

Date March 29, 2012

Item No. 2
File No. _____

**SUNSHINE ORDINANCE TASK FORCE
COMPLIANCE AND AMENDMENTS COMMITTEE
AGENDA PACKET CONTENTS LIST**

Sunshine Ordinance Task Force

Date: _____

Compliance and Amendments Committee

Date: March 29, 2012

CAC/SOTF

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Completed by: Andrea Ausberry Date March 27, 2012
Completed by: _____ Date _____

*An asterisked item represents the cover sheet to a document that exceeds 25 pages. The complete document is in the file.

MEMORANDUM

To: SOTF Compliance & Amendments Committee

Date: March 25, 2012

Re: Why the EC Staff's proposed Regs are so unresponsive to the needs of the SOTF.

There is a basic reason why the EC Staff's proposed Regs are so dramatically unresponsive to the needs of the SOTF. The reason is that one of the Ethics Commission's main jobs is an "enforcer" to investigate and punish those persons, including City employees, who violate the City charter and City ordinances relating to campaign finance, lobbying, conflicts of interest and governmental ethics and, so, the these proposed Regs are all about punishment of the "willful violators" and the penalties, as contrasted with the SOTF's goal is to have the complainants' rights to public access enforced. That is why the EC staff mistakenly utilized a two prong approach in its proposal. One prong is its focus on the SO § 67.34 provision which calls for hearings and punishment for "official misconduct" or for a "willful violation" by those city officials who are in high places. The other prong was is to follow the same investigation, ED report, ED recommendation and full blown hearing approach in its existing Regs dealing with those alleged violations of laws relating to campaign finance, lobbying, conflicts of interest and governmental ethics. Of course, the result is to eliminate entirely the relatively simple and direct enforcement aspect of what the EC is supposed to do with SOTF referrals.

An important difference between the remedies of aggrieved public access complainants and the EC's role in investigation and enforcing the ethics, conflicts of interest, lobbying and campaign finance laws is that the public access aggrieved complainants can enforce their rights under the CPRA, Brown Act and Sunshine Ordinance in the Superior Court, whereas the only venue to punish violators of the laws the EC is specifically designed to investigate and enforce is the EC itself. But the EC Staff did not recognize the difference in the EC's role when looking at what the EC's jurisdiction should be for the enforcement of SOTF referrals and the requirement of §67.30(c).

However, punishment and the tedious process for achieving it, even assuming the process results in some sort of "conviction" (i.e., a "warning letter"), may not necessarily result in the complainants obtaining what they want, namely, the public records or to have a meeting run as the law requires, but any other result following a "finding" of a "willful violation" would be unwarranted. According to the proposed Regs, these are the penalties that the EC can impose:

"[t]he Commission may issue orders and penalties requiring any or all of the following:

- (a) the Respondent(s) to cease and desist the violation and/or produce the public record(s);

- (b) the Executive Director to refer the matter to the Mayor with the Ethics Commission's recommendation to initiate of the suspension and removal proceedings pursuant to San Francisco City Charter section 15.105 against the Respondent(s);
- (c) the Respondent's department, commission, or board to pay a monetary penalty to the General Fund of the City of up to five thousand dollars (\$5,000) for each violation; and/or
- (d) the Executive Director to post on the Ethics Commission's website the Commission's finding that the Respondent(s) willfully violated the Sunshine Ordinance.”

So the real problem is that the EC Staff's proposed Regs create a process that is not primarily about achieving the goals of the SOTF and its complainants but rather something else. This is best demonstrated by a comparison to a lawsuit in the Superior Court -- the complainants' alternative to the EC Staff's approach, *assuming that at the end of the EC procedure, the Respondent was found guilty of willful misconduct, which, based on past history would not be the likely result:*

	<u>Superior Court Lawsuit</u>	<u>Days</u>	<u>SOTF Process/ EC Procedure</u>	<u>Days</u>
(1)	Mandate Petition Filed		Complaint filed w/SOTF	
(2)	Respondent responds	30	Respondent files response	5
(3)	Short date for hearing	10	SOTF hears complaint	25
(4)	Hearing,	30	SOTF issues OD	10
(5)	Court makes decision,	14	SOTF C & compliance hearing/refers to full SOTF	25
(6)	Complainant gets records	14	SOTF refers to EC	21
(7)	Court has all filings		SOTF records sent to EC	10
(8)	No investigation		EC Investigation/Report	45
(9)	No additional briefs		Parties file briefs	
(9)	No additional hearing		EC Hearing	30
(10)	Case closed		EC Decision/Penalties	7
(11)	Complainant gets records.		Complainant gets records.	14
	<u>Total Days Elapsed</u>	<u>98</u>		<u>192</u>

So at the end of the day, the complainant may get the records after a more than six month process before the SOTF and the EC, whereas the complainant will know within three months whether the records will be disclosed. Of course, suing is expensive because fees and a lawyer is involved, whereas, under the SOTF and EC procedures, a complainant can handle the case without a lawyer, albeit at a disadvantage as the respondent will either have the City Attorney's office helping or a personal lawyer. On the other hand, if successful in court, the complainant gets attorneys fees, whereas there is no comparable provision in the EC Staff's proposed Regs.

Another point to be considered is one that was made in the Memorandum dealing with EC Staff's ignoring the jurisdictional mandate of §67.30(c) and the "power" of § 67.35(d):

Section 67.35(d) provides:

" Any person may institute proceedings for enforcement and penalties under this act in any court of competent jurisdiction or before the Ethics Commission if enforcement action is not taken by a city or state official 40 days after a complaint is filed.

Staff considers §67.35(d) relevant only to the day the 40-day clock starts the Commission's §67.34 power to "handle" willful violation cases. It ties §67.35(d) to the "handling" provision of §67.34 to give the Commission its jurisdiction over willful violation complaints and thus implicates the 40-day rule.

However, Staff ignore that section's substantive powers. First, it empowers a complainant whose complaint resulted in an SOTF Order 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, it establishes the Ethics Commission as a "municipal office with enforcement power" to which the SOTF's referrals can be made under §67.30(c).

Each of these two provisions is independent of the other. Even if §67.35(d) did not exist, no one would argue that although §67.34 provides that willful violation complaints are to be "handled" by the Ethics Commission, it cannot be interpreted to confer jurisdiction on the Commission. On the other hand, if §67.34 did not exist, no one would argue that §67.35(d) does not confer jurisdiction on the Commission to "enforce" the Sunshine Ordinance ("this act") after 40 days have elapsed from the time a complaint is filed with a city or state official. The correct interpretation requires following the text of each section without regard to the other.

There is no question about §67.34: It means what it says. "Complaints" involving a "willful violation" by any respondent in either of two categories, "elected officials or department heads" are handled by the Ethics Commission; not just any "municipal office with enforcement power" to which the SOTF refers persons who "violate" any provisions of the ordinance or the Acts, as provided in §67.30(c). That distinction makes sense. The Commission has the power to impose penalties and to find "official misconduct" and thus is the proper place for the respondents in these two categories to be brought for a proceeding on such egregious complaints. That power does not exist in any other San Francisco body.

On the other hand, §67.35(d) makes sense if it is read to provide a venue for enforcement of an aggrieved person's right, if the city or state official has not acted on it within 40 days after the [original] complaint was filed. Thus, when the Ethics Staff states that the SOTF is required to turn over non-complied with Orders to the District Attorney (a "city official") and the Attorney

General (a “state official”) under §67.21(e) and, therefore, the Commission is not “tasked” with enforcing those Orders, if neither official takes any action, it misses the point of §67.35(d): The aggrieved person can enforce that right (i.e., access to particular records or to public meetings) as determined by the SOTF [or the Supervisor of Records] through a proceeding in the Superior Court or in the Ethics Commission. This should be contrasted with §67.30(a), which also allows enforcement of the statutory “access right” comparable to that in the CPRA:

“Any person may institute proceedings for injunctive relief, declaratory relief, or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this Ordinance or to enforce his or her right to attend any meeting required under this Ordinance to be open, or to compel such meeting to be open.”

If the same “right” were involved, the inclusion of “penalties” and “a court of competent jurisdiction” would not be needed in §67.35(d).

Needless to say, with the EC Staff’s misunderstanding of the EC’s role when faced with an SOTF referral, what the EC Staff produced is no surprise.

MEMORANDUM TO THE ETHICS COMMISSION

Re: The Commission's "Enforcement" Jurisdiction: As proposed in its Staff's draft "Regulations for Complaints Alleging Willful Violations of the Sunshine Ordinance."

Date: March [--], 2012

The Sunshine Ordinance Task Force (SOTF), through its five member Compliance and Amendments Committee, reviewed and considered Commission Staff's proposed draft "Regulations for Complaints Alleging Willful Violations of the Sunshine Ordinance" (Staff's Draft), as well as Staff's November 10, 2011 Memorandum to the Commission and SOTF members with reference to these proposed Regulations.

SOTF's primary concern is that Staff's Draft so drastically restricts the Commission's enforcement jurisdiction over violations of the California and San Francisco public access laws from that of its prior draft as to render such enforcement non-existent. Staff's Draft does so by limiting the Commission's enforcement jurisdiction solely and exclusively to "willful violations" of those laws and, then, only by "elected city officials and department heads." It completely eliminates the Commission's jurisdiction to enforce SOTF referred violations. If Staff's Draft were adopted, there would be no State or San Francisco administrative body or office to enforce SOTF referrals of violations of the public's constitutional right of access to records and meetings.

As Staff explains:

"Staff's revised proposals differ from its recommendations in 2010 and depart from the Commission's earlier policy decisions, particularly with regard to non-willful violations of the Ordinance and handling of complaints against managerial City employees."

Staff acknowledges its departure from the "Commission's earlier policy decisions." For that very reason alone, Staff's Draft cannot be adopted. Staff's Draft reverses the Commission's policy decision taken in June 2010 to include SOTF referrals for enforcement within its jurisdiction. That decision was taken by a unanimous vote of the Commission, after full discussion and public comment at a properly noticed and agendized public meeting. It is the SOTF's position that Ethics Staff cannot reverse that decision on its own, without appropriate formal action by the Commission at a public meeting held in compliance with the Brown Act and Sunshine Ordinance notice, agenda and other applicable requirements.

Further, SOTF has concluded that that the proposed Regulations cannot be adopted with that jurisdiction limitation for the following additional reasons:

- I. Staff failed to apply or consider relevant sections of the California Constitution, City Charter §15.102 and Sunshine Ordinance §67.35(d) in the proposed Regulations.

Ethics Staff missed much of the relevant law that governs the Commission's adoption of regulations dealing the public's access to public records and meetings. Staff did not refer to or discuss the following:

First, the first sentence of Section 3(b)(2) of Article I of the California Constitution, which requires that:

“(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.”

Staff recognizes that “there are a number of ambiguities in the enforcement provisions of the Ordinance.” Accordingly, if there are any ambiguities in the Sunshine Ordinance’s provisions, including those in §§67.30(c) or 67.35(d), those provisions must be “broadly construed” to further the people’s rights of access. Staff’s narrow construction of those ambiguities is contrary to that constitutional mandate.

Second, the second sentence of Section 3(b)(2) of Article I of the California Constitution requires that:

“A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.”

Ethics Staff made no attempt to satisfy this constitutional requirement. That requirement is implicated in two ways. One, by eliminating the only available administrative forum for enforcement against entire groups of persons who would deny public access. The other, by failing to provide adequate procedural and substantive “due process” protections (for the parties) and for complainants seeking public access, whether through the SOTF referrals or directly. The comparable forum (and the only alternative offered by both the CPRA and the Sunshine Ordinance) is a proceeding in the Superior Court, in which there are ample safeguards insuring the parties’ due process, such as testimony from non-party witnesses and access to non-privileged records. Since the limited jurisdiction and procedure in the Staff’s Draft do not meet that standard, there must be findings, as required by the constitutional provision, “demonstrating the interest protected by the limitation and the need for protecting that interest.” Staff made no such findings.

Third, Section 15.102 of the City Charter provides, in part:

“... the Commission may adopt rules and regulations relating to carrying out the purposes and provisions of ordinances regarding open meetings and public records.”

Any regulations adopted by the Ethics Commission to “carry out the purposes and provisions” of the Sunshine Ordinance, the only City ordinance “regarding open meetings and public records”, must implement a cornerstone of that law - making the SOTF an effective body in resolving public access disputes, by conferring jurisdiction on the Ethics Commission to enforce SOTF’s orders. The Ethics Commission will have failed in carrying out one of the essential purposes of the Sunshine Ordinance if it denies the public its only real remedy to enjoy its constitutional right of access. Put differently, there is no question but that in fulfilling its responsibility to carry out the purposes and provisions of the Sunshine Ordinance, the Commission has ample authority to enforce SOTF referrals, by recognizing that it is the only municipal office capable of doing just that.

