Date: Jan. 10, 2012

Item No. 6

File No.

SUNSHINE ORDINANCE TASK FORCE

Compliance and Amendments Committee

AGENDA PACKET CONTENTS LIST*

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Completed by: **Chris Rustom** **Date:** **Jan. 6, 2012**

***This list reflects the explanatory documents provided**

~ Late Agenda Items (documents received too late for distribution to the Task Force Members)

** The document this form replaces exceeds 25 pages and will therefore not be copied for the packet. The original document is in the file kept by the Administrator, and may be viewed in its entirety by the Task Force, or any member of the public upon request at City Hall, Room 244.

SUNSHINE ORDINANCE
TASK FORCE

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December 16, 2011

San Francisco Ethics Commission
220 Van Ness Avenue, Suite 220
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Honorable Commissioners:

The Sunshine Ordinance Task Force (SOTF), through its five-member Compliance and Amendments Committee completed a thorough review of the Commission staff's August 17, 2010 draft "Regulations for Complaints Alleging Violations of the Sunshine Ordinance" and forwarded suggested changes, with an explanatory Memorandum, to the Commission on August 1st, 2011.

In late September, as Chair of that Committee, I wrote requesting that the Commission and our Committee hold at least one joint public meeting to discuss the proposed Regulations before the Commission adopts them. We did not receive a response to that letter.

Ethics Commission staff instead presented a revision of the August 17, 2010 proposed Regulations for your review and possible action at your November 14, 2011 meeting. The matter was tabled after several SOTF members in attendance, as well as members of the public, urged the Commission to meet with the Compliance and Amendments Committee to discuss the complex issues involved in the Commission's handling of SOTF's enforcement referrals and Sunshine Ordinance complaints filed directly with the Commission. At that meeting, several of the Commissioners appeared to be amenable to convening a joint meeting.

I am writing again to request such a joint meeting. The week of February 6th would be a good time for our Committee members although we have some flexibility. The Committee expects to have its written comments on the proposed Regulations to the Commission at least a week prior to the meeting.

Please contact Committee Chair, Dr. Allyson Washburn, through the office of our Administrator, Chris Rustom: phone (415) 554-7724, e-mail *sotf@sfgov.org* with suggestions for meeting dates and times during the week of February 6th or as soon thereafter as convenient. We look forward to continuing our work together. Thank you for your kind attention.

Sincerely,

Allyson M. Washburn

Allyson Washburn, Ph.D.

Chair, Sunshine Ordinance Task Force Compliance and Amendments Committee

cc: Hope Johnson, Chair, Sunshine Ordinance Task Force;
Chris Rustom, Sunshine Ordinance Task Force Administrator
Jerry Threet, Deputy City Attorney
Supervisor David Campos

MEMORANDUM

To: **SOTF Compliance & Amendments Committee**

Dated: **December 8, 2011**

Re: **<u>EC Staff's November 11, 2011 revised proposed "Sunshine" Regulations</u>**

I. The bombshell in the proposed new Regulations is described in the Summary:

> "The proposed Regulations' Preamble establishes the purpose of the regulations and the jurisdiction of the Commission regarding complaints alleging violations of the Sunshine Ordinance. **Under staff's proposal, the Commission will handle only allegations of willful violations of the Ordinance by elected officials, department heads, or managerial City employees [Emphasis added].**"

> "Administrative Code section 67.34 provides that "[c]omplaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records Act by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission (emphasis added)." **Staff believes the best interpretation of this provision is that the Commission has jurisdiction over only willful violations, and does not have jurisdiction over allegations of non-willful violations of the Ordinance. Under this interpretation, the Commission would only handle complaints or referrals that allege willful violations; staff would reject any complaint or referral alleging a non-willful violation [Emphasis added].**"

The Ethics staff, without authority, reversed the Commission's specific decision in June 2010 to include SOTF referrals for enforcement within its jurisdiction. That decision was made by a unanimous vote of the Commission, taken after full discussion and public comment at public meeting. Staff reversed that decision without any action by the Commission at a public meeting or otherwise complying with the Brown Act and Sunshine Ordinance notice and agenda requirements.

II. The implications of the Ethics Commission limiting its jurisdiction to "willful" violation cases, even ignoring the other "outs" built into the proposed Regulations, are profound. Ultimately, almost all of the SOTF's ability to effectively do its job of supporting the public in its efforts to obtain access to both records and meetings would be gone.

(1) As the Ethics staff points out, the San Francisco Sunshine Ordinance contains provisions for enforcement of either an SOTF Order for disclosure of public records or when it concludes that any person has violated any provisions of the ordinance or under the California Public Records Act and the Brown Act. Per §67.21(e), SOTF Orders for enforcement are sent only to the San Francisco District Attorney and the California Attorney General. However, for "violations" of the Ordinance, the CPRA and the Brown Act, the Task Force shall [is obliged to] make referrals to a municipal office with enforcement power under the ordinance or under the CPRA and the Brown Act. §67.30(c).

The practical effect of those provisions is to limit the venues for enforcement to only one. The San Francisco District Attorney has no authority under either the California Government Code or the San Francisco Charter to enforce violations of public access laws. He can try to find some criminal violation that the failure to comply implicates, but that doesn't require disclosure, *per se*. On its part, the Attorney General has always rejected SOTF requests to enforce the Sunshine Ordinance, considering such enforcement to be a "local matter" and has taken the position it does not enforce local laws and.[1] Neither the CPRA nor the Brown Act confers enforcement power on a municipal office; recourse for violations of those laws can be had only in the Superior Court. Thus, the only venue for enforcement of a violation of the Sunshine Ordinance (other than by an action in the Superior Court) is a "municipal office with enforcement power under this ordinance..." As noted, last year the Ethics Commission decided it had such "enforcement power" under Section 67.35(d).

In its current explanation of the purpose of §67.35(d), staff considers it only relevant when discussing when the 40-day clock starts the Commission's §67.34 power to "handle" willful violation cases. Staff ignores that section's substantive powers. First, to empower a complainant whose complaint resulted in an Order to a city employee or agency that has not been acted upon (e.g. enforced) by the District Attorney or Attorney General for 40 days to have that Order enforced by the Ethics Commission. Second, its establishment of Ethics as a "municipal office with enforcement power" to which the SOTF's referrals can be made under §67.30(c).

(2) Section 67.34, which ("willful violations" shall be handled by the Ethic Commission) applies only to "elected officials" and "department heads."[2] In their eagerness to exclude SOTF referrals of simple violations of public access laws in favor of the willful violation requirement in §67.34, staff failed to mention the enormous hole in coverage, namely:

Members of all boards and commissions (and their staffs) can not be the subject of a complaint filed with the Ethics Commission under §67.34 nor can any "unelected" officials nor any number of other "custodians" of public records, including city employees who are not department heads, but nevertheless hold important positions in City Departments, such as the City Administrator, the Zoning Administrator and all the various deputy directors. Given that there are upwards of 50 boards and commissions in the City and many important "custodians" who are not department heads, the fact that there is not remedy available to the public, other than a lawsuit, is completely untenable.

(3) Not to be forgotten is Staff's history in handling most of SOTF's prior "enforcement" referrals as "willful violation" cases – partly due to the SOTF findings of "willful violations" and such descriptions in the referral letters. The reinvestigations, the different findings of "willful", no "probable cause", etc., all under the current inapplicable Regulations, have resulted in every case dismissed, with the one exception.

Although the proposed Regulations now mandate a hearing on every case, staff, i.e., St. Croix, will have a major role in what is presented to the Commission before the hearing and how the hearing is conducted:

> "Under Section IV.A., the Executive Director's investigation may include, but is not limited to, interviewing the Respondent(s) and any witnesses and reviewing documentary and other

[1] http://www.firstamendmentcoalition.org/2009/06/enforcement-of-the-cpra/

[2] "Complaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records Act by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission."

evidence. This proposal tracks the language used in the Commission's current regulations for non-Sunshine complaints, and provides staff the flexibility and discretion it needs to conduct thorough investigations. "

"Under Section IV .B., the Executive Director must prepare a written recommendation, which will include a summary of factual and legal findings after concluding his or her investigation. **The report must also include the Executive Director's disposition recommendation,** which will be one of the following: a) that the Respondent willfully

violated the Sunshine Ordinance; **b) that the Respondent violated the Sunshine Ordinance but the violation was not willful;** or c) that the Respondent did not violate the Sunshine Ordinance. The recommendation must be delivered to the Commission, Complainant, and Respondent in advance of the hearing." **[Emphasis added.]**

V. The proposed Regulations also include several "outs" for the respondents in the "willful violations" cases. The Regulations contain three definitions designed to provide a respondent an "escape hatch", when the violation would otherwise be deemed "willful". They are:

"Exculpatory information" means information tending to show that the respondent is not guilty of the alleged violations.

"Mitigating information" means information tending to excuse or reduce the culpability of the Respondent's conduct.

"Willful violation" means an action or failure to act **with the knowledge that such act or failure to act was a violation of the Sunshine Ordinance. [Emphasis added.]**

These definitions are tied to the Executive Director's "recommendations to the Commission and to the Commission's consideration of "willful":

"After the Executive Director has completed his or her investigation, the Executive Director shall prepare a written report and recommendation summarizing his or her factual and legal findings. The recommendation shall contain a summary of the relevant legal provisions and the evidence gathered through the Commission's investigation, including any exculpatory and mitigating information. ...

The report shall recommend one of the following: a) that Respondent(s) willfully violated the Sunshine Ordinance; b) **that Respondent(s) violated the Sunshine Ordinance but the violation was not willful**; or c) that Respondent(s) did not violate the Sunshine Ordinance. The recommendation shall be delivered to the Commission, Complainant and Respondent pursuant section III.B. **[Emphasis added.]**

To determine whether a violation of the Sunshine Ordinance is willful, the Commission shall consider all the relevant circumstances surrounding the case, including but not limited to:

(a) whether the Respondent complied with all aspects of the Sunshine Ordinance, but failed to comply within the appropriate time-frame;

(b) the volume of records requested, and the extent to which they were practically accessible; and/or

(c) whether the Respondent consulted with counsel or relied on the advice of other City employees prior to committing the alleged violation. [Emphasis added.]

In its report, staff comments as follows:

> "The Task Force recommended that the Ethics Commission adopt the definition of "willfully" as defined in section 7 of the Penal Code. That definition, according to the Task Force, is "the word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to injure another, or to acquire any advantage."
>
> **"The Ethics Commission has determined that the term "willful" under the Ordinance includes a purposeful failure to carry out mandatory duties of office. In the context of the Sunshine Ordinance, a willful violation would occur if a Respondent purposefully withheld public documents or violated public meeting requirements knowing that the Sunshine Ordinance required otherwise." [Emphasis added.]**

So far, I have been unable to find any record that the Ethics Commission had "determined that the term "willful" under the Ordinance includes a "purposeful failure to carry out mandatory duties of office" at any meeting or in any published record. It may be buried in a dismissal letter that was sent by the Executive Director when his report on a particular "complaint" was submitted and became the Commission's action under the default procedure in the current (no-applicable) Regulations.

However, the definition of "willful" proposed by the staff does not use the word "purposeful", but rather acting "with knowledge" that the action was a "violation". While this may be a distinction without a difference, it should be considered in light of the requirement under §67.33 that:

> " **All City department heads** and all City management employees **and all** employees or **officials** who are required to sign an affidavit of financial interest with the Ethics Commission **shall sign an annual affidavit or declaration stating under penalty of perjury that they have read the Sunshine Ordinance and have attended or will attend when next offered, a training session on the Sunshine Ordinance, to be held at least once annually. [Emphasis added.]**

Since the purpose of the training requirement is to educate the respondent on what his or her disclosure obligations are under the Ordinance, any failure to disclose would seem to be done with "knowledge" even under the definition.

As for "consulting with counsel", we know from experience that the Respondents regularly consult with either the DCA assigned to their department or to some lawyer in the City Attorney's government group. So, the "out" for the Respondent is built into the Regulations.