all City Attorney legal advice communications to Mayor Lee regarding the present Mirkarimi matter. As we know under Sunshine they are disclosable."

On March 22, 2012, this office already provided you with all the documents in our possession that are responsive to this request and that are subject to public disclosure.

Again, here is the link for your reference: http://sfcityattorney.org/index.aspx?page=404

We assume that your statement, "As we know under Sunshine they are disclosable." intends to request any confidential attorney-client communications our office addressed to the Mayor relating to the charges of official misconduct that they Mayor filed against Sheriff Mirkarimi.

The Public Records Act does not require an agency to provide "records the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." (California Government Code Section 6254(k).) California Evidence Code Section 954 protects from disclosure communications between attorneys and their clients. Disclosure of communications between this office and our client departments would chill the ability of both attorney and client to discuss candidly with each other issues on which legal advice is sought.

Further, California Business and Professions Code Section 6068(e) requires attorneys to keep inviolate the confidential communications of clients. Therefore, we cannot disclose any records reflecting those communications.
We further assume that you are relying section 67.24 (b)(1)(iii) of the Sunshine Ordinance which provides:

(b) Litigation Material.
   (1) Notwithstanding any exceptions otherwise provided by law, the following are public records subject to disclosure under this Ordinance:

   (iii) Advice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning... any San Francisco Governmental Ethics Code....

There are two reasons why this provision does not require disclosure of communications between our office and the Mayor relating to the matter at hand. First, the Mayor has filed charges against Sheriff Mirkarimi under Charter section 15.105. That section is not part of the City's "Governmental Ethics Code" within the meaning of section 67.24(b)(1)(iii). There is no City "Governmental Ethics Code." But a court would likely conclude that the City's Campaign and Government Conduct Code is the City's Governmental Ethics Code within the meaning of section 67.24(b)(1)(iii). The Mayor's charges against Sheriff Mirkarimi do not reply on or cite the Campaign and Government Conduct code. Therefore the Sunshine Ordinance does not require disclosure of attorney client communication between our office and the Mayor relating to the charges against Sheriff Mirkarimi.

Second, even if a court concluded that the Charter provision supporting the charges against Sheriff Mirkarimi is an "Ethics Code" within the meaning of the Sunshine ordinance, a court would still conclude that the Office of the City Attorney may not disclose the communications with the Mayor relating to the charges. Charter section 6.102 creates the Office of the City Attorney and requires the city attorney to represent and advise city officers, employees, offices departments and agencies. This section essentially creates an attorney-client relationship between our office and the City acting through its officers and employees. In creating this relationship the Charter imports the duties and privileges, discussed above, that state law confers on clients and their lawyers.

The Charter is the City's constitution. All city ordinances, whether the voters or the Board of Supervisors approves them, are subject to the Charter. The Sunshine Ordinance is therefore subject to the Charter and may not alter the privileges or duties relationship arising from the attorney-client relationship between the City Attorney and the City's officers, employees and agencies. Accordingly, the Sunshine Ordinance may not require our office to disclose communications with the Mayor relating to the Mirkarimi matter.

Finally, because the City Attorney's Office recognizes the public's interest on the case relating to Mr. Ross Mirkarimi, we will be posting, on a rolling basis, all public records involving the suspension and removal process Mayor Ed Lee initiated against Sheriff Mirkarimi on March 20, 2012. You can check our website http://sfcityattorney.org/index.aspx?page=404 for updates. As a professional courtesy, we can also provide you with email updates of when public records relating to the case are made available.

Thank you.

Best regards,

JACK SONG
Public Information Officer

-------------------------
OFFICE OF CITY ATTORNEY DENNIS HERRERA
San Francisco City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94110

------- Forwarded message -------
Immediate Disclosure Request

Please provide all City Attorney legal advice communications to Mayor Lee regarding the present Mrikaarimi matter.

As we know under Sunshine they are discloseable.

67.24

(iii) Advice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act, any San Francisco governmental ethics code, or this Ordinance.
Dear Mr. Eskenazi,

Thank you for your petition to the Supervisor of Records, dated April 2, 2012. Your petition concerns your December 22, 2011 public records request to the Assessor’s Office for “any and all communications sent to, from, and within the assessor’s office in calendar years 2010, 2011, and 2012 regarding 27 Athens Street and/or parcel No. 5946-040.”

The Supervisor of Records has reviewed your petition, including the March 15, 2012 response that the Assessor’s Office provided in response to your records request.

The Revenue and Taxation Code specifically requires the assessor to prepare and keep certain records such as county maps (Rev. & Tax. Code, § 327); records relating to claims for exemptions (Rev. & Tax. Code, §§ 251, 252, 254); certain property tax statements (Rev. & Tax. Code, § 441); an assessment roll containing certain specified information (Rev. & Tax. Code, §§ 601, 602); and an index to the roll (Rev. & Tax. Code, § 615). These records are all open to public inspection. Accordingly, public information regarding 27 Athens Street and/or parcel No. 5946-040 is available at the public computer terminals in the Assessor’s Office in Room 190 in City Hall.

But state law treats differently “… any information and records in the assessor’s office which are not required by law to be kept or prepared by the assessor ….” and such documents “are not public documents and shall not be open to public inspection” under California Revenue and Taxation Code Section 408(a). State law does not require the assessor to keep or maintain the specific documents you requested. Accordingly, the Supervisor of Records has concluded that section 408(a) required the Assessor to decline to provide the documents. For these reasons, the Assessor lawfully declined to produce the records you sought. Stateside Homeowners, Inc. v. Williams (1973) 30 Cal. App. 3d 567, 570 (unless state law expressly requires an assessor to keep or maintain a record, such records are exempt from public inspection under California Revenue and Taxation Code Section 408(a).)

The Assessor’s Office has also indicated that the Assessment Appeals Board might maintain additional responsive documents.

This concludes our review of your petition.

Sincerely,

Adine Varah (Acting Supervisor of Records)  
Deputy City Attorney  
City and County of San Francisco  
City Hall, Room 234  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4689

(415) 554-4670 (tel)  
(415) 554-4747 (fax)  
Adine.Varah@sfgov.org

From: Joe Eskenazi <joe.eskenazi@sfweekly.com>  
To: "matt.dorsey@sfgov.org" <Matt.Dorsey@sfgov.org>  
Date: 04/02/2012 02:17 PM
Subject: Fwd: Public Records Act Request

Dear sir or madam --

I am writing this e-mail to initiate an appeal of a public records request for which I was denied. Below is my letter to the city. Attached is the city's reply.

I can always be reached at this good old e-mail address with questions. My office line is 415 536 8197.

Best,

JE

***

Dear Mr. Thomas:

... I reiterate my immediate disclosure request - and append it to include this year's documents as well:

"I desire any and all communications sent to, from, and within the assessor's office in calendar years 2010, 2011, and 2012 regarding 27 Athens Street and/or parcel No. 5946-040."

Your rationale for refusing my earlier request was based on Revenue and Taxation Code section 408(a), which states "any information and records in the assessor's office which are not required by law to be kept or prepared by the assessor are not public documents and shall not be open to public inspection."

I am not requesting tax-sensitive material, however. This is a suspect defense because the assessor, like any city department, is required by law to maintain many records - including interoffice memos and e-mails. That was the specific finding of Gallagher vs. Boller (1964 Cal Ap. Second 482), in which a county assessor similarly claimed RTC 408(a) exempted the disclosure of materials they were required by law to keep - just not by tax-related law.

Just because there is no revenue and tax code requiring the maintenance of the documents I am seeking doesn't mean this is not required by other areas of law. That was the finding in Gallagher vs. Boller, and I believe that should hold here as well.

Finally, the state constitution (Article I, Section III, Subsection B2) says that a statute, court ruling, or other authority shall be broadly construed if it furthers the people's right to access and narrowly construed if it limits the right of access.

I am on the side of the people's right to access here.

Considering you previously replied to me on Jan. 18 following a Dec. 22 request, it would appear that you have already spent considerable time amassing material relevant to my search. I humbly request you turn over the aforementioned files in a timely manner.

I can always be reached at this good old e-mail address or at the phone number below.

Yours,

Joe Eskenazi

415 536 8197
Dear Mr. Hartz,

You asked the Supervisor of Records to review the response by the San Francisco Police Department to your request for a copy of Police Department Complaint #120098278 and "any and all documents produced in relation to this complaint . . . ."

I received a copy of the message that Lieutenant Jennifer Dorantes sent you on May 15, 2012, informing you in relevant part as follows:

Regarding your public records request for a copy of the police incident report in that case [that is, case number 120098278], and "documents produced in relation to this complaint," the Department does have responsive investigative records in addition to the police incident report that we provided previously. However, those records are records of a complaint to and an investigation conducted by a local police agency, and are exempt from production under California Government Code Section 6254(f). While San Francisco Administrative Code Section 67.24(d) provides for the disclosure of records pertaining to a law enforcement investigation in some circumstances, those circumstances do not apply here. Neither the District Attorney nor Court has determined that a prosecution will not be sought, and the statute of limitations for filing charges has not expired. Accordingly, the Department is not disclosing these additional responsive records.

In light of the response provided by Lieutenant Dorantes, the Supervisor of Records finds that the San Francisco Police Department has responded to your public records request and, accordingly, considers this matter moot.

Paula Jesson
Deputy City Attorney
City and County of San Francisco
Room 325 City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682
Telephone: (415) 554-6762
Fax: (415) 554-4699
email: paula.jesson@sfgov.org
June 1, 2012

Via Electronic Mail Only

Ray Hartz, Jr.

Re: Petition to Supervisor of Records – City Attorney’s Office

Dear Mr. Hartz:

On May 14, 2012, you submitted a petition to the Supervisor of Records regarding a public records request that you made to Deputy City Attorney Kimberly Bliss on May 3, 2012. In the request, you provided the following information from a San Francisco Police Department incident report, with the complainant’s name redacted by the Police Department:

... While at the Tenderloin Station, (redacted) completed a written statement (E2) of the incident. It should be noted that (redacted) is in contact with City Attorney Kimberly Bliss who is looking into a stay-a-way restraining order against Hartz ...

After quoting that language from the police report, you requested "any and all documents relating to the communications between Ms. Jewelle Gomez, President of the San Francisco Library Commission and the City Attorney's Office and any subsequent discussions and/or actions."

On May 14, 2012, the Coordinator for Community Relations for the City Attorney's Office informed you that the Office had responsive records but that the records constitute attorney work product and attorney-client communications and are therefore exempt from disclosure. The Community Relations Coordinator cited the following laws to support the exemption: San Francisco Administrative Code section 67.21(k) (release of records under the San Francisco Sunshine Ordinance governed by the California Public Records Act in particulars not addressed by the Sunshine Ordinance); Government Code section 6254(k) (providing an exemption for records protected from disclosure under federal or state law, including provisions of the Evidence Code relating to privilege); California Evidence Code section 954 (communications between attorneys and their clients are privileged); and Code of Civil Procedure section 2018.030 (protecting from disclosure any writing that reflects an attorney’s impressions, conclusions, opinion, or legal research or theories).

After receiving this response, you filed a petition with this office as Supervisor of Records. You contend that the City Attorney's Office improperly withheld the records as attorney work product. To support this contention, you cite Section 67.21(i) of the San Francisco Sunshine Ordinance (S.F. Admin. Code Section 67.21(i)) (hereafter, "Section 67.21(i)")}, which provides as follows:
The San Francisco City Attorney's office shall act to protect and secure the rights of the people of San Francisco to access public information and public meetings and shall not act as legal counsel for any city employee or any person having custody of any public record for purposes of denying access to the public. The City Attorney may publish legal opinions in response to a request from any person as to whether a record or information is public. All communications with the City Attorney's Office with regard to this ordinance, including petitions, requests for opinion, and opinions shall be public records.

You argue further as follows:

This matter was part of a series of actions and reactions related to my legal rights to make public comment. It was a direct result of Ms. Jewelle Gomez, President of the Library Commission, trying to portray my legitimate public comments as "threats." 

[She filed] this police report against me, disclosing the intent of having me excluded from future public meetings. As all matters pertaining to the discussions with Ms. Bliss were directly related to her desire to compromise my rights under local, state and Federal laws covering "freedom of speech" and/or my right to "petition the government for a redress of grievances," and subsequently constitute "requests for opinion, and opinions" related to the right to make public comments they are not covered under the "attorney work product" exemption.

Before turning to our analysis, we should address the issue of the identity of the person who complained to the Police Department about your conduct. Although the Police Department redacted the name of the complainant from the police report, it is clear from your petition that you assume that Library Commissioner Jewelle Gomez is the complainant. For purposes of this determination, we make the same assumption without considering or deciding its accuracy.

Determination

Code of Civil Procedure section 2018.030(a) provides that "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." Section 2018.030(b) provides that "[t]he work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." The attorney work product doctrine thus 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.

The Legislature has articulated the policy reasons for protecting the work product of an attorney, in Code of Civil Procedure section 2018.020:

It is the policy of the state to do both of the following:

(a) Preserve 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.

(b) Prevent attorneys from taking undue advantage of their adversary's industry and efforts.

See, also, American Mutual Liability Insurance Co. v. Superior Court, 38 Cal.App.3d 579, 594 (1974) ("While the lawyer-client privilege is prompted by the need for confidentiality of the
client, the work product rule is designed to satisfy the attorney's requirement for privacy." [Emphasis in original].)

The protections afforded attorney work product arise under State law and are expressly incorporated in the Public Records Act. (Cal. Gov. Code §6276.04.)

The City Attorney's Office has addressed the attorney work product doctrine in light of the provisions of the San Francisco Sunshine Ordinance (hereafter, "Sunshine Ordinance") on several occasions. See, for example:

- Eighth Annual Report of the Supervisor of Records dated November 21, 2007, pages 16-21 (in responding to a request for records relating to the investigation of ex-Supervisor Ed Jew, the City Attorney may withhold records under the attorney work product doctrine; the protection is absolute for records that reflect the impressions, conclusions, opinions or legal research or theories of attorneys).
- Ninth Annual Report of the Supervisor of Records dated December 18, 2008, pages 2-3 and Appendix pages 4-9 (if copies of "slip opinions" and court decisions cited in a letter from the City Attorney's Office to the Sunshine Ordinance Task Force were considered public records, they would be protected from disclosure under the work product doctrine).
- Letter from the City Attorney's Office to the Sunshine Ordinance Task Force dated September 16, 2008 (work product doctrine protects drafts of an advice letter sent to the Sunshine Ordinance Task Force regarding the role of the City Attorney under the Sunshine Ordinance, as well as communications among attorneys in the office about the letter)

Moreover, the Good Government Guide, at page 95 (available on the City Attorney's website) makes clear the office's view that City departments may withhold records under the work product doctrine.

Of the opinions of the office described above, the most relevant here is the September 16, 2008 letter to the Sunshine Ordinance Task Force. In that letter, the City Attorney's Office considered the work product doctrine in light of Section 67.24(b)(iii) of the Sunshine Ordinance (hereafter, "Section 67.24(b)(iii)"), which provides as follows:

(b) Litigation Material

(1) Notwithstanding any exemptions otherwise provided by law, the following are public records subject to disclosure under this Ordinance:

* * *

(iii) Advice on compliance with, analysis of, an opinion concerning liability under, or any communications otherwise concerning the California Public Records Act . . . or this Ordinance.

(S.F. Admin. Code §67.24(b)(iii).)

A complainant in a case before the Sunshine Ordinance Task Force argued that Section 67.24(b)(iii) requires the City Attorney's Office to make public drafts of a letter, and communications about the letter among attorneys in the office, because the letter is "[a]dvice on compliance with [and] analysis of . . . the California Public Records Act [and the Sunshine Ordinance]." The complainant argued that Section 67.24(b)(iii) prohibits a City department from asserting the work product doctrine for such records.
This office rejected the complainant's argument, noting as follows:

Section 67.24(b)(iii) makes no reference to an attorney's work product. The protections afforded the attorney work product arise under State law and are expressly incorporated in the Public Records Act . . . . The absence of any reference to work product compels the conclusion that the Sunshine Ordinance did not intend to require the disclosure of records that constitute work product.

With these prior opinions in mind, we turn to the records at issue in this determination. They consist of handwritten notes by Deputy City Attorney Kimberly Bliss. The Supervisor of Records has reviewed the notes and found that they reflect Ms. Bliss' "impressions, conclusions, opinion, or legal research and theories." Therefore, the work product doctrine affords them absolute protection.

As noted above, you contend that the City may not rely on the attorney work product doctrine because of Section 67.21(i). Section 67.21(i) provides that "[a]ll communications with the City Attorney's Office with regard to this ordinance, including petitions, requests for opinion, and opinions shall be public records."

The Supervisor of Records disagrees with your interpretation of Section 67.21(i) for two separate and distinct reasons.

First, Section 67.21(i) applies to "communications with the City Attorney's Office" regarding the Sunshine Ordinance. Its purpose is to prohibit secret legal opinions that City officials and employees are privy to, but not the general public. Its language makes clear that it covers communications between City employees and officials and the City's attorneys. But nothing in the language of Section 67.21(i) suggests an intent to cover records of an attorney's "impressions, conclusions, opinions, or legal research or theories" or any other record constituting attorney work product. The Supervisor of Records concludes, as this office did when construing Section 67.24(b)(iii), that Section 67.21(i) did not intend to require the disclosure of records that constitute work product because the section does not refer to the work product doctrine and State law expressly recognizes that public agencies may rely on the doctrine when responding to public records requests.

Second, the Supervisor of Records has determined that Section 67.21(i) does not apply to the records in question for second reason. As you note, the police report indicates that the purpose of the "contact with City Attorney Kimberly Bliss" was to discuss a restraining order against you. Section 67.21(i) applies to communications with this office regarding the interpretation of the Sunshine Ordinance. It does not apply to communications about other legal issues, such as laws designed to protect citizens from persons who, it is feared, may cause them harm.

You attempt to link the complainant's concern for his or her safety with your right to speak at a public meeting. You argue that discussion of a restraining order in this matter constitutes an opinion, or a request for an opinion, on the Sunshine Ordinance because the statements that caused the complainant to go to the police occurred during a public meeting. But the fact that your statements occurred at a public meeting does not transform the discussion between the complainant and Deputy City Attorney Bliss from one about restraining orders to one about public meetings. Were the court to issue a restraining order against you, such an order would presumably forbid you to have contact with the complainant in any context, not merely at public meetings. Had you made your comments to the complainant at another time and place—completely outside of any meeting—the legal issue considered by this office would be the same: The scope of the court's power to issue a restraining order for the protection of a citizen who fears for his or her safety from another person.
For these reasons, the Supervisor of Records determines that the City Attorney's office properly relied on the attorney work product doctrine in withholding the records that you requested.

Very truly yours,

DENNIS J. HERRERA
City Attorney

PAULA JESSON
Deputy City Attorney
Via Electronic Mail Only

Ray Hartz, Jr.

Re: Petition to the Supervisor of Records -- San Francisco Public Library

Dear Mr. Hartz:

You filed a petition with the Supervisor of Records on May 17, 2012, relating to your request for assistance from the San Francisco Public Library ("Library") in identifying certain records regarding the Friends of the San Francisco Public Library ("Friends").

Your Requests to the Library for Assistance in Identifying Records

On July 21, 2011 you asked the Library for assistance in identifying records showing the Library's financial relationship with the Friends. You made this request under San Francisco Administrative Code section 67.21(c) (hereafter, "Section 67.21(c)"). In the letter, you state that you are interested in records showing the amounts that the Friends raised during fiscal years 2008-2009 and 2009-2010 and the amounts received by the Library from the Friends during those fiscal years. You further state that the "figures relating to receipts by the San Francisco Public Library should contain enough information to ascertain the exact value, either in cash or in kind of all monies and/or material actually received by the library during the two fiscal years indicated."

In a second letter, dated December 15, 2011, you also sought assistance in identifying records under Section 67.21(c) relating to the Friends. Again, the letter specified your interest in certain information, as follows:

.... Specifically the amounts listed in previously provided documents as grants from the Friends of the San Francisco Public Library during the fiscal years 2008 to 2009 under the headings "City Librarian Fund -- City Librarians Discretionary Fund for $36,000 and External Relations Consultant for $30,000" and 2009 to 2010 under the headings "City Librarian Fund -- City Librarians Discretionary Fund for $35,000 and External Relations Consultant for $30,000." The requested information should be from the audited City Library budget records which the City Librarian has provided to the Comptroller's Office. It should include funds received by the Library from these grants and include all information as to the specific expenditures for which these monies were used. [Emphasis in original.]

Arguments in Support of the Petition

Your petition to the Supervisor of Records raises a number of concerns about the Library's response to your requests under Section 67.21(c), which we summarize: That the Library produced some records in response to your July 21, 2011 request, but you believe that it has withheld others. That you filed a complaint with the Sunshine Ordinance Task Force, which issued an Order of Determination in your favor, but that the Library still delayed in sending you...
responsive records. That staff made statements at a May Library Commission meeting that lead you to believe that the Library has withheld additional documents, namely those relating to a “supposed” contribution by the Friends to the Branch Library Improvement Program in an amount in excess of $5.17 million. That Library staff stated that requests were provided to the Friends for various “in kind” material donations, and those requests would be public records responsive to your request. And that you have waited nine months to receive documents which are public records and which “all the persons involved know are disclosable.”

The Library’s Response to Your Requests

The two letters described above from you to the Library represent only part of many communications between you and Library staff regarding this matter. The City Librarian recounted the actions the Library has taken in response to your requests in a May 21, 2012 email message to you. We provide below a summary of the Library’s actions as set forth in that email. Note that “BLIP” refers to the Branch Library Improvement Program and “FF&E” refers to the in-kind donations by the Friends for furniture, fixtures and equipment for the BLIP.

The Department sent you records five times between July 29, 2011 and February 23, 2012. The responses included audited financial statements of the Friends; a matrix detailing the Grant Funding Requests, by category, program and amount for Fiscal Years 2008-09 and 2009-10 (“FY 2008-2010”); check/voucher registers detailing individual checks received from the Friends for FY 2008-2010; spreadsheets that track the approved budgets and funds expended to support Library programs by category and individual program/line item for FY 2008-2010; and a copy of Board of Supervisors Resolution No. 696-05, which authorized the Library to accept up to $16 million from the Friends for furniture, fixtures and other costs for the BLIP.

On March 29, 2012, the City Librarian and the Library’s Chief Financial Officer and the Chief of Communications for Programs and Partnerships met with you to discuss your inquiry and identify further responsive documents. At the meeting, staff explained that the Library could provide records showing funds provided by the Friends for BLIP items by capturing individual “screenshots” of the City’s computerized financial management system, FAMIS. They offered to provide copies of the screenshots to you, but also explained that it would take time because of staffing shortages. Staff explained that purchases that the Friends make directly for the BLIP constitute in-kind contributions and, therefore, the Library would not process or records such purchases through the FAMIS system.

During the March 29, 2012 meeting, you requested copies of the Library’s approved budget for FY 2008-2010. That same day staff sent you copies of the Library’s budget pages from the City’s Annual Appropriation Ordinance for FY2008-10 and the link to the Ordinance on the Controller’s web page.

On April 20, 2012, staff sent you the following:

- Spreadsheet of accounting journal entries for funds received by the Library from the Friends for BLIP FF&E as of that day.
- Screenshots of the City’s accounting system showing the journal entries of funds that the Library received from the Friends for BLIP Furniture, Fixtures and Equipment (“FF&E”) for FY 2008-10.

Staff summarized the information provided to you about the funds donated by the Friends for BLIP FF&E as of April 20, 2012. Staff noted that the accounting spreadsheet of
journal entries shows that the Library received a total of $3,670,665.46 and had expended $3,629,904.84. That left a balance of $40,760.62 available for BLIP FF&E for the Bayview and North Beach branches.

On April 30, 2012, you asked for information on a contribution amount of $5,170,976 that was reported on a monthly BLIP Current Budget Report and attributed to the Friends. On May 1, 2012, staff provided information on purchases that the Friends make directly. Staff noted that the Library does not receive either direct revenue to buy items, or invoices for items that the Friends purchase. The Friends is a separate legal entity. Items that it purchases are not records in the City's FAMIS system.

Staff informed you that they understood from the meeting that your interest was the in-kind donation of FF&E for the BLIP by the Friends. It states further that the Library requests in-kind donations for FF&E from the Friends by providing the organization with lists of the furnishings and equipment that Library staff wish the Friends to buy. The Library informed you that it would ask staff who work directly with the BLIP to locate records for individual branches in order to document the Library's FF&E requests. The requests are not financial documents, but they document the procedure by which the Library requests FF&E items which the Friends purchase and provide to the Library. The email then lists a number attached records that are FF&E requests, and informed you that the Library would send more on a rolling basis.

Communications between you and the Library have continued since May 21, 2012, as the Library continues to provide you with records and address issues you raise regarding your request.

**Determination**

As we have informed you, the Supervisor of Records does not generally render a determination on a petition alleging that a City department has failed to conduct an adequate search for records or failed to comply with Section 67.21(c)'s requirement to provide a requester a statement as to the existence, quantity, form and nature of its records, or otherwise assist a requester. See, for example, Ninth Annual Report of the Supervisor of Records dated December 18, 2008, Appendix pages 17 (petition alleging a violation of Section 67.21(c)) and 44 (petition alleging inadequate search for records).

While we have recognized that there may be circumstances where a department's inaction or incomplete response warrants a determination, we do not find it appropriate to issue a determination in this case. The Library has shown a willingness to work with you to identify and provide responsive records. It had provided you with numerous records before March 29, 2012 and, on that date, the City Librarian and two other high-level Library administrators met with you to discuss the status of your request and develop a process for producing additional records. The Library is following that process and, we understand, is continuing to provide records to you. These actions evidence the Library's willingness to provide the information that you seek. We find no basis for concluding that the Library will not continue working with you on this matter and providing you with responsive records.

With respect to records maintained by the Friends relating to donations for the BLIP, the Library has no control over, or access to, those records because the Friends is a separate legal entity. Library staff inform us that, with one exception, the Library does not have possession of any Friends' records responsive to your requests. The exception is a spreadsheet showing the total in-kind gift amount from the Friends which staff requested from the Friends. The Library informs us that it has provided a copy of the spreadsheet to you.
We address two additional issues. First, you complain in your petition that Library staff made comments at a Library Commission meeting that "lead [you] to believe additional documents have been withheld. These documents are records relating to a 'supposed' contribution by the [Friends] to the [BLIP] in an amount in excess of $5.17 million. [Certain Library staff] stated that requests were provided to the Friends for various 'in kind' material donations. These 'requests' would be public records . . . and would be responsive to [your] request." We understand from Library staff that the Library is in the process of producing these request records to you.

Second, your petition complains that you "have waited for nine months to receive documents which are public records, and which all the persons involved know are disclosable...." But the role of the Supervisor of Records is not to determine whether a City department has, in the past, violated the requirements in State and local law governing the time to respond to a public records request. It is to determine whether a City department is currently withholding any record without a lawful basis.

For the reasons discussed above, the Supervisor of Records denies your petition.

Very truly yours,

DENNIS J. HERRERA
City Attorney

Paula Jesson
Deputy City Attorney
Via Electronic Mail Only

Larry Bush

Re: Petition to Supervisor of Records – District Attorney’s Office

Dear Mr. Bush:

You filed a petition with the Supervisor of Records relating to your public records request to the District Attorney's Office for the following records:

... all emails, documents or other material regarding payments, including witness fees, reimbursement for travel or other expenses or any compensation to any witness in the District Attorney's investigation into Ross Mirkarimi in 2012.

The District Attorney's Office denied the request for the following reasons:

Any responsive records would be within the District Attorney's investigative files. The investigatory records of a law enforcement agency are exempt from disclosure under the California Public Records Act. Cal Govt Code §6254(f). Furthermore, because the D.A.'s investigation of alleged criminal violations is a matter of statewide concern, caselaw specifically holds that the office's investigatory records cannot be subject to compelled disclosure under the Sunshine Ordinance or any other local law. Rivero v. Superior Court (1997) 54 Cal.App.4th 1048, 1059-1060.

The District Attorney's Office has a policy and practice of maintaining the confidentiality of its investigatory files, even after closing a case. Among other reasons, this policy is necessary to avoid disclosure of the Office's investigatory techniques, and to avoid the chilling effect a policy of routine public disclosure would have on cooperation from witnesses and confidential informants.

In your petition to the Supervisor of Records, you state as follows:

Ms. DeBerry claims a "policy and practice" of maintaining the confidentiality of files "even after closing a file." She cites no legal basis for this policy and practice, which I believe is a violation of the California Public Records Act and the city's Sunshine Ordinance.

I note for example that other jurisdictions release files after the close of an investigation.

Relevant State and Local Laws

We begin by reviewing several key provisions of State and local law that govern this issue.

The Public Records Act permits a public agency to withhold "[r]ecords of ... any investigatory ... files compiled by any ... state or local agency for ... law enforcement ... purposes." (Cal. Gov. Code §6254(f) (hereafter, "Section 6254(f)").

...
The San Francisco Sunshine Ordinance ("Sunshine Ordinance") provides that "[r]elease of documentary public information ... shall be governed by the California Public Records Act (Government Code Section 6250 et. seq.) in particulars not addressed by this ordinance and in accordance with the enhanced disclosure requirements provided in this ordinance." (S.F. Admin. Code §67.21(k).) One of the "enhanced disclosure requirements" of the Sunshine Ordinance is for records of law enforcement investigations. Under that requirement, and subject to some exceptions, a City department may not withhold records of a law enforcement investigation "once ... a prosecution will not be sought ... or ... the statute of limitations has expired ...." The exceptions are sensitive information like secret investigative procedures and the identity of juvenile witnesses and confidential sources. (S.F. Admin. Code §67.24(d) (hereafter, "Section 67.24(d)).)

Also relevant is California Government Code Section 25303 ("Section 25303"), which protects a district attorney's investigative and prosecutorial functions from interference by the county. The statute provides as follows:

The board of supervisors shall supervise the official conduct of all county officers ... This section shall not be construed to affect the independent and constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff and district attorney of a county. The board of supervisors shall not obstruct the investigative function of the sheriff of the county nor shall it obstruct the investigative and prosecutorial function of the district attorney of a county ....

Determination

In this matter, we consider whether the California Public Records Act ("Public Records Act") or the Sunshine Ordinance requires the District Attorney to disclose records of "payments ... to any witness" in a closed criminal investigation.

As to the Public Records Act, the California Supreme Court has held that records of law enforcement investigations are exempt from disclosure under Section 6254(f), even after a criminal case is closed. (See Williams v. Superior Court (Freedom Newspapers, Inc.), 5 Cal.4th 337, 355 (1993) (holding that the exemption for law enforcement investigatory files does not end when the investigation has ended after the defendant was tried and acquitted).)

The Sunshine Ordinance, as noted above, provides greater access to public records than the Public Records Act. For law enforcement records, Section 67.24(d) generally provides that a City department may not withhold records of an investigation once a prosecution will not be sought or the statute of limitations has expired. Thus, the Sunshine Ordinance provides access to closed investigation files that the Public Records Act does not.

Section 67.24(d) permits the withholding of the identity of certain persons and other information, described above. For purposes of this determination, we assume that no exception applies to the records that you have requested.

Rivero v. Superior Court (Smith), 54 Cal.App.4th 1048 (1997), which the District Attorney cited when denying your request, addresses the issue we face here: Does Section 67.24(d) require the District Attorney to disclose records of closed investigations? Rivero held that it does not. The court concluded that the "compelled disclosure of closed criminal investigation files [obstructs] the investigatory function of the district attorney's office" and thus contravenes Section 25303. (Rivero, supra, 54 Cal.App.4th at 1058.) The court observed as follows:

Very few activities performed by public officials are more important to the public and to the individuals most directly involved than the full and proper investigation of criminal complaints. Every effort must be made to ensure that investigators can gather
all evidence that is available and legally obtainable. Without the assurance of continuing confidentiality, potential witnesses could easily be dissuaded from coming forward. Even if they knew that sensitive information would not automatically be turned over, publicity-shy witnesses would still have reason to be wary.

It is not a complete answer that publicity-shy witnesses may already be deterred from coming forward by the prospect of being subpoenaed for a criminal trial. Sometimes anonymous sources, well known to the targets of investigations, provide important information. That information, though not usable itself, may help focus the inquiry and lead to the acquisition of admissible evidence. These sources' anonymity would be compromised and their willingness to provide information hindered if the subjects could easily review investigation files.

(Rivero, supra, 54 Cal.App.4th at 1058-59.)

Rivero also notes that the court in Williams invited the Legislature to reconsider the protections afforded records of closed investigations, in the following passage (Rivero, supra, 54 Cal.App.4th at 1059):

In our view, the matter does appear to deserve legislative attention. Although there are good reasons for maintaining the confidentiality of investigatory records even after an investigation has ended, those reasons lose force with the passage of time. Public policy does not demand that stale records be kept secret when their disclosure can harm no one, and the public good would seem to require a procedure by which a court may declare that the exemption for such records has expired. [Citations omitted.]

(Williams, supra, 5 Cal.4th at 361-362, fn. 13.)

But, as Rivero notes, "the Legislature has amended section 6254 more than once since the Williams decision, but has not revised the statute to permit disclosure of closed investigation files. We will not do what the Legislature has declined to do." (Rivero, supra, 54 Cal.App.4th at 1059.)

Finally, Rivero held that San Francisco may not "override [Section 23503] by adopting a municipal ordinance that interferes with the district attorney's state criminal law investigations" because the "[i]nvestigation and prosecution of state criminal law are statewide concerns, not municipal affairs . . . ." Because Section 67.24(d) conflicts with Section 23505, it "must yield" to State law. (Rivero, supra, 54 Cal.App.4th at 1059.)

Your petition states that "other jurisdictions release files after the close of an investigation." If that is the case – and we do not consider or decide that issue – we do not find such circumstances to warrant a different conclusion. As Rivero also notes, "... the fact that [the District Attorney] could voluntarily disclose records of his investigations does not mean that the board of supervisors may compel him to do so." (Rivero, supra, 54 Cal.App.4th at 1060.)

For the reasons discussed above, the Supervisor of Records denies your petition.

Very truly yours,

DENNIS J. HERRERA
City Attorney

Paula Jesson
Deputy City Attorney
August 21, 2012

Sent via e-mail

Christopher Peak

Re: Petitions to Supervisor of Records – District Attorney

Dear Mr. Peak:

This letter responds to the three petitions you have sent to the Supervisor of Records regarding your public records requests to the District Attorney's Office.

The first two petitions, sent August 6, 2012 and August 14, 2012, concern requests dated July 23, 2012 and August 3, 2012. The third petition, sent August 15, 2012, concerns your request under San Francisco Administrative Code Section 67.21(c) ("Section 67.21(c)") that the District Attorney's Office provide a written statement of 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 . . . ."

We do not issue a determination on your first two petitions because the District Attorney has now responded to the requests covered by the petitions and, more significantly, you have filed a lawsuit asking a Court to review the District Attorney's response. We do not decide your third petition alleging a violation of Section 67.21(c) because, as explained below, the role of Supervisor of Records does not include determining whether a City department has complied with that provision.

We now address these matters in more detail, beginning with the public records requests at issue in the first two petitions, described below:

August 6, 2012 Petition

On July 23, 2012, you asked for the following records:

- "Records of numbers regarding all domestic violence prosecutions brought by the District Attorney's Office from 2004 until the present, as well as numbers on convictions or pleas and sentences."

- "If more detailed legal briefs are available on a case-by-case basis, I would also request access to them for review at a later date." [As noted below, you subsequently clarified your intent regarding this request.]
August 14, 2012 Petition

On August 3, 2012, you asked for the following records. Note that the first description below clarifies your intent from the July 23 request in asking for "detailed legal briefs [that] are available on a case-by-case basis," described in the previous section:

- "In regards to the second part of my request for detailed individual files, I understand the case law prohibiting records of investigation, particularly an investigation conducted by the DA. I do not need to see the documents compiled for an investigation, but I do request access to any releasable information for each domestic violence case presented to the DA's District Attorney's Office by the police, which may include the name and/or address of the victim and/or perpetrator. With this request, I do not intend to obtain specifics of any investigation, but simply a marker to track cases from the point they are given to the DA's District Attorney's Office by the police to the time when a sentence is assigned after a trial or a plea. If any data set is available to track individual cases from the time they are assigned to their conclusion, I request access to it for review. I will be more than happy to clarify if this second request is unclear."

- The Domestic Violence Felony or Misdemeanor Protocol.

After sending petitions to this office regarding these requests, you had further communications with the District Attorney's Office. Of particular significance is an email you sent August 7, 2012 – four days after your first petition - stating that you had "listed all pending requests below in terms of priority as well as some new requests ...." [Emphasis added.] The list of pending requests included two of the matters covered by your petitions to this office (the number of domestic violence prosecutions and the District Attorney's Office's protocol for the prosecution of domestic violence cases). But the list did not include the requests for "more detailed legal briefs ... on a case-by-case basis" or "any data set [that] is available to track individual cases from the time they are assigned to their conclusion."

As to the two requests included on your "pending list," the District Attorney's Office has now provided a response. On August 17, 2012, it provided additional data on domestic violence prosecutions and confirmed it had no additional responsive records. It also provided a document regarding policy for domestic violence cases, but declined to provide other responsive records that are protected by the attorney work product doctrine.

The District Attorney's August 17, 2012 letter did not directly respond to your requests for "more detailed legal briefs ... on a case-by-case basis" or "any data set [that] is available to track individual cases from the time they are assigned to their conclusion." But it noted that your "pending list" requests "appear largely duplicative of" earlier requests. The letter also asks that you let staff know if "you believe that there are additional documents called for" in an earlier request that should have been responded to. Assistant District Attorney Alex Bastian has confirmed with the Supervisor of Records that the District Attorney's Office understood that your intent was that the list of pending requests should supersede earlier requests not included on the list.

Although the further response by the District Attorney's Office is obviously relevant in any review of your petitions, more significant to the Supervisor of Records is your having filed a petition for writ of mandate in the Superior Court regarding this matter (Christopher Peak v.
George Gascón, San Francisco Superior Court No. CPF-12-512410). In light of your decision to initiate litigation, we do not believe it appropriate for the Supervisor of Records to engage in further review. As noted in an earlier determination of the Supervisor of Records (Eleventh Annual Report of the Supervisor of Records, dated March 31, 2011, page 3):

The Sunshine Ordinance creates the position of Supervisor of Records in order to give citizens an expeditious and inexpensive method, short of litigation, to obtain review of a City department's response to a public records request. All laws must be construed to further the intent of those who adopted them. The most reasonable construction of the Sunshine Ordinance is that neither the drafters, nor the voters who adopted it, intended to require the City Attorney's Office to issue a determination as Supervisor of Records while simultaneously representing the City on the same issue in court.

Moreover, a determination by the Supervisor of Records is not a court decision. A court has the final say as to what the law means. As noted, it is unlikely that the Sunshine Ordinance was intended to require the City Attorney's Office to use its resources to issue an administrative determination when a lawsuit has been filed on the same issue and a court might render a final, and conclusive, decision on the matter.

Accordingly, the Supervisor of Records will not issue a determination on your petitions.

Finally, the Supervisor of Records does not review allegations that a City department has failed to comply with Section 67.21(c). The role of the Supervisor of Records is limited to determining whether "the record requested, or any part of the record requested, is public." (S.F. Admin. Code §67.21(d).) A determination on a City department's compliance with Section 67.21(c) is not a determination whether a requested record is public. Accordingly, the Supervisor of Records does not review these complaints. For prior determinations to the same effect, see Ninth Annual Report of the Supervisor of Records, sent to the Sunshine Ordinance Task Force on December 18, 2008, Appendix pages 17 and 43-44.

For the reasons set forth above, the Supervisor of Records declines to make a determination on your three petitions.

DENNIS J. HERRERA
City Attorney

Paula Jesson
Deputy City Attorney
August 24, 2012

Deron J. van Hoff
San Francisco CA 94122

Re: Petition to Supervisor of Records – SFMTA Records

Dear Mr. van Hoff:

You filed a petition with the Supervisor of Records regarding your public records request to the San Francisco Municipal Transportation Agency ("SFMTA") for various records relating to enforcement of transit violations. We understand the term "transit violations" within the context of your public records request to mean citations issued for fare evasion.

We summarize below those categories of records that you requested and for which you seek review. We also summarize communications between you and the SFMTA regarding these requests.

The SFMTA received your request on June 7, 2012 and responded to it on June 18, 2012. In a June 25, 2012 letter, you acknowledged the Agency's response but raised several objections and concerns. The SFMTA provided a further response on July 25, 2012. You submitted your petition to this office in a letter dated August 6, 2012.

Correspondence between the defendant and the SFMTA regarding citations issued during one calendar year, preferably between May 3, 2011 and May 2, 2012.

The SFMTA informed you that it was unable to provide copies of correspondence sent to or from persons receiving citations for transit violations. It said that the agency sends and receives about 110,000 pieces of correspondence to or from persons issued citations for either parking or transit violations and that the correspondence for both categories is not maintained separately. To locate and produce responsive records, staff would need to search through all the records and redact personal information, such as home addresses and telephone numbers. The SFMTA declined to comply with your request on the ground that searching for responsive records and providing redacted copies of such a large volume of records would be an unreasonable and unduly burdensome task. Moreover, the SFMTA informed you, because the correspondence contains private information, the Agency may not allow you to inspect the paper records without first redacting private information in them. Therefore, the SFMTA said, unless you were prepared to narrow the scope of your request, it declined to produce the requested records.

In reply to this response, you stated that you understood that it may be unduly burdensome to provide the records because of the need to redact them, and that perhaps you could obtain enough information from responses to your other requests, "as long as the reason for waiving the payment is also provided."

In reply to your comments, the SFMTA again noted that it would be "unduly burdensome for the SFMTA to generate copies of all of this correspondence."
The status of payment for citations issued during the same calendar year, and whether or not the citation protest has been accepted or payment has otherwise been waived or discharged.

The SFMTA's initial response did not specifically address this part of your public records request, but in its second response it informed you it had provided a statistical summary of the requested information in an Excel file. The SFMTA further stated that it does not maintain this information in the form that you requested and "is not required to engage in reprogramming to create it," citing San Francisco Administrative Code Section 67.21(1). But, the agency informed you, you can request the City's citation processing contractor to prepare a special report with this information, although "you would need to pay for the cost of reprogramming to generate this report." Finally, the Agency said that you could contact staff for more information about having the contractor create the report.

Correspondence by the City and County of San Francisco pertaining to enforcement actions relating to transit violations.

The SFMTA's first response did not specifically address this part of your request, but its further response stated that the request "is both vague and extremely broad" and "would potentially encompass the records included under [the request for correspondence described above] as well as additional records." The Agency informed you that, given its breadth, the request is not "sufficiently particular to identify a category of documents" as required by the California Public Records Act. Moreover, the Agency stated, courts have held that the duty of a public agency to respond to public records requests is limited by a "rule of reason." Therefore, the law imposes an "inherent reasonableness limitation" on those seeking records" (citing Bruce v. Gregory, 65 Cal.2d 666, 676 (1967).

Correspondence by the City and County of San Francisco pertaining to projected revenue from issuance of transit violation citations.

The SFMTA did not initially respond to this part of your request, but its further response informed you that you could obtain responsive information in the Agency's budget documents, available online (the Agency provided the link to this online information).

Arguments Provided in the Petition

Your petition states that the SFMTA's responses provide "a list of reasons why SFMTA does not have to comply with the request, but does not offer a means to obtain the requested documents." You asked this office to determine "whether the records requested are public . . . ." You also state as follows:

If you can provide alternative language to my request for public records so that it is not considered . . . "unduly burdensome" or "vague and extremely broad," I would appreciate it. I am not asking for all of SFMTA's records, only correspondence related to transit citations, enforcement actions, and projected revenue from issuance of transit violation citations. These requests should be specific enough to require SFMTA to comply.

Determination

We first consider the following two requests:
Correspondence between the defendant and the SFMTA regarding citations issued during one calendar year, preferably between May 3, 2011 and May 2, 2012.

The status of payment for citations issued during the same calendar year, and whether or not the citation protest has been accepted or payment has otherwise been waived or discharged.

With respect to SFMTA records in paper form, the Agency objected to complying with your requests because of the large volume of records that staff would need to search in order to locate responsive records. In addition, staff would have to review them to find and redact any private information.

We have discussed the nature and volume of the paper records in some detail with SFMTA staff (and also reviewed the files on site). Given the volume of records and the time that would be required to search, review, copy and redact them, the SFMTA had strong reasons for relying on the "rule of reason" to conclude that complying with your request would be unreasonably burdensome.

With respect to electronic records, the Agency informed you that it could not provide the detailed individualized citation information from electronic files, but that its citation processing contractor might be able to produce a special report for some of the more individualized information you want. But, the Agency noted, the contractor would charge a fee that you would need to pay. Staff invited you to contact the Agency to discuss the procedure for obtaining available information through the contractor, which we understand you have not done.

But we also understand that staff has located, and is providing to you, existing records in electronic form that contain the date the citation was issued, citation number, and hearing disposition.

In light of this additional information, the Supervisor of Records will not make a determination on these two requests until you have had a chance to review these records and discuss with SFMTA staff whether that review will enable you to make a more targeted request that would meet your objectives without imposing an undue burden on staff.

Your petition asked this office, as Supervisor of Records, to "provide alternative language" so that your request would not be considered "unduly burdensome." As a technical matter, that is really not the function of the Supervisor of Records. Under the Sunshine Ordinance, the Supervisor of Records is charged with determining "whether the record requested is public." (S.F. Admin. Code §67.21(d).) In any event, it is difficult to comply with your request for alternative language because we do not have enough information to understand your objective sufficiently to know what records you hope to find. Nor do we have a mastery of the Agency's system for maintaining its records. But we note that your request seems to focus on the reason for the citation protest and on successful protests. If that is the information you want, we can provide the following input about the Agency's records based on our discussions with the managers of the SFMTA's Citation and Permit Processing Section and Hearing Section.

The SFMTA provides two "levels" of administrative appeals for transit citations. At the first level, staff determine whether the persons cited failed to pay the required fare. For this first level review, staff do not provide a hearing for complainants.
The vast majority of first level appeals are denied. Once staff denies the appeal, the person cited either pays the citation or does not, and – if not – may seek a second level appeal, discussed below. The records in the Citation and Permit Processing Section would not show which option was chosen by the person cited. Therefore, if you want records of successful appeals and the basis for the appeal, records from this Section would not likely be helpful.

At the second level appeal, protesters have the right to a hearing. At this level, hearing officers have broader discretion to decide the appeal. Paper records from the Hearing Section would show the basis for citation challenge and which challenges succeeded. If you want records showing this information, paper records from the Hearing Section would be more useful. However, for the reasons that the Agency explained in its responses to you, the time it would take to find and produce these records would be substantial.

Some information from the Hearing Section is available electronically, but it is more limited than that available in the paper records. The electronic records may, but do not always, provide the basis for the citation challenge. Moreover, this electronic information includes all citation challenges, not just those for transit violations, and the ability to search is limited.

After you have reviewed the additional records that the Agency is providing about individual citations, you may decide to ask for a more targeted category of records. You may also choose to discuss with staff how best to narrow your request so that you can achieve your objective without placing an undue burden on staff. In the meantime, the Supervisor of Records finds it premature to make a determination on this portion of your petition.

- Correspondence by the City and County of San Francisco pertaining to enforcement actions relating to transit violations.

The SFMTA properly denied this request on the ground that it fails to identify records with sufficient particularity. Staff had offered to discuss with you how to narrow your request so that you could obtain the records you wanted without imposing an unreasonable burden on the Agency. As noted above, staff remain available to discuss your request and assist you in describing particular categories of records.

Correspondence by the City and County of San Francisco pertaining to projected revenue from issuance of transit violation citations.

As noted above, the SFMTA provided you with a computer link to the Agency's budget documents for revenue information regarding transit violation citations. Staff have also informed us that they can provide updated budget information showing actual revenue from Fiscal Year 2011-2-12 and the budgeted revenue for Fiscal Year 2012-2013.

However, you apparently were not seeking budget information, but rather memoranda, email, letters or similar types of records among staff discussing transit violations and projected revenue. We discussed this matter with Caroline Celaya, Manager for Public Records Requests for the SFMTA, who has informed us that she asked for responsive records from those members of staff who would likely have them and obtained none in response to those queries. However, she has agreed to send further inquiries to confirm whether the Agency may have responsive records that staff did not provide to her. She will inform you if she obtains responsive records...
and expects to be able to do so by September 4, 2012. Accordingly, the Supervisor of Records is not making a finding on this part of your petition until staff conducts that further search.

Very truly yours,

DENNIS J. HERRERA
City Attorney

[Signature]

Paula Jessón
Deputy City Attorney