Fourth, there is no reference to §67.35(d) in Staff’s analysis of the Commission’s power to hear enforcement actions. That section provides:

“Any person may institute proceedings for enforcement and penalties under this act in any court of competent jurisdiction or before the Ethics Commission if enforcement action is not taken by a city or state official 40 days after a complaint is filed.”

The effect of this section is to empower a complainant whose complaint before the SOTF or petition to the Supervisor of Records 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 it enforced by the Ethics Commission. The significance of this section as the basis for the Commission's jurisdiction is detailed in II below.

II. Ethics Staff's legal analysis of the Commission's "limited" jurisdiction over "sunshine" matters is incomplete and flawed.

As noted, the proposed new Regulations, contrary to the Commission's June 2010 decision, eliminate referrals from the SOTF of non-willful violations of public access laws. As described, in part, in Staff's Summary under "1. Section I – Preamble", at page 4:

"... 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]."

"... Staff believes the best interpretation of this provision [§67.34] 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]."

By way of further explanation, Staff adds, under IV.1 "The Role of the Commission under the Ordinance."

"The Task Force's recommendations appear to be premised on the notion that the Ethics Commission has two distinct roles under the Sunshine Ordinance: one with respect to the enforcement of Task Force referrals, and the second with respect to the Ethics Commission's handling of willful violations under section 67.34. Staff does not agree."

"As the Commission has determined in recent decisions, the Ethics Commission is not tasked anywhere in the Ordinance with enforcing orders of determination from the Task Force ... Section 67.21(d) further provides that if the custodian still fails to comply with the records request after being ordered to release the records by the Supervisor of Records, the '*supervisor of records shall notify the district attorney or the attorney general who shall take whatever measures she or he deems necessary and appropriate to insure compliance with the provisions of this ordinance [emphasis added].*' **Under section 67.21(d), the district attorney or the attorney general—not the Ethics Commission—is specifically tasked with the enforcement of a public records request. [Emphasis added].**

"... 'If the custodian refuses or fails to comply with any such order [of the Task Force] within 5 days, the [Task Force] *shall notify the district attorney or the attorney general who may take whatever measures she or he deems necessary to insure compliance with the provisions of this ordinance [emphasis added].*' **Again, the power to enforce the public records request lies with the district attorney or the attorney general, not the Ethics Commission.**" [Emphasis added].

As Ethics Staff correctly points out, Sunshine Ordinance §67.21(e) provides that SOTF Orders for disclosure of public records are sent to the San Francisco District Attorney and the California Attorney General for enforcement. However, Ethics Staff does not recognize that failure to comply with an SOTF Order is also a “violation” of the Sunshine Ordinance, and as such would fall under §67.30(c), as the Commission had originally determined in June 2010.

Limiting recourse for enforcement of SOTF Orders regarding public records violations, as Staff proposes, to the San Francisco District Attorney or the Attorney General is illusory; neither can nor will enforce SOTF Orders. The District Attorney has no authority under either the California Government Code or the San Francisco Charter to enforce violations of public access laws. On its part, the Attorney General’s consistent position is that its office does not enforce the CPRA or local laws, having rejecting all SOTF referrals. Neither the CPRA nor the Brown Act confers enforcement power on a “municipal office”; recourse for violations of those State laws can be had only in the Superior Court.

As a result, Staff’s interpretation limits the venue for enforcement of an SOTF Order or a “violation” - other than by an action in the Superior Court - to a “municipal office with enforcement power under this ordinance...” Staff has not identified any San Francisco “municipal office” with such enforcement power under the CPRA, the Brown Act or, for that matter, the Sunshine Ordinance. There is only the Ethics Commission, whether by virtue of §67.34 or §67.35(d).

Section 67.35(d) provides:

“ Any person may institute proceedings for enforcement and penalties under this act in any court of competent jurisdiction or before the Ethics Commission if enforcement action is not taken by a city or state official 40 days after a complaint is filed.”

Staff considers §67.35(d) relevant only to the day the 40-day clock starts the Commission’s §67.34 power to “handle” willful violation cases. It ties §67.35(d) to the “handling” provision of §67.34 to give the Commission its jurisdiction over willful violation complaints and thus implicates the 40-day rule.

However, Staff ignore that section’s substantive powers. First, it empowers a complainant whose complaint resulted in an SOTF Order 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, it establishes the Ethics Commission as a “municipal office with enforcement power” to which the SOTF’s referrals can be made under §67.30(c).

Each of these two provisions is independent of the other. Even if §67.35(d) did not exist, no one would argue that although §67.34 provides that willful violation complaints are to be “handled” by the Ethics Commission, it cannot be interpreted to confer jurisdiction on the Commission. On the other hand, if §67.34 did not exist, no one would argue that §67.35(d) does not confer jurisdiction on the Commission to “enforce” the Sunshine Ordinance (“this act”) after 40 days have elapsed from the time a complaint is filed with a city or state official. The correct interpretation requires following the text of each section without regard to the other.

There is no question about §67.34: It means what it says. “Complaints” involving a “willful violation” by any respondent in either of two categories, “elected officials or department heads” are handled by the Ethics Commission; not just any “municipal office with enforcement power” to

which the SOTF refers persons who “violate” any provisions of the ordinance or the Acts, as provided in §67.30(c). That distinction makes sense. The Commission has the power to impose penalties and to find “official misconduct” and thus is the proper place for the respondents in these two categories to be brought for a proceeding on such egregious complaints. That power does not exist in any other San Francisco body.

On the other hand, §67.35(d) makes sense if it is read to provide a venue for enforcement of an aggrieved person’s right, if the city or state official has not acted on it within 40 days after the [original] complaint was filed. Thus, when the Ethics Staff states that the SOTF is required to turn over non-complied with Orders to the District Attorney (a “city official”) and the Attorney General (a “state official”) under §67.21(e) and, therefore, the Commission is not “tasked” with enforcing those Orders, if neither official takes any action, it misses the point of §67.35(d): The aggrieved person can enforce that right (i.e., access to particular records or to public meetings) as determined by the SOTF [or the Supervisor of Records] through a proceeding in the Superior Court or in the Ethics Commission. This should be contrasted with §67.30(a), which also allows enforcement of the statutory “access right” comparable to that in the CPRA:

“Any person may institute proceedings for injunctive relief, declaratory relief, or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this Ordinance or to enforce his or her right to attend any meeting required under this Ordinance to be open, or to compel such meeting to be open.”

If the same “right” were involved, the inclusion of “penalties” and “a court of competent jurisdiction” would not be needed in §67.35(d).

It is noteworthy that prior to last year, that is, since the year 2000 when the Sunshine Ordinance became effective, the Ethics Commission and Mr. St. Croix “handled” all SOTF referrals – albeit improperly – whether or not the respondent was an “elected official” or a “department head” and the SOTF members, who, in the early days included several who had drafted Prop G, made referrals of violations to the Ethics Commission as a matter of course. These actions reflect the general understanding among those who were directly involved was that violations of the Sunshine Ordinance, the CPRA and the Brown Act would be enforced by the Ethics Commission, the only municipal office which had enforcement power at that time (and remains so).

III. Ethics Staff’s proposal would deprive almost all complainants alleging public records and public meetings violations of any remedy other than Superior Court lawsuits.

Section 67.34, which (“willful violations” shall be handled by the Ethic Commission) applies only to “elected officials” and “department heads.”¹ In their willingness 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:

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 for public meetings violations or public records violations nor can any “unelected” officials nor any number of other “custodians” of public records, including city employees who are not department heads, but hold important positions in City Departments, such as the City Administrator, the Zoning Administrator and all the various deputy

directors. Given the number of boards and commissions in the City and the many important "custodians" who are not department heads, the fact that there is no remedy available to the public, other than a lawsuit, is completely untenable.

How effective would the proposed Regulations be in enabling the public to secure its public access rights when a City official, department or commission denies them?

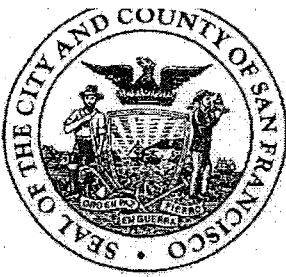
First, the Index pages from a 2004 Memorandum from the CA to Mayor Newsom regarding Mayoral appointments, etc. lists all the Board and Commission, which, at that time, involved those appointments. The total is 81 Boards and Commissions, many with more than five or seven members, all probably with a Secretary (or equivalent). An estimate of the potential persons not covered (at five or six per policy body), plus a Secretary/Administrator for each, would exceed 500. None would be covered by the proposed Regulations.

Second, within many departments, there are layers of deputies and managers of different aspects of the department's activities. For example, the Department of Building Inspection has four deputy directors, with 12 direct reports [managers, etc.], several supervisors, in addition to all the inspectors and administrative Staff. DPW has 15 "managers" and each manager may be supervising several of its activities. None of the first several layers of "management" would be covered under the proposed Regulations.

Ethics Staff recognized this problem and sought to include "managerial City employees", but the Commissioners expressed reservations about extending jurisdiction to them under §67.34.

Third, the historical record of the Commission's disposition of SOTF referrals suggests that the chances of a finding against an "elected official" or a "department head" are slim. Of the 19 cases referred since April 2008, only two involved a respondent elected official or department head and both were dismissed. The other 17 did not meet this threshold requirement.

The SOTF "Referral" Log for the period 2005 - through 12/5/2011, provided by the SOTF Administrator, shows, with some duplication, a total of 35 referrals to the Ethics Commission, of which 29 were dismissed, one was heard (Cauthen) and five are still pending. Mr. St. Croix first introduced the principle that the Commission "only handles complaints filed under §67.34" in his September 13, 2011 dismissal of the SOTF referred Tsang case, #10015, which cited §67.30(c) for enforcement. Since then all eight subsequent SOTF referrals have been dismissed based, in part or entirely, on the requirements of §67.34; to wit, either the SOTF did not find a willful violation, the violation in fact not "willful" or the respondent was not an "elected official or department head."



ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

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JOHN ST. CROIX
EXECUTIVE DIRECTOR

Date: November 10, 2011

To: Members, Ethics Commission
Members, Sunshine Ordinance Task Force

From: John St. Croix, Executive Director
By: Catherine Argumedo, Investigator/Legal Analyst
Garrett Chatfield, Investigator/Legal Analyst

Re: Regulations regarding Enforcement of Sunshine Ordinance Complaints

I. Background

On June 7, 2010, staff presented to the Ethics Commission ("Commission") a memorandum regarding possible regulations governing the Commission's handling of complaints alleging a violation of the Sunshine Ordinance, San Francisco Administrative Code Chapter 67 ("Ordinance"). At its June 14, 2010 meeting, the Commission discussed and adopted the following three policy directives:

1. The Commission's jurisdiction regarding violations and alleged violations of the Ordinance includes: a) alleged willful violations of the Ordinance by elected officials and department heads; b) referrals of violations of the Ordinance from the Sunshine Ordinance Task Force ("Task Force"); and c) complaints brought directly to the Commission alleging a violation of the Ordinance.
2. The Commission has jurisdiction to establish penalties for violations of the Ordinance, including whether to impose monetary fines or other penalties or to find official misconduct by elected officials and department heads.
3. For all referrals from the Task Force, the Commission will hold an enforcement hearing. The real party in interest (the original complainant) and the Respondent may appear. Because the Task Force will have already determined that the Respondent violated the Ordinance, the Respondent will have the burden of proof to show that he or she did not violate the Ordinance.

Guided by these three policy directives, staff drafted a set of regulations and forwarded the draft to the Task Force for review and comments on August 17, 2010. The Task

Force responded in writing with its own proposed regulations to the Ethics Commission on August 1, 2011.

After considering the Task Force's recommendations, reviewing the Commission's resolution of Sunshine complaints in the past year, and refocusing on the language of the Ordinance, staff now proposes a revised set of regulations. Staff's revised proposals differ from its recommendations in 2010 and depart from the Commission's earlier policy decisions, particularly with regard to non-willful violations of the Ordinance and handling of complaints against managerial City employees.

II. Relevant Provisions of the Sunshine Ordinance

There are a number of ambiguities in the enforcement provisions of the Ordinance, which was drafted and adopted by the voters in 1999. Under the Charter, the Commission has the authority to adopt regulations reasonably interpreting these ambiguities. Specifically, five provisions of the Sunshine Ordinance are relevant here. They are set forth below.

1. ***From S.F. Administrative Code section 67.30(c):***
The Task Force shall make referrals to a municipal office with enforcement power under this ordinance or under the California Public Records Act and the Brown Act whenever it concludes that any person has violated any provisions of this ordinance or the Acts.
2. ***S. F. Administrative Code section 67.34:***
The willful failure of any elected official, department head, or other managerial city employee to discharge any duties imposed by the Sunshine Ordinance, the Brown Act or the Public Records Act shall be deemed official misconduct. 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.
3. ***S.F. Administrative Code section 67.35:***
 - (a) Any person may institute proceedings for injunctive relief, declaratory relief, or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this Ordinance or to enforce his or her right to attend any meeting required under this Ordinance to be open, or to compel such meeting to be open.
 - (b) A court shall award costs and reasonable attorneys' fees to the plaintiff who is the prevailing party in an action brought to enforce this Ordinance.
 - (c) If a court finds that an action filed pursuant to this section is frivolous, the City and County may assert its rights to be paid its reasonable attorneys' fees and costs.
 - (d) Any person may institute proceedings for enforcement and penalties under this act in any court of competent jurisdiction or before the Ethics Commission if enforcement action is not taken by a city official or state official 40 days after a complaint is filed.

4. *S.F. Administrative Code section 67.21(d):*

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

5. *S.F. Administrative Code section 67.21(e):*

If the custodian [of a public record] refuses, fails to comply, or incompletely complies with a [public records] request . . . or if a petition is denied or not acted on by the supervisor of public records, the person making the request may petition the Sunshine Task Force for a determination whether the record requested is public. The Sunshine Task Force shall inform the petitioner, as soon as possible and within 2 days after its next meeting but in no case later than 45 days from when a petition in writing is received, of its determination whether the record requested, or any part of the record requested, is public. Where requested by the petition, and where otherwise desirable, this determination shall be in writing. Upon the determination that the record is public, the Sunshine Task Force shall immediately order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order within 5 days, the Sunshine Task Force shall notify the district attorney or the attorney general who may take whatever measures she or he deems necessary to insure compliance with the provisions of this ordinance. The Board of Supervisors and the City Attorney's office shall provide sufficient staff and resources to allow the Sunshine Task Force to fulfill its duties under this provision. Where requested by the petition, the Sunshine Task Force may conduct a public hearing concerning the records request denial. An authorized representative of the custodian of the public records requested shall attend any hearing and explain the basis for its decision to withhold the records requested.

III. Summary of Proposed Regulations

The Regulations proposed by staff aim to reconcile the ambiguities in the Sunshine Ordinance and to outline a standard procedure to handle all complaints that allege willful violations of the Sunshine Ordinance – whether referred by the Task Force, initiated by staff, or filed by a complainant directly with the Commission. The proposed Regulations also aim to reconcile concerns expressed by the Task Force regarding the Commission's handling of complaints. The main changes that the proposed regulations would achieve are to:

- a) Establish that the Commission will handle complaints alleging willful violations of the Sunshine Ordinance by elected officials, department heads, and managerial City employees;
- b) Ensure that complaints are handled and resolved in an expeditious manner;
- c) Ensure that the hearing process is open to the public; and
- d) Allow the Commission to impose monetary fines for willful violations of the Sunshine Ordinance.

The remainder of this section of the memo sets forth the new regulations proposed by staff. Rather than review the proposed regulations line-by-line, this memo presents a series of decision points for the Commission's consideration, followed by a final decision point to adopt the regulations in whole.

1. Section I – Preamble.

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.

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.

Although section 67.34 states that the Commission "shall handle" allegations of willful violations by elected officials and department heads, staff recommends that handling allegations against managerial City employees is consistent with the intent of the law. Oftentimes elected officials or department heads are not directly involved in responding to records requests, and staff recommends that it is appropriate to hold managerial City employees in those instances accountable for compliance with the Ordinance regarding responses to records requests. The term "managerial City employee" will be defined within these regulations as "a City employee with final decision-making authority in determining a response to the identified record requested."

Decision Point 1: Shall the Commission enforce or review only allegations of willful violations of the Sunshine Ordinance by elected officials, department heads, and managerial City employees?

2. **Section III – Complaints Alleging Willful Violations of the Sunshine Ordinance.**

Section III specifies the process by which the Commission will handle complaints involving alleged willful violations of the Sunshine Ordinance by an elected official, department head, or managerial City employee.

Under Section III.A., any person may file a complaint with the Commission; the Task Force may make a referral to the Commission; and Commission staff may initiate a complaint.

If the Task Force refers or a complainant makes a complaint that does not allege a willful violation of the Ordinance, the Commission will return the referral or complaint with a letter explaining that the Commission does not have jurisdiction to handle non-willful complaints. In addition, if the Task Force refers or a complainant makes a complaint or alleges a violation of the Ordinance by an individual who is not an elected official, department head, or managerial City employee, the Commission will return the referral or complaint with a letter explaining that the Commission does not have jurisdiction to handle the complaint.

Decision Point 2(a): Shall the Commission approve the process set forth in Section III.A, as set forth on page 2 of the proposed regulations?

Under Section III.B., upon receipt of a complaint the Executive Director must schedule a hearing before the Commission. Section 67.35(d) requires a 40-day waiting period before the initiation of enforcement proceedings before the Commission, but the Ordinance does not state what starts the 40-day clock ticking. Staff proposes to resolve this ambiguity in the Ordinance with the following procedure: For complaints that have been considered by the Task Force or Supervisor of Records,¹ the date of the Commission's hearing must be at least 40 days from the date that the Task Force or Supervisor of Records received the matter. For staff-initiated complaints or complaints filed only with the Commission, no 40-day clock applies.

Upon receiving or initiating a complaint, the Executive Director must provide notice to each Respondent and original Complainant. The Executive Director will also send the Task Force a courtesy notice.

A regulatory requirement for the Commission to hold a public hearing on each complaint within its jurisdiction will ensure that no such complaint will be dismissed in closed session or without a hearing. It addresses the Task Force's concern that all complaints regarding Sunshine Ordinance violations should be deliberated in public by the Ethics Commission. A public hearing allows the Ethics Commission to hear from the Complainant(s) and Respondent(s) and make findings after hearing and reviewing the evidence and considering public comment.

As proposed in section V of this memo, staff envisions that the public hearing will be an expedited process.

¹ The Sunshine Ordinance designates the City Attorney as the "Supervisor of Records." Separate from the complaint process, a member of the public may request that the City Attorney's Office review a department's decision to withhold records. The City Attorney's Office investigates and responds to these requests. The Supervisor of Records does not hold a public hearing or impose penalties against any City officers or employees.

Decision Point 2(b): Shall the Commission approve the proposals in Section III.B., as set forth on page 3 of the proposed regulations?

3. Section IV – Investigation and Recommendation.

Section IV outlines the process for investigating alleged willful violations of the Sunshine Ordinance.

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 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. Additionally, this section adopts the Task Force's recommendation that the investigation be completed within 30 days of the receipt of a complaint, unless the Executive Director shows why it cannot be concluded within 30 days.

Decision Point 3(a): Shall the Commission approve the proposals in Section IV.A., as set forth on page 3 of the proposed regulations?

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.

Decision Point 3(b): Shall the Commission approve the proposals in Section IV.B., as set forth on pages 3 – 4 of the proposed regulations?

Section IV.C. provides that the Complainant and Respondent may submit a response to the Executive Director's recommendation; it also sets the time frame and procedure for submitting the response.

Decision Point 3(c): Shall the Commission approve the proposals in Section IV.C, as set forth on page 4 of the proposed regulations?

4. Section V – Public Hearing; Deliberations and Findings; Administrative Orders and Penalties; Warning Letters.

Section V.A. outlines the hearing process. Although patterned after the regulations which govern the hearing process for non-Sunshine complaints, there are several key differences. For instance, staff will not play a prosecutorial role in Sunshine hearings, the Commission will not hold a probable cause hearing or issue a formal accusation, and presentation of the evidence will be more limited. The primary features of the proposed hearing structure are:

- 1) The hearing, including the Commission's decision-making process, will be public.

- 2) The Complainant will have an opportunity to speak before the Commission, as will the Respondent. No other live testimony will be permitted unless the Chair determines otherwise.

Decision Point 4(a): Shall the Commission approve the proposals in Sections V.A., as set forth on pages 4 – 5 of the proposed regulations?

Section V.B. requires the Commission to deliberate the merits of the allegations in public. It also provides that any finding of a willful or non-willful violation of the Sunshine Ordinance must be supported by conclusions of law and fact based on the entire record.

Section V.B. also outlines the relevant circumstances that the Commission must consider when making a determination whether a Respondent willfully violated the Sunshine Ordinance.

Decision Point 4(b): Shall the Commission approve the proposals in Section V.B, as set forth on page 5 of the proposed regulations?

Section V.C sets forth the remedies the Commission may order. Under the proposal, the Commission may order a Respondent to produce a public record; refer the matter to the Mayor with a recommendation to initiate official misconduct proceedings under Charter section 15.105; order a penalty payment of up to \$5,000 per violation; and/or order a notice of the violation to be posted on the Commission's website. Section V.C.2 lists factors that the Commission may consider in determining appropriate penalties, including: the severity of the violation; the presence or absence of any intention to conceal, deceive, or mislead; whether the violation was an isolated incident or part of a pattern; and whether the Respondent has a prior record of violations of the Sunshine Ordinance.

Section V.C.3 allows for remedies when the Commission determines that Respondent violated the Sunshine Ordinance, but the violation was not willful. In such cases, the Commission may issue warning letters urging the Respondent(s) to cease and desist the violation. The Commission may also order the Executive Director to post on the Ethics Commission's website the Commission's finding that the Respondent(s) violated the Sunshine Ordinance.

Decision Point 4(c): Shall the Commission approve the proposals in Section V.C, as set forth on pages 5 – 6 of the proposed regulations?

5. Finding of No Violation.

Section V.D outlines that if the Commission determines that a Respondent has not committed a violation of the Ordinance, it shall publicly announce that determination.

Decision Point 5: Shall the Commission approve the proposals in Section V.D., as set forth on page 6 of the proposed regulations?

6. Sections VI and VII – Miscellaneous Provisions; Severability.

Modeled after the Regulations for all other complaints within the Commission's jurisdiction, Section VI contains provisions to address issues such as ex parte communications, access to complaints and deliberations, and continuance requests. Section VI.B. provides that no records related to complaints may be disclosed except as necessary to the conduct of the investigation or as required by the California Public Records Act or the Sunshine Ordinance. In order to provide for the integrity of the investigation, internal staff notes may not be disclosed until the Commission has issued its final decision following the hearing. Section VI.F permits any Complainant or Respondent to request a continuance and also provides that the Commission may reschedule hearings for good cause. Section VI.H establishes a statute of limitations period. Section VII provides for severability of any invalid regulation.

Decision Point 6: Shall the Commission approve the proposals in Section VI.A -L. and Section VII, as set forth on pages 6 – 9 of the proposed regulations?

7. Section II – Definitions

Section II contains the definitions relevant to the regulations. Included is the definition of "managerial City employee" which is not defined in the Sunshine Ordinance. Staff proposes defining the term to mean "a City employee with final decision-making authority in determining a response to the identified record requested."

The definitions section also clarifies who is a complainant, and establishes that a finding of a willful violation by the Task Force in an Order of Determination will be treated as a recommendation to the Ethics Commission that a willful violation occurred.

Decision Point 7: Shall the Commission approve the proposals in Section II, Definitions, as set forth on pages 1 – 2 of the proposed regulations?

9. General Adoption of Regulations

Decision Point 8: Shall the Commission adopt the "Ethics Commission Regulations for Complaints Alleging Willful Violations of the Sunshine Ordinance" as set forth on pages 1 – 9 of the proposed regulations?

III. Clean-up Language for Existing Regulations

If the Commission adopts the proposed Sunshine Regulations, it should also amend the existing Enforcement Regulations, which will continue to apply to all enforcement matters that do not involve allegations of Sunshine violations. The proposed amendments would: a) clarify that all complaints alleging a violation of the Sunshine Ordinance will be governed by the new Sunshine enforcement regulations; b) delete references in the existing Regulations to violations of the Sunshine Ordinance; and c) amend the definition of "business day" by adding the language "or a day on which the Commission office is closed for business" to conform with the definition in the proposed Sunshine regulations.

Decision Point 9(a): Shall the Commission approve the addition of Section III.D. as set forth on page 3 of the current Regulations?

Decision Point 9(b): If the answer to Decision Point 9(a) is yes, shall the Commission approve the deletion of other references to the Sunshine Ordinance in the current Regulations? (*See strikethrough language in Attachment B, pages 2, 7, 15, and 16.*)

Decision Point 9(c): Shall the Commission approve the amended definition of "business day" of Section II.A. on page 1 of the current Regulations?

IV. Task Force Recommendations Not Included in Staff's Proposed Regulations

While staff has incorporated some of the Task Force recommendations into the proposals discussed above, there were several provisions that staff did not include.

1. The Role of the Commission under the Ordinance.

The Task Force's recommendations appear to be premised on the notion that the Ethics Commission has two distinct roles under the Sunshine Ordinance: one with respect to the enforcement of Task Force referrals, and the second with respect to the Ethics Commission's handling of willful violations under section 67.34. Staff does not agree.

As the Commission has determined in recent decisions, the Ethics Commission is not tasked anywhere in the Ordinance with enforcing orders of determination from the Task Force. Section 67.21(d) permits a requestor to petition the Supervisor of Records (the City Attorney's Office) for a determination of whether a record is public when a City department fails to comply with a public records request. If the Supervisor of Records determines that the record is public, he or she must order the department to comply with the records request. Section 67.21(d) further provides that if the custodian still fails to comply with the records request after being ordered to release the records by the Supervisor of Records, the "*supervisor of records shall notify the district attorney or the attorney general who shall take whatever measures she or he deems necessary and appropriate to insure compliance with the provisions of this ordinance [emphasis added].*" Under section 67.21(d), the district attorney or the attorney general—not the Ethics Commission—is specifically tasked with the enforcement of a public records request.

Along with the right to petition the Supervisor of Records, a person also has the right to petition the Task Force under section 67.21(e) "for a determination whether the record requested is public." Section 67.21(e) further provides that if the Task Force makes "the determination that the record is public, the [Task Force] shall immediately order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order within 5 days, the [Task Force] *shall notify the district attorney or the attorney general who may take whatever measures she or he deems necessary to insure compliance with the provisions of this ordinance [emphasis added].*" Again, the power to enforce the public records request lies with the district attorney or the attorney general, not the Ethics Commission.

2. The Task Force proposed to define “willfully” using the California Penal Code.

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.

3. The Task Force proposed to allow testimony from individuals other than the parties in interest.

The Task Force recommended the elimination of any restriction on persons who can provide testimony in support of a Respondent or Complainant in order to maintain a level playing field.

Staff proposes to permit only the Respondent and Complainant to provide live testimony. This process ensures that these parties have the right to present their case; it also expedites the hearing process. There is nothing that limits a Respondent or Complainant from permitting another individual to use their time allotted to provide supporting testimony. The draft regulations allow for additional testimony at the Chair’s discretion. In addition, there will be public comment as part of every hearing.

4. The Task Force proposed that any monetary penalties imposed should be paid out of “non-City funds.”

The Task Force recommended that when the Ethics Commission imposes a monetary penalty on a Respondent, the penalty should be not less than \$500 and not more than \$5,000 for each willful violation. The Task Force also recommended that these monetary penalties be paid from the Respondent’s personal funds and not City funds. The California Tort Claims Act governs the indemnification of City employees for acts taken within the course and scope of their employment.

5. The Task Force proposed that the Sunshine Ordinance supersedes the City Charter.

Another consideration for the Commission is the interpretation of section 67.36 of the Ordinance. This section states “[t]he provisions of this Sunshine Ordinance supersede other local laws. Whenever a conflict in local law is identified, the requirement which would result in greater or more expedited public access to public information shall apply.”

In its August 1, 2011 response to the Commission, the Task Force concluded that “the Sunshine Ordinance has primacy over any other inconsistent local laws in the aspects of open government

that it covers.” However, this section does not state that the provisions of the Sunshine Ordinance supersede all local laws. The Ethics Commission and the Office of the City Attorney have repeatedly concluded that the Sunshine Ordinance does not supersede the City’s Charter.

The Task Force has concluded in the past that the Sunshine Ordinance supersedes the City Charter, specifically when a City department has asserted that documents were confidential based upon a Charter provision. Staff recommends that the Commission make a final determination regarding this issue.

ATTACHMENT A

San Francisco
Ethics Commission



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**ETHICS COMMISSION REGULATIONS FOR COMPLAINTS
ALLEGING WILLFUL VIOLATIONS OF THE SUNSHINE
ORDINANCE**

Effective Date: _____, 2011

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I. PREAMBLE

Pursuant to San Francisco Charter section 15.102, the San Francisco Ethics Commission promulgates these Regulations in order to ensure compliance with the San Francisco Sunshine Ordinance, S.F. Admin. Code §§ 67.1, et seq. These Regulations shall apply to complaints alleging willful violations of the Sunshine Ordinance by elected officials, department heads, and managerial City employees pursuant to S.F. Administrative Code section 67.34. Any allegations regarding non-willful violations of the Sunshine Ordinance, or willful violations committed by individuals other than elected officials, department heads, or managerial City employees, shall not be handled by the Ethics Commission. All allegations of violations of conflict of interest, campaign finance, lobbyist, campaign consultant or other ethics laws shall be handled under the Ethics Commission's Regulations for Investigations and Enforcement Proceedings.

II. DEFINITIONS

For purposes of these Regulations, the following definitions shall apply:

- A. "Business day" means any day other than a Saturday, Sunday, City holiday, or a day on which the Commission office is closed for business.
- B. "City" means the City and County of San Francisco.
- C. "Commission" means the Ethics Commission.
- D. "Complaint" means a Task Force referral or a written document submitted directly to the Ethics Commission, alleging a willful violation of the Sunshine Ordinance by an elected official, department head, or managerial city employee.
- E. "Complainant" means a person or entity that filed the original complaint alleging a willful violation of the Sunshine Ordinance by an elected official, department head, or managerial City employee with the Task Force, Supervisor of Records, or Commission. "Complainant" shall also mean the Commission if the complaint was initiated by the Commission staff.
- F. "Day" means calendar day unless otherwise specifically indicated. If a deadline falls on a weekend or City holiday, the deadline shall be extended to the next business day.
- G. "Deliver" means transmit by U.S. mail or personal delivery to a person or entity. The Commission, the Executive Director, the Task Force or a Respondent or Complainant receiving material may consent to any other means of delivery, including delivery by e-mail or fax. In any proceeding, the Commission Chairperson, designated Commissioner or hearing officer may order that the delivery of briefs or other materials be accomplished by e-mail.

- H. "Executive Director" means the Executive Director of the Commission or the Executive Director's designee.
- I. "Exculpatory information" means information tending to show that the respondent is not guilty of the alleged violations.
- J. "Managerial City Employee" means a City employee with final decision-making authority in determining a response to the identified record requested.
- K. "Mitigating information" means information tending to excuse or reduce the culpability of the Respondent's conduct.
- L. "Order of Determination" means a final recommendation issued by the Task Force that a willful violation of the Sunshine Ordinance by an elected official, department head, or managerial City employee occurred.
- M. "Referral" means a recommendation from the Task Force to the Commission that a willful violation of the Sunshine Ordinance has occurred.
- N. "Respondent" means an elected official, department head, or managerial City employee who is alleged or identified in a complaint to have committed a willful violation of the Sunshine Ordinance.
- O. "Sunshine Ordinance" means San Francisco Administrative Code section 67.1, et seq.
- P. "Task Force" means the Sunshine Ordinance Task Force, established by San Francisco Administrative Code section 67.30.
- Q. "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.

III. COMPLAINTS ALLEGING WILLFUL VIOLATIONS OF THE SUNSHINE ORDINANCE.

A. Filing Complaints. Any person or entity may file a complaint with the Commission alleging a willful violation of the Sunshine Ordinance by an elected official, department head, or managerial City employee. Commission staff may also initiate a complaint alleging the willful violation of the Sunshine Ordinance by an elected official, department head, or managerial City employee.

Any complaint or referral that is filed with the Commission that does not allege a willful violation of the Sunshine Ordinance by an elected official, department head, or managerial City employee will be returned to the complainant or Task Force with a letter explaining the Commission's jurisdiction.

B. Scheduling of Hearing.

- 1) When the Executive Director receives a complaint or a referral alleging a willful violation of the Sunshine Ordinance by an elected official, department head, or managerial City employee, the Executive Director shall schedule a public hearing at a regular meeting of the Commission at least 15 business days after the conclusion of his or her investigation.
- 2) For complaints that have been considered by the Task Force or Supervisor of Records prior to the initiation of a complaint with the Commission, the Commission may not conduct a hearing until at least 40 days after the date that the Task Force or Supervisor of Records received the matter. For complaints initiated by Commission staff, no 40-day waiting period applies.

At least 15 business days in advance of the hearing date, the Executive Director shall issue a written notice and his or her report and recommendation pursuant to section IV to each Commission member, each Respondent, and each Complainant of the date, time and location of the hearing.

- 3) In the case of a referral, the Executive Director also shall provide a courtesy notice and a copy of the staff recommendation to the Task Force.

IV. INVESTIGATION AND RECOMMENDATION

A. Factual Investigation. Upon receipt of a complaint, the Executive Director shall conduct a factual investigation. The Executive Director's investigation may include, but shall not be limited to, interviews of the Respondent(s) and any witnesses, as well as the review of documentary and other evidence. The investigation shall be concluded within 30 days following the Executive Director's receipt of the complaint. The Executive Director may extend the time for good cause, including but not limited to: staffing levels; the number of other pending complaints under these Regulations or the Ethics Commission Regulations for Investigations and Enforcement Proceedings; other staffing needs associated with pending campaigns; or the cooperation of witnesses, Complainants or Respondents. If the Executive Director extends the time for the investigation to conclude, his or her reasons for the extension shall be included in the recommendation to the Ethics Commission.

B. Report and Recommendation.

1. 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. In the recommendation, the Executive Director may present statements including hearsay, declarations of

investigators or others relating to the statements of witnesses, or the examination of any other evidence. The recommendation shall not exceed ten pages excluding attachments.

2. 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.

C. Response to the Report and Recommendation.

1. Each Complainant and Respondent may submit a written response to the report and recommendation. The response may contain legal arguments, a summary of evidence, and any mitigating or aggravating information. The response shall not exceed ten pages excluding attachments.

2. If any Complainant or Respondent submits a response, he or she must deliver the response no later than five business days prior to the date of the hearing. The Complainant or Respondent must deliver eight copies of the response to the Executive Director, who must then immediately distribute copies of the response(s) to the Commission and any other Complainant or Respondent. Upon mutual consent of the parties in interest and the Executive Director, a response may be distributed by e-mail.

V. PUBLIC HEARING.

A. General Rules and Procedures.

1. Public Hearing

The hearing shall be open to the public. The Commission may hold the hearing, or the Commission may assign one of its members or a hearing officer to hold the hearing.

Each Complainant and Respondent may speak on his or her behalf, subject to a time limit determined by the Commission Chairperson, the Commission member assigned to hold the hearing, or the hearing officer. At his or her discretion, the Commission Chairperson, the Commission member assigned to hold the hearing, or the hearing officer may allow additional testimony. Unless otherwise decided by the Commission, formal rules of evidence shall not apply to the hearing. The Complainant and each Respondent may submit any document to the Commission to support his or her position. Any documents so provided shall also be provided to the opposing party.

Commissioners may question each party regarding the allegations. Complainants and Respondents may not directly question each other.

2. Standard of Proof

The Commission may determine that an elected official, department head, or managerial City employee has committed a willful violation of the Sunshine Ordinance only if a person of ordinary caution and prudence would so conclude, based on a preponderance of the evidence.

3. Role of the Executive Director.

Except when a complaint is staff-initiated, the Executive Director's role at the hearing will be limited to providing the recommendation containing the legal and factual basis for his or her recommendation to the Commission.

B. Deliberations and Findings.

The Commission shall deliberate the merits of the allegations in public. Public comment on the matter shall be allowed for each hearing.

The votes of at least three Commissioners are required to make a finding that a Respondent has committed a willful violation of the Sunshine Ordinance or that a Respondent has committed a non-willful violation of the Sunshine Ordinance. The finding of a willful violation or non-willful violation of the Sunshine Ordinance shall be supported by findings of fact and conclusions of law and shall be based on the entire record of the proceedings.

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.

C. Administrative Orders and Penalties; Warning Letters.

1. If the Commission finds that a Respondent committed a willful violation of the Sunshine Ordinance, the Commission may issue orders and penalties requiring any or all of the following:

- (a) the Respondent(s) to cease and desist the violation and/or produce the public record(s);

(b) the Executive Director to refer the matter to the Mayor with the Ethics Commission's recommendation to initiate of the suspension and removal proceedings pursuant to San Francisco City Charter section 15.105 against the Respondent(s);

(c) the Respondent's department, commission, or board to pay a monetary penalty to the General Fund of the City of up to five thousand dollars (\$5,000) for each violation; and/or

(d) the Executive Director to post on the Ethics Commission's website the Commission's finding that the Respondent(s) willfully violated the Sunshine Ordinance.

2. When deciding penalties, the Commission shall consider all the relevant circumstances surrounding the case, including but not limited to:

(a) the severity of the violation;

(b) the presence or absence of any intention to conceal, deceive, or mislead;

(c) whether the violation was an isolated incident or part of a pattern; and

(d) whether the Respondent has a prior record of violations.

3. If the Commission finds that the Respondent(s) has violated the Sunshine Ordinance but has not committed a willful violation, the Commission may issue a warning letter urging the Respondent(s) to cease and desist the violation. The Commission may also order the Executive Director to post on the Ethics Commission's website the Commission's finding that the Respondent(s) violated the Sunshine Ordinance.

D. Finding of No Violation.

If the Commission determines that there is insufficient evidence to establish that the Respondent has committed a violation of the Sunshine Ordinance, the Commission shall publicly announce this fact. The Commission's announcement may, but need not, include findings of law and fact. Thereafter, the Commission shall take no further action on the complaint.

VI. MISCELLANEOUS PROVISIONS

A. Ex Parte Communications.

Once a complaint is filed with the Commission or referred by the Task Force, no Commissioner shall engage in oral or written communications outside of a Commission

meeting regarding the merits of an enforcement action with the Commission's staff, the Respondent, the Complainant, any member of the Task Force or any person communicating on behalf of the Respondent, Complainant, or any member of the Task Force, except for communications, such as scheduling matters, generally committed between a court and a party appearing before that court.

B. Access to Complaints and Related Documents and Deliberations.

Complaints, investigative files and information contained therein shall be disclosed as necessary to the conduct of an investigation or as required by the California Public Records Act (Government Code section 6250, et seq.) or the San Francisco Sunshine Ordinance. In order to guarantee the integrity of the investigation, internal notes taken by the Executive Director or his or her staff regarding complaints shall not be disclosed until the Commission has issued its final decision following the hearing.

C. Oaths and Affirmations.

The Commission, and individual Commissioners and hearing officers assigned to conduct hearings, may administer oaths and affirmations.

D. Selection of Designee by the Executive Director.

Whenever the Executive Director designates an individual other than a member of the Commission staff to perform a duty arising from the Charter or these Regulations, the Executive Director shall notify the Commission of the designation no later than the next business day.

E. Powers and Duties of Individual Commissioners and Hearing Officers.

1. Unless otherwise provided, whenever the Commission assigns an individual Commissioner or hearing officer to hear any matter under these Regulations, the assigned Commissioner or hearing officer shall have the same authority, and be subject to the same restrictions, as the Commission.

2. When the Commission sits as the hearing panel to hear a case, with an outside hearing officer presiding, the hearing officer shall rule on procedural matters and on the admission and exclusion of evidence only, and shall have no role in the decision on the merits.

F. Extensions of Time and Continuances.

Any Complainant or Respondent may request the continuance of a hearing date in writing. The requester must deliver the written request to the Commission Chairperson or the individual Commissioner or hearing officer assigned to hold the hearing, and provide a copy of the request to all other parties no later than ten business days before the

date of the hearing. The Commission Chairperson or the individual Commissioner or hearing officer assigned to hold the hearing shall have the discretion to consider untimely requests.

The Commission Chairperson or the individual Commissioner or hearing officer assigned to hold the hearing shall approve or deny the request within five business days of the submission of the request. The Commission Chairperson or the individual Commissioner or hearing officer assigned to hold the hearing may grant the request upon a showing of good cause.

The Commission or Commission Chairperson or the individual Commissioner or hearing officer may reschedule a hearing in their discretion for good cause.

G. Recordings.

Every hearing shall be electronically recorded.

H. Statute of Limitations.

No action alleging a willful violation of the Sunshine Ordinance by an elected official, department head, or managerial City employee shall be commenced more than one year after the date on which the alleged willful violation occurred. The date on which the Executive Director delivers a recommendation regarding an alleged willful violation to the Ethics Commission, as required by these Regulations, shall constitute the commencement of the action.

I. Place of Delivery.

1. Whenever these Regulations require delivery to the Commission, its members, or the Executive Director, delivery shall be effected at the Commission office.

2. Whenever these Regulations require delivery to a Respondent, delivery shall be effective and sufficient if made by U.S. mail, personal delivery or any other means of delivery agreed upon by the parties under section II, subsection G, to:

a. If the Respondent is a City employee, to the employee's City office address or to the address listed with the (Controller/ Payroll) as the employee's current address.

b. If the Respondent is a former City employee, to the address listed with the City's retirement system.

c. If neither subsections (a) nor (b) are applicable, to an address reasonably calculated to give notice to and reach the Respondent.

3. Delivery is effective upon the date of delivery, not the date of receipt.

4. All delivery requirements to deliver documents to the Commission may be conducted via electronic mail after a written request is made and approved by the Executive Director.

J. Page Limitations and Format Requirements.

Whenever these Regulations impose a page limitation, a "page" means one side of an 8½ inch by 11 inch page, with margins of at least one inch at the left, right, top and bottom of the page, typewritten and double-spaced in no smaller than 12 point type. Each page and any attachments shall be consecutively numbered.

K. Conclusion of Hearing.

For the purposes of these Regulations, a hearing concludes on the last date on which the Commission hears argument or testimony in the proceeding.

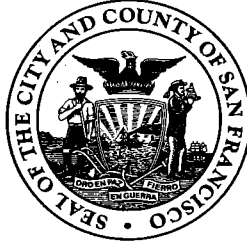
L. Proceedings under Charter section 15.105.

Members of the Commission shall not be precluded from participating in any proceeding initiated under Charter section 15.105 because of his or her participation in any hearing held pursuant to these Regulations.

VII. SEVERABILITY

If any provision of these Regulations, or the application thereof, to any person or circumstance, is held invalid, the validity of the remainder of the Regulations and the applicability of such provisions to other persons and circumstances shall not be affected thereby.

SUNSHINE ORDINANCE
TASK FORCE



City Hall
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San Francisco 94102-4689
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August 1, 2011

San Francisco Ethics Commission
Commissioner Benedict Hur, Chair
Commissioner Jamiene Studley, Vice Chair
Commissioner Beverly Hayon
Commissioner Dorothy Liu
Commissioner Charles Ward

**Re: Sunshine Ordinance Task Force Recommendations re Proposed
Regulations for Enforcement of Sunshine Complaints and Referrals**

Dear Commissioners,

The Sunshine Ordinance Task Force respectfully submits the enclosed recommended amendments to the Ethics Commission staff's June 2010 proposed regulations for the Commission's handling of Sunshine Ordinance complaints and Task Force referrals. An explanatory memorandum and redlined draft comparing changes have been included to clarify the advised amendments.

The Task Force regrets its delayed response to the proposed regulations, however, comprehensive discussions among Task Force members, open government advocates and experts, and members of the public were necessary to ensure such an important policy matter received a thorough review.

Thank you for the opportunity to participate in the development of the Ethics Commission's Sunshine Ordinance enforcement procedures. In order to facilitate the adoption of constructive and mutually agreeable regulations, the Task Force requests a joint open hearing between its Compliance and Amendments Committee and the Ethics' Commissioners to fully discuss the proposed regulations and submitted amendments. Please contact Chris Rustom, the Sunshine Ordinance Administrator, to arrange a joint hearing and discuss potential hearing dates.

Task Force members trust these recommended amendments will prove useful to the Commissioners' ongoing discussions and look forward to working with you more on this project. Please do not hesitate to contact the Task Force with any questions or concerns regarding these suggestions.

Thank you for your time and consideration.

Respectfully submitted,

A handwritten signature in black ink that reads "Hope Johnson". The signature is written in a cursive style with a large initial "H" and "J".

Hope Johnson
Sunshine Ordinance Task Force Chair

Encls.

cc: John St. Croix, Ethics Commission Executive Director

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MEMORANDUM

Date: July 26, 2011
To: Ethics Commission
From: Sunshine Ordinance Task Force
Subject: Ethics Commission Staff's August 17, 2010 draft "Regulations for Complaints Alleging Violations of the Sunshine Ordinance."

Introduction:

The Sunshine Ordinance Task Force (SOTF), through its five member Compliance and Amendments Committee¹ has reviewed, considered, and adopted suggested changes to the Commission staff's August 17, 2010 draft "Regulations for Complaints Alleging Violations of the Sunshine Ordinance" (Staff's Draft) Developed during many meetings of the Committee, some devoted almost exclusively to that task, the suggested changes also reflect extensive public comments taken at those meetings.

A paramount consideration for the SOTF was the need to distinguish between the Commission's two distinct roles under the regulations. One is its role with respect to SOTF referrals to the Commission for enforcement of non-compliance with SOTF Orders. The other, its role in "handling" specific complaints filed directly with the Commission for willful violations of the Sunshine Ordinance against "elected officials" and "department heads." In addition, as it moved through the process, the Committee concluded that editing and making additions or other major changes to the Staff's Draft, such as deleting and/or moving sentences and paragraphs, would likely result in a document difficult to follow and cumbersome to the point that the purpose of some of the changes would be lost to the reader. As a result, it prepared a redraft called "Regulations for Enforcement of the Sunshine Ordinance" (SOTF Draft), which is submitted with this Memorandum that is intended to explain the changes and the reasons for those changes.

1 That Committee's members were the SOTF Chair, its Vice-Chair, its member attorney, a former President of the League of Women Voters of San Francisco, and an experienced paralegal.

Statutory Background:

The Ethics Commission's authority to issue rules and regulations with respect to open government matters is found in Article XV, §15.02 of the City Charter:

"The Commission may adopt, amend and rescind rules and regulations consistent with and related to carrying out the purposes and provisions of this Charter and ordinances related to campaign finances, conflicts of interest, lobbying, campaign consultants and governmental ethics and to govern procedures of the Commission. **In addition, the Commission may adopt rules and regulations relating to carrying out the purposes and provisions of ordinances regarding open meetings and public records.**" (Emphasis Added.)

The San Francisco Sunshine Ordinance (Sunshine Ordinance) is only City "ordinance" that deals with the open government matters. Accordingly, any Regulations issued by the Ethics Commission (Commission) must implement "the purposes and provisions" of the Sunshine Ordinance.

The Regulations adopted by the Commission must be consistent with the Sunshine Ordinance for two reasons: (1) the Commission, in its By-laws, has undertaken to comply with the Sunshine Ordinance² and (2) by virtue of Section 67.36,³ the Sunshine Ordinance has primacy over any other inconsistent local laws in the aspects of open government that it covers.

The Commission's Jurisdiction:

In its covering August 17, 2010 Memorandum to the Commission, the Staff noted that at "its June 14, 2010 meeting, the Commission ... adopted the three decision points", the first of which was:

"The Commission's jurisdiction regarding violations and alleged violations of the Ordinance includes: a) alleged willful violations of the Ordinance by elected officials

² Article I, Section 3: Authority, Statutory Requirements, other Laws and Policies.

"The Commission shall comply with all applicable laws, including, but not limited to, the San Francisco Charter, San Francisco Sunshine Ordinance (Administrative Code sections 67.01 et seq.), the Ralph M. Brown Act (Government Code sections 54950 et seq.)..."

³ **SEC. 67.36. SUNSHINE ORDINANCE SUPERSEDES OTHER LOCAL LAWS.**

The provisions of this Sunshine Ordinance supersede other local laws. Whenever a conflict in local law is identified, the requirement that would result in greater or more expedited public access to public information shall apply.

and department heads; b) referrals of violations of the Ordinance from the Sunshine Ordinance Task Force ("Task Force"); and c) complaints brought directly to the Commission alleging a violation of the Ordinance."

For that reason, the Staff's Draft is based on these three jurisdictional grounds. However, the Commission's jurisdiction is limited only to the first two: "a) alleged willful violations of the Ordinance by elected officials and department heads; and "b) referrals of violations of the Ordinance from the Sunshine Ordinance Task Force ..." The Commission does not have jurisdiction for "c) complaints brought directly to the Commission alleging a violation of the Ordinance."

Staff's position that the Commission has jurisdiction over complaints alleging non-willful violations of the Ordinance is based on its mistaken reading of subdivision (d) of Section 67.35⁴ of the Ordinance:

"(d) Any person may institute proceedings for enforcement and penalties under this act in any court of competent jurisdiction or before the Ethics Commission if enforcement action is not taken by a city official or state official 40 days after a complaint is filed."

While Section 67.34 is explicit that "complaints involving allegations of **willful violations** ... by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission", subdivision (d) of Section 67.35 refers to enforcement "proceedings" before either the Commission or a court of competent jurisdiction, not to original "complaints".⁵ (Emphasis Added.) If subdivision (d) authorizes the filing of complaints with the Commission or a "court of competent jurisdiction", subdivision (a) of the same Section 67.35 would not be needed:

"(a) Any person may institute proceedings ... in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this Ordinance or to enforce his or her right to attend any meeting required under this Ordinance to be open, or to compel such meeting to be open."

Further, the SOTF has original jurisdiction to hear and decide complaints alleging violations of the Ordinance under provisions of Section 67.21 and 67.37, to wit:

⁴ References to Sections in this Memorandum are to Sections of the Sunshine Ordinance.

⁵ At the hearing on the quoted decision points, the Ethics Commission discussed how to implement subdivision (d) of Section 67.34 and what "order" or "finding" would be enforced became an issue. The SOTF concluded and has incorporated in its draft, that it is either an SOTF order referred by SOTF to an official, such as the Attorney General who declines to enforce it, or an order issued by the Supervisor of Records pursuant to §67.21(d).

§67.21(e) “If the custodian refuses, fails to comply, or incompletely complies with a request described in (b) above or if a petition is denied or not acted on by the supervisor of public records, the person making the request may petition the Sunshine Task Force for a determination whether the record requested is public. The Sunshine Task Force shall inform the petitioner... of its determination whether the record requested, or any part of the record requested, is public. ... Upon the determination that the record is public, the Sunshine Task Force shall immediately order the custodian of the public record to comply with the person's request...”

§67.37(c) “...The Task Force shall make referrals to a municipal office with enforcement power under this ordinance ... whenever it concludes that any person has violated any provisions of this ordinance...”

As a matter of overall policy, the SOTF is the body logically suited to handle simple “violation” complaints; it is designated to handle these complaints, its 11 public members representing various segments of the open government “community”; and a ten-year history of experience, knowledge and time-developed procedures for doing so. On the other hand, given the Commission’s extensive substantive responsibilities for enforcing and monitoring multiple laws under the Charter and under its own Regulations, the use of the Commission’s limited resources to determine, for example, whether or not a particular public record is exempt would not seem justified, particularly as its hearing procedures are formal and carefully spelled out.

As a practical matter, if the Commission had concurrent jurisdiction with the SOTF on simple violation complaints, contrary determinations from each could result should a complainant file with both the SOTF and the Commission, with obvious undesirable implications, particularly in the event of the SOTF’s referral to the Commission for enforcement of its Order. Moreover, as noted below, the procedure followed by the SOTF and that proposed by your Staff (in the Staff’s Draft) are fundamentally different, both procedurally and substantively.

Comparison of Non-Willful Violation Complaint Procedures.

The procedure proposed in the Staff’s Draft for “handling” non-willful violation complaints is rigidly structured, detailed and proscribed. The Executive Director becomes the real party or *de facto* complainant and the procedure for handling them is much the same as a complaint involving the other laws the Commission enforces. The Executive Director conducts a full investigation (with some investigative records held “confidential”), and recommends to the Commission a finding of either “no violation”, or “a violation and proposed penalties” or “a violation with an agreed stipulation” by the Respondent. The recommendation automatically becomes the Commission’s official action without a hearing unless, within five days after the recommendation is sent, at least two Commissioners request that the matter be agendaized for its next meeting. If it is heard, the original complainant has no right to speak at the hearing (§V.A.1.b); while the

Respondent is allowed to be represented by counsel (§IV.C.) - undoubtedly the City Attorney, directly contrary to §67.21(i) of the Sunshine Ordinance.

The procedure before the SOTF is quite different. While structured to comply with the mandate of the Ordinance for prompt disposition of these complaints, the procedure is informal and conducted with complete public access to all filings and records. The parties are the complainant and the Respondent official, department or agency. Each files written support for its positions. Neither the SOTF nor its Administrator "investigates" complaints. Unless there is a jurisdictional issue, the complaint is promptly scheduled for hearing before the full SOTF. At the hearing, the parties (and any supporters) present their respective positions and answer questions posed by the SOTF members, followed by public comment. Motions are discussed without time limit, followed by public comment. If one or more violations are found, an Order of Determination is issued to the Respondent that the records be disclosed (or some other action taken) within five days. The decision on the complaint is resolved at this single hearing. It is not unusual for as many as 10 complaints be heard at a SOTF meeting.

Changes to Staff's Draft in the SOTF Draft:

First: Given that the Commission does not (and probably should not) have concurrent jurisdiction over non-willful violation complaints, all references to such complaints, and the investigations, hearings and other provisions that would relate to them are eliminated in the SOTF Draft. As a result, the SOTF Draft only deals two kinds of cases: (1) SOTF references to the Commission for enforcement of SOTF Orders and (2) willful violation complaints filed with the Commission.

Second: Due to the inherent difference between these two types of cases, the SOTF Draft creates separate paths, one for SOTF and other person enforcement referrals/proceedings and the other for willful violation complaints. These two separate paths are reflected throughout the SOTF Draft. For example, a significant difference in the drafts respective definitions, e.g. Ethics Staff: "Complaint" compared to the SOTF Draft: "Enforcement Action".

Third: The SOTF Draft reflects the SOTF's strong conviction that because these are open government cases, all actions taken and records related to them, including the Staff's investigatory files, are to be fully accessible to the public at all times. There is neither a legal basis for keeping any of them "confidential" nor any policy supporting "confidentiality" in an open government setting, as these cases are. The only exceptions are public records whose disclosure is prohibited by the California Public Records Act or some other state law.

Fourth: Ethics Staff's proposal to simply shift the 'burden of proof' in enforcement hearings, effectively allowing the Respondent to retry the case, has been eliminated. The SOTF Draft limits the hearing on enforcement cases to a "penalty" phase summary

hearing, precluding any new "evidence" on the original violation or on the Respondent's refusal to comply, allowing only evidence that will fully remedy the original violation or provide some basis not to penalize the Respondent or to minimize the penalty. An added provision prohibits introduction of any evidence that was presented to the SOTF or the Supervisor of Records prior to issuance of the SOTF or the Supervisor of Records Order being enforced.

Fifth: Ethics Staff's proposal to define "willfully" and to provide "outs" for willful violations through definitions of "exculpatory information" and "mitigating information" have been eliminated in favor of the California Penal Code's statutory definition of "willfully."⁶ In addition, the SOTF draft eliminates the provision in the Ethics draft that sought to make the "confidentiality" of a non-disclosed public record under the Charter but disclosable under the Ordinance, a complete defense to any claimed violation. As noted above, the Regulations have to be consistent with the San Francisco Sunshine Ordinance.

Sixth: All other provisions in the Staff's Draft that go to the Commission's decision making, such as "circumstances surrounding the case," have been eliminated. The Commission presently has five members, four of whom are lawyers. They are well qualified to determine on their own what the "circumstances" should be.

Seventh: All restrictions on persons who can testify or provide support for a Respondent or Complainant at a hearing have been eliminated and ample time for public comment added. Any restrictions of that kind are unacceptable as a matter of fairness and in maintaining a level playing field.

Eighth: The provisions relating to outside "hearing officers" have been eliminated, given the importance of an enforcement or willful violation hearing, the need for the Commission to be directly involved, and the potential serious adverse consequences for the Respondent. Rather, the SOTF believes the full Commission or a panel of three Commissioners should hear these cases. The SOTF enforcement hearings should be relatively short since little new evidence (if any) will be introduced – the hearing will be essentially a "sentencing" one, while the "willful violation" hearing carries with it penalties and, possibly, an official misconduct finding.

⁶ "Willfully" is defined in section 7 of the Penal Code as: "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."

Ninth: Because public policy is to provide fast and efficient access to public records, under the SOTF Draft, where appropriate, time periods for actions have been shortened and prompt resolution has been called for.⁷

Tenth: The Investigation and Hearing provisions in Sections IV and V of Staff's Draft with reference to willful violation "Complaints" have been edited to improve the flow of the investigative, reporting and hearing procedures involved and eliminating those specific provisions identified above.

Attachment A:

SOTF Proposed Revised Version of Staff's Draft.

Attachment B:

Auto Generated Compared Document showing changes (in blue) in the SOTF Draft from the Ethics Staff's Draft, with italicized and highlighted (yellow) comments.

⁷ This is demonstrated by CPRA §6258 "...*The times for responsive pleadings and for hearings in these [injunctive or declarative relief or writ of mandate] proceedings shall be set by the judge of the court with the object of securing a decision as to these matters at the earliest possible time.*" CPRA §6259(c), "...*an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure ... shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ.*" Sunshine Ordinance §67.21(c), "...*The Sunshine Task Force shall inform the petitioner, as soon as possible and within 2 days after its next meeting but in no case later than 45 days from when a petition in writing is received, of its determination whether the record requested, or any part of the record requested, is public.*"

ATTACHMENT A
to SOTF Memorandum

SOTF Proposed Revised Version
[JUNE 14, 2011]

**ETHICS COMMISSION REGULATIONS FOR ENFORCEMENT OF
THE SUNSHINE ORDINANCE**

Effective Date: _____, 2011

DRAFT

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DRAFT

I. PREAMBLE

Pursuant to San Francisco Charter § 5.102, the San Francisco Ethics Commission promulgates these Regulations in order to carry out the purposes and provisions of the San Francisco Sunshine Ordinance, S.F. Admin. Code §§ 67.1, et seq. These Regulations apply only to complaints alleging willful violations of the Sunshine Ordinance and actions for enforcement of orders issued by the Sunshine Ordinance Task Force and the Supervisor of Records. All matters involving alleged violations of conflict of interest, campaign finance, lobbyist, campaign consultant or other ethics laws shall be handled under the Ethics Commission's Regulations for Investigations and Enforcement Proceedings.

II. DEFINITIONS

For purposes of these Regulations, the following definitions shall apply:

- A. "Business day" means any day other than a Saturday, Sunday, City holiday, or a day on which the Commission office is closed for business.
- B. "City" means the City and County of San Francisco.
- C. "Commission" means the Ethics Commission.
- D. "Complaint" means a document filed with the Commission in any form of media, including any electronic format, alleging one or more willful violations of the Sunshine Ordinance by an elected official or department head of the City and County of San Francisco.
- E. "Complainant" means, as applicable, a person or entity that files a Complaint or who was the original complainant in a SOTF Referral or an Enforcement Petition.
- F. "Day" means calendar day unless otherwise specifically indicated. If a deadline falls on a weekend or City holiday, the deadline shall be extended to the next business day.
- G. "Enforcement Action" means a SOTF Referral or Enforcement Petition, as applicable.
- H. "Enforcement Petition" means a petition filed by a Complainant pursuant to Section 67.35 (d) of the Sunshine Ordinance to commence a proceeding for enforcement of (1) a SOTF Order of Determination that is not the subject of a SOTF Referral or (2) a Supervisor of Records Order that has not been complied with by the Respondent to whom issued.
- I. "Executive Director" means the Executive Director of the Commission.
- J. "Hearing Panel" means a panel of three Commissioners assigned to conduct a hearing on a Complaint.
- K. "Order" means either a SOTF Order of Determination or a Supervisor of Records Order, as applicable.

L. "Respondent" means either (1) an elected official or department head who is alleged in a Complaint to have willfully violated the Sunshine Ordinance or (2) the official, department head, or other person who has failed to comply with an Order.

M. "SOTF Order of Determination" means an Order issued by the Task Force to a Respondent finding a violation of the Sunshine Ordinance and requiring the Respondent to correct the violation.

N. "SOTF Referral" means a referral from the Task Force to the Commission for the enforcement of a SOTF Order of Determination that has not been complied with by the Respondent to whom issued.

O. "Sunshine Ordinance" means San Francisco Administrative Code §§67.1, et seq., as amended from time to time, or any ordinance replacing it.

P. "Supervisor of Records Order" means an order issued by the Supervisor of Records to a Respondent pursuant to Section 67.21(d) of the Sunshine Ordinance.

Q. "Task Force" means the Sunshine Ordinance Task Force, established in accordance with the Sunshine Ordinance.

III. COMPLAINTS / SOTF REFRRALS / ENFORCEMENT PETITIONS

A. Any person or entity may file a Complaint with the Commission. Each Complaint shall be administered in accordance with Section IV of these Regulations. Upon receipt of a Complaint, the Executive Director shall immediately notify and forward a copy thereof to the District Attorney and the California Attorney General.

B. When the Executive Director receives a SOTF Referral or an Enforcement Petition, the Executive Director shall immediately (1) schedule a hearing on it at the next regular meeting of the Commission to be held more than 21 days after receipt thereof and (2) give notice to the Respondent and the Complainant (as the real party in interest) and, in the case of a SOTF Referral, the Task Force, of the date, time, and location of the hearing. Section V of these Regulations shall otherwise govern the SOTF Referral and Enforcement Petition, to the extent applicable.

C. No enforcement action shall be taken on a SOTF Referral or an Enforcement Petition nor any action taken by the Commission with respect to a Complaint unless at least 40 days have elapsed after the date the District Attorney and the California Attorney General shall have been notified by the Task Force of the filing of the complaint resulting in the SOTF Referral or by the Executive Director in the case of a Complaint or Enforcement Petition, as the case may be.

IV. COMPLAINT INVESTIGATIONS, REPORT, AND RECOMMENDATION

A. The Executive Director shall thoroughly investigate each Complaint. The investigation (a) shall be completed within 30 days after the Complaint is filed, (b) shall include interviews of the Complainant and the Respondent and a review of all documentary and other evidence submitted by the Complainant and Respondent, or by other persons on their respective behalves,

in support of or in opposition to the allegations in the Complaint, and (c) may include interviews of any other persons and the review of any other documentary and other evidence deemed relevant. All interviews shall be audio recorded and maintained as part of the investigative files.

B. After the investigation of the Complaint is completed, the Executive Director shall prepare a draft report with proposed factual findings. The draft report shall contain a summary of (a) the evidence gathered through the investigation, (b) the provisions in the Sunshine Ordinance relevant to the Complaint and the proposed findings, and (c) the Executive Director's recommendation, which shall be either: (1) a finding that Respondent willfully violated the Sunshine Ordinance with a proposed order and any proposed penalties; (2) a finding that Respondent willfully violated the Sunshine Ordinance and a proposed settlement (in the form of a stipulation among the Complainant and Respondent) satisfactory to the Executive Director, or (3) a finding that the Respondent has not willfully violated the Sunshine Ordinance and a recommendation that the Complaint be dismissed.

C. The draft report shall be delivered to the Complainant and the Respondent, each of whom, within 20 days after receipt of the draft report, may submit comments and proposed changes to the draft report to the Executive Director and to the other. Within 10 days after receipt of any such comments and proposed changes, the Executive Director shall meet and confer with the submitting party regarding them. Following such meetings the Executive Director may revise and shall complete the report and submit it to the Commission, the Complainant, and the Respondent. The Complainant and Respondent may each submit to the Commission written exceptions to the report at least 10 days before the meeting at which the report is scheduled to be heard. Copies of such exceptions shall also be sent to the Executive Director and the other party.

D. If the Executive Director's report recommends a finding of willful violation(s) and proposes any order and/or the imposition of any penalties, the Executive Director shall schedule a hearing by the full Commission at its next regular meeting to be held no sooner than 20 days after the date the Commission receives the report.

E. If the Executive Director's report recommends a finding of willful violation(s) and approval of a proposed settlement in the form of a stipulation signed by the Complainant and the Respondent, the Executive Director shall schedule a hearing by the full Commission at its next regular meeting to be held no sooner than 20 days after the date the Commission receives the report. Following the hearing, the Commission, by the majority vote, shall either: (a) approve the proposed settlement and enter any orders and/or impose any penalties consistent with it; (b) reject the proposed settlement and instruct the Executive Director to seek a different settlement; or (c) reject the proposed settlement and instruct the Executive Director to schedule a hearing by the full Commission at its next regular meeting. If the Commission approves the settlement, the stipulation shall be and become fully enforceable and the order(s) and penalties provided for therein shall be deemed orders issued and penalties imposed by the Commission, effective the date of such approval with the same force and effect as an order issued or penalty imposed by the Commission.

F. If the Executive Director's report recommends a finding that the Respondent has not willfully violated the Sunshine Ordinance and dismissal of the Complaint, the Executive Director shall schedule a hearing by the full Commission at its next regular meeting to be held no sooner

than 20 days after the date the Commission receives the report. Following the hearing on the report, the Commission, by a majority vote, shall either: (a) enter an order dismissing the Complaint; (b) reject the dismissal recommendation and instruct the Executive Director to seek a settlement; or (c) reject the dismissal recommendation and instruct the Executive Director to schedule a hearing on the Complaint by the full Commission at its next regular meeting. If a hearing is scheduled, the Executive Director shall notify the Respondent and Complainant of the date, time, and location of the hearing at least 28 days in advance of the hearing date.

G. At any time after the Commission receives a Complaint, the Executive Director may enter into negotiations with Respondent and the Complainant for the purpose of settling the allegations in a Complaint, the terms of which, including a proposed Commission order and/or penalties, would be incorporated into a stipulation.

1. Any stipulation, shall explicitly state that:

(a) The Respondent knowingly and voluntarily waives any and all procedural rights under law and these Regulations;

(b) The Respondent understands and acknowledges that neither the settlement nor any terms in the stipulation are binding on any other agency or body, and does not preclude the Commission or its staff from referring the matter to, cooperating with, or assisting any other agency or body with regard to the matter, or any other matter related to it; and

(c) In the event the Commission does not approve the proposed settlement and, accordingly, a hearing before the Commission or a Hearing Panel on the Complaint becomes necessary, no Commissioner shall be disqualified because of prior consideration of the stipulation.

2. The stipulation shall set forth the pertinent facts and may include an agreement by Respondent as to any order issued or penalty imposed by the Commission for a willful violation of the Sunshine Ordinance.

H. All written submissions to the Commission or any Hearing Panel shall be on one side of letter size pages with margins of at least one inch at the left, right, top, and bottom of the page, double-spaced in no smaller than 12 point type. Each page and any attachments shall be consecutively numbered.

V. HEARINGS GENERAL

A. All hearings on Complaints and Enforcement Actions shall be public hearings. The Commission shall hold the hearing, unless the hearing is on a Complaint, in which case, it may assign a Hearing Panel to hold the hearing.

B. Except as otherwise provided herein, whenever the Commission assigns a Hearing Panel to hear a Complaint, the assigned Hearing Panel shall have the same authority, subject to the same restrictions, as the Commission.

C. A Hearing Panel shall submit its report to the Commission, no later than 30 days after the date the Complaint hearing is concluded. The report shall include proposed findings of fact, proposed conclusions of law, and any proposed orders or penalties. Upon receipt of the report, the Executive Director shall (a) deliver copies to the Complainant and each Respondent and (b) schedule a hearing on the report at the next regular Commission meeting to be held which is more than 15 days after the date the report is received by the Commission.

D. At hearings on Enforcement Actions, the Complainant (as the real party in interest) and Respondent(s) shall have the right to appear and speak on his or her own behalf. In addition, other individuals may testify in support of either of them. At the conclusion of the testimony, public comment shall be had in accordance with the Commission policy.

E. At hearings on Complaints, the Executive Director, the Complainant, and the Respondent(s) shall each have the right to appear and speak on his or her own behalf. In addition, other individuals may testify in support of either the Complainant or Respondent(s). At the conclusion of the testimony, public comment shall be had with a maximum of five minutes per speaker and otherwise in accordance with the Commission policy.

F. For the purposes of these Regulations, a hearing concludes on the last date on which the Commission or the Hearing Panel hears argument or testimony in the proceeding and closes the hearing.

G. At or prior to a hearing on an Enforcement Action, no evidence presented, heard, or considered in connection with (1) its hearings on the original complaint or subsequent proceedings before the Task Force prior to the SOTF Referral or (2) the petition to the Supervisor of Records giving rise to its Order, as the case may be, shall be admissible or considered by the Commission, all of which Orders shall be deemed final and conclusive for all purposes hereunder. The Commission's sole determinations shall be the nature and scope of the penalties or other enforcement actions against the Respondent(s).

H. No formal rules of evidence shall apply to testimony given at a hearing or to documents or records submitted as exhibits, but the Commission or a Hearing Panel may require that all testimony taken in a hearing be given under oath and any exhibits presented be properly authenticated. When hearing a Complaint, the Commission or a Hearing Panel may examine *in camera* any public record that a Respondent asserts is wholly exempt from disclosure under a specifically identified exemption available under the Sunshine Ordinance.

I. A Respondent who fails to appear at a hearing on a Complaint shall be deemed to have willfully violated the Sunshine Ordinance as alleged in such Complaint.

VI. DETERMINATION OF WILLFUL VIOLATIONS

A. When determining whether a Respondent's actions constitute a "willful violation" of the Sunshine Ordinance, the Commission shall apply the definition of "willfully" in Penal Code section 7. [Note: "Willfully" is defined in section 7 of the Penal Code as: "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."]

B. The Commission shall determine, no later than 30 days after (a) the date a hearing on a Complaint conducted by it is concluded or (b) the date it receives the report and recommendation of the Hearing Panel that conducted a hearing on a Complaint, whether the Respondent(s) has committed a willful violation of the Sunshine Ordinance.

C. The vote of at least three Commissioners shall be required to find that a Respondent has willfully violated the Sunshine Ordinance. A finding of a willful violation of the Sunshine Ordinance shall be supported by findings of fact and conclusions of law. Prior to taking the vote, a Commissioner who did not attend the hearing held by the Commission or by the Hearing Panel shall certify that he or she reviewed the entire record of the proceedings, including an audio recording of the hearing.

VII. ADMINISTRATIVE ORDERS AND PENALTIES

A. The majority vote of at least three Commissioners shall be required to (a) dismiss a Complaint or (b) issue any order or impose any penalties (1) for a willful violation of the Sunshine Ordinance or (2) enforcing a SOTF Order of Determination, or an Order of the Supervisor of Records.

B. The Commission may issue an order to and/or impose penalties on a Respondent who willfully violated the Sunshine Ordinance or who is the subject of an Enforcement Action requiring such Respondent to (a) immediately cease and desist the willful violation or comply with the order, (b) cure and correct the willful violation through whatever action is necessary, (c) immediately comply with (1) the Complainant's request that was the subject of the Complaint or (2) the SOTF Order or the Supervisor of Records Order that was the subject of the SOTF Referral or the Enforcement Petition, as the case may be, and/or (d) as a penalty, pay (out of non-City funds) to the general fund of the City within 30 days from the date of imposition an amount not less than five hundred (\$500) nor more than five thousand dollars (\$5,000) for each willful violation or failure to comply with a SOTF Order of Determination or Supervisor of Records Order. In addition, the Commission may refer a Respondent who willfully violated the Sunshine Ordinance to the San Francisco District Attorney for possible criminal action.

C. If the Commission finds that a Respondent who is an elected official or a department head willfully violated the Sunshine Ordinance, the Commission may find official misconduct by such Respondent and proceed in accordance with the applicable provisions of Article XV of the City Charter.

VIII. MISCELLANEOUS PROVISIONS

A. Once a Complaint is filed with the Commission or an Enforcement Action is received by the Commission, no Commissioner shall engage in communications of any kind outside of a Commission meeting or Hearing Panel hearing regarding the merits of the Complaint or the Enforcement except for procedural communications.

B. All Complaints, investigative records of whatever nature or description, as well as all records relating to Enforcement Actions, in whatever form, and all information contained therein, including any work product (as defined in Code of Civil Procedure §2018.030), in the

custody of the Commission and its staff, including internal notes taken by the Executive Director or any staff member, constitute public information and are fully disclosable non-exempt public records, except and solely to the extent disclosure thereof is specifically prohibited pursuant to any provision of the California Public Records Act or of any other State law, *provided that* the specific statutory authority for such withholding is cited in writing in accordance with subdivision (b) of Section 67.27 of the Sunshine Ordinance.

C. The Commission and individual Commissioners assigned to conduct hearings may administer oaths and affirmations.

D. The Executive Director, the Complainant or any Respondent may request the continuance of the date of a scheduled hearing on a Complaint. The Respondent or the Complainant in an Enforcement Action may request the continuance of the date of a scheduled hearing on the Enforcement Action. The request shall be submitted to the Executive Director and copies provided to all other parties no later than 14 days before the date of the scheduled hearing. The Commission Chair or the Chair of the Hearing Panel, as the case may be, shall approve or deny a timely request within seven days of the submission of the request and, in addition, shall have the discretion to consider and rule on untimely requests for continuances.

E. Every hearing on a Complaint and Enforcement Action shall be electronically audio recorded and made available on the Commission's website within 48 hours after the hearing ends.

F. All notices and other communications hereunder (any of which is a "notice") to be effective shall be in writing. Notice shall be delivered by one or more of the following means: (a) personally, including delivery by a recognized national overnight courier with a signed acknowledgement of receipt, (b) if mailed, by priority first class certified mail, return receipt requested, postage prepaid, or (c) by confirmed facsimile, electronic, or digital means other than email (any of which shall be deemed a "writing" for purposes hereof), in each case as follows:

1. To the Commission, any of the Commissioners, or the Executive Director at the Commission office.

2. To a Respondent, (a) if the Respondent is then a City Official or other City employee, to such Respondent's City office address, if any, and if none, to the address listed with the Controller/ Payroll as such Respondent's current address or (b) if the Respondent is a former City official or other employee, to the address listed for such Respondent in the City's retirement system or (c) if the Respondent is neither a current nor former City official or other City employee, to such Respondent's last known residence address or an address that is reasonably believed to reach the Respondent.

3. To a Complainant in a Complaint, to the address given in the Complaint for receipt of notices and other communications relating to the Complaint.

4. To a Complainant in an Enforcement Action, to the address given in the original complaint filed with the Task Force or in the Petition filed with the Supervisor of Records, as the case may be.

G. At the time a Complaint or Enforcement Action is filed with or received by the Executive Director, the address for receipt of notices of each of the affected parties shall be confirmed by the Executive Director. Any affected party to any Complaint or Enforcement Action may supplement or change the address for notice by giving notice conforming to the above to the other affected parties.

H. All notices shall be deemed delivered on the business day received or on the business day received when received by confirmed facsimile. Any notice received after 5:00 P.M. on a business day shall be deemed received the next business day.

DRAFT

ATTACHMENT B
to SOTF Memorandum

SOTF Proposed Revised Version
[May 19, 2011]

SOTF Additions are in bold blue/ Deletions are red strike throughs.
Comments are bold blue italicized and highlighted.

ETHICS COMMISSION REGULATIONS FOR COMPLAINTS
ALLEGING VIOLATIONS ENFORCEMENT OF THE SUNSHINE
ORDINANCE

Effective Date: _____, 20102011

DRAFT

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I. PREAMBLE

Pursuant to San Francisco Charter section ~~1~~ § 5.102, the San Francisco Ethics Commission promulgates these Regulations in order to ~~ensure compliance with~~ carry out the purposes and provisions of the San Francisco Sunshine Ordinance, S.F. Admin. Code §§ 67.1, et seq. These Regulations shall apply only to complaints alleging willful violations of the Sunshine Ordinance and referrals from actions for enforcement of orders issued by the Sunshine Ordinance Task Force, and the Supervisor of Records. All matters involving alleged violations of conflict of interest, campaign finance, lobbyist, campaign consultant or other ethics laws shall be handled under the Ethics Commission's Regulations for Investigations and Enforcement Proceedings.

Comment: See §III (pages 3-4) explaining why non-willful complaints are not subject to the Commission's jurisdiction and the inclusion of Supervisor of Records Orders.

II. DEFINITIONS

For purposes of these Regulations, the following definitions shall apply:

- A. "Business day" means any day other than a Saturday, Sunday, City holiday, or a day on which the Commission office is closed for business.
- B. "City" means the City and County of San Francisco.
- C. "Commission" means the Ethics Commission.
- D. "Complaint" means a written document alleging a violation of the Sunshine Ordinance filed with the Commission, in any form of media, including any electronic format, alleging one or more willful violations of the Sunshine Ordinance by an elected official or department head of the City and County of San Francisco.

Comment: Makes clear that a "complaint" can be only for a willful violation. See §III.

- E. "Complainant" means, as applicable, a person or entity that files a complaint or who was the original complainant in a SOTF Referral or an Enforcement Petition.

Comment: Because the original complainant in a referral is the real party in interest, the definition has been broadened.

- F. "Day" means calendar day unless otherwise specifically indicated. If a deadline falls on a weekend or City holiday, the deadline shall be extended to the next business day.

- G. "Deliver" means transmit by U.S. mail or personal delivery to a person or entity.

The Commission, the Executive Director, the Task Force or a Respondent receiving material may consent to any other means of delivery, including delivery by e-mail or fax. In any proceeding, the Commission Chairperson, designated Commissioner or hearing officer may order that delivery of briefs or other materials be accomplished by e-mail.

"Enforcement Action" means a SOTF Referral or Enforcement Petition, as applicable.

Comment: Using a defined term to distinguish a referred enforcement case and a "Complaint" filed with the Commission. See SY, pages 9-11).

H. "Enforcement Petition" means a petition filed by a Complainant pursuant to Section 67.35 (d) of the Sunshine Ordinance to commence a proceeding for enforcement of (1) an SOTF Order of Determination that is not the subject of a SOTF Referral or (2) a Supervisor of Records Order that has not been complied with by the Respondent to whom issued.

Same comment.

I. "Executive Director" means the Executive Director of the Commission or the Executive Director's designee.

Comment: Given the responsibilities involved in these cases, only the ED should be allowed to make the decisions assigned to the ED.

J. "Hearing Panel" means a panel of three Commissioners assigned to conduct a hearing on a Complaint.

Comment: Using outside Hearing Officers has been eliminated as the SOTF believes the nature of these cases requires the direct involvement of the Commissioners at hearings.

K. "Order of Determination" means a final recommendation issued by the Task Force concerning a violation of the Sunshine Ordinance.

"Order" means either a SOTF Order of Determination or a Supervisor of Records Order, as applicable.

L. "Referral" means a reference for enforcement and/or penalties from the Task Force to the Commission, after the Task Force has issued an Order of Determination finding a violation of the Sunshine Ordinance. "Respondent" means either (1) an elected official or department head who is alleged in a Complaint to have willfully violated the Sunshine Ordinance or (2) the official, department head or other person who has failed to comply with an Order.

Comment: Another clarification of the difference between the Respondent in an enforcement case and one who is subject to a willful violation claim.

M. "Respondent" means a person who is alleged or identified in a complaint to have committed a violation of the Sunshine Ordinance. "SOTF Order of Determination" means an Order issued by the Task Force to a Respondent finding a violation of the Sunshine Ordinance and requiring the Respondent to correct the violation.

N. "Stipulated order" means an order regarding a complaint, the terms of which have been agreed to by both the Executive Director and the Respondent. "SOTF Referral" means a referral from the Task Force to the Commission, for the enforcement of an SOTF Order of Determination that has not been complied with by the Respondent to whom issued.

O. "Sunshine Ordinance" means San Francisco Administrative Code section §§67.1, et seq., as amended from time to time, or any ordinance replacing it.

P. "Supervisor of Records Order" means an order issued by the Supervisor of Records to a Respondent pursuant to Section 67.21(d) of the Sunshine Ordinance.

Comment: See footnote 5, page 3 of the Memorandum.

Q. "Task Force" means the Sunshine Ordinance Task Force, established by San Francisco Administrative Code section 67.30.

Q. "Willful violation" means a violation where an individual intentionally violated the Sunshine Ordinance and acted or failed to act with the knowledge that such act or failure to act was a violation of the Sunshine Ordinance.

III. COMPLAINTS ALLEGING VIOLATIONS OF THE SUNSHINE ORDINANCE. COMPLAINTS/SOTF REFERRALS/ENFORCEMENT PETITIONS.

A. Any person, including Commission staff, or entity may file a complaint. Complaint with the Commission or the Task Force alleging. Each Complaint shall be administered in accordance with Section IV of these Regulations. Upon receipt of a violation of the Sunshine Ordinance. When Complaint, the Executive Director receives shall immediately notify and forward a complaint that the Task Force has not yet considered or that is still pending at the Task Force, the Executive Director may handle the complaint pursuant copy thereof to Section IV of these Regulations or may, in his or her discretion, take no action until after the Task Force has issued an Order of Determination or a final recommendation regarding the complaint. the District Attorney and the California Attorney General.

Comment: This paragraph A and the next paragraph B establish the two separate paths that are followed depending on whether there is a "Complaint" filed for a willful violation (A) or an "enforcement" referral (B). See §V (pages, 9-11).

B. When the Executive Director receives a referral from the Task Force, SOTF

Referral or an Enforcement Petition, the Executive Director shall immediately (1) schedule a hearing on it at the next regular meeting of the Commission, provided that: 1) the Executive Director issue a written notice to each be held more than 21 days after receipt thereof and (2) give notice to the Respondent and the original Complainant (as the real party in interest) and, in the case of a SOTF Referral, the Task Force, of the date, time and location of the hearing, at least 15 days in advance of the hearing date. The Executive Director shall also provide a courtesy notice to the Task Force. Such hearings shall otherwise be governed by the provisions of Section V of these Regulations. Section V of these Regulations shall otherwise govern the SOTF Referral and Enforcement Petition, to the extent applicable.

See prior comment. In addition, this paragraph removes the ED as a party, limiting his or her role to that of an administrator.

C. If the Task Force or a Complainant notifies the District Attorney or California Attorney General of a violation or alleged violation of the Sunshine Ordinance, the Executive Director shall not take action on the referral or complaint regarding that violation or alleged violation until at least 40 days after the notification date. No enforcement action shall be taken on a SOTF Referral or an Enforcement Petition nor any action taken by the Commission with respect to a Complaint unless at least 40 days have elapsed after the date the District Attorney and the California Attorney General shall have been notified by the Task Force of the filing of the complaint resulting in the SOTF Referral or by the Executive Director, in the case of a Complaint or Enforcement Petition, as the case may be.

Comment: Rephrasing of the paragraph Staff included to satisfy the 40-day threshold in Section 67.35(d), as explained in Staff's Memorandum, page 4, re this Section III.C.

IV. COMPLAINT INVESTIGATIONS; REPORT AND RECOMMENDATION

Comment: This Section IV deals solely with Complaints for willful violations.

A. **Factual Investigation.** The Executive Director's investigation may include, but shall not be limited to, the interview of the Respondent(s) and any witnesses, and the review of documentary and other evidence. The Executive Director shall thoroughly investigate each Complaint. The investigation (a) shall be completed within 30 days after the Complaint is filed, (b) shall include interviews of the Complainant and the Respondent and a review of all documentary and other evidence submitted by the Complainant and Respondent, or by other persons on their respective behalves, in support of or in opposition to the allegations in the Complaint and (c) may include interviews of any other persons and the review of any other documentary and other evidence deemed relevant. All interviews shall be audio recorded and maintained as part of the investigative files.

Comment: This section has been reworked to emphasize the need for prompt completion of the investigation, its completeness and ensure the information obtained

is available to the parties and the public.

investigation shall be conducted in a confidential manner, pursuant to San Francisco Charter, Appendix C, section C3.699-13.

B. Report of Investigation.

B. After the

1. After the Executive Director has investigation of the Complaint is completed his or her investigation, the Executive Director shall prepare a written draft report summarizing his or her with proposed factual and legal findings. The draft report shall contain a summary of the legal provisions cited by the complaint and (a) the evidence gathered through the Ethics Commission's investigation, including any exculpatory and mitigating information. In investigation, (b) the provisions in the Sunshine Ordinance relevant to the report, Complaint and the Executive Director may present statements including hearsay, declarations of investigators or others relating to the statements of witnesses, or the examination of any other evidence. The report shall not exceed 10 pages excluding attachments.

proposed findings and (c) the Executive Director's recommendation, which shall be comprised of one of the following: either: (1) a finding that Respondent willfully violated the Sunshine Ordinance with a proposed order and any proposed penalties; b(2) a finding that Respondent willfully violated the Sunshine Ordinance and a proposed settlement (in the form of a stipulation, decision among the Complainant and order; Respondent) satisfactory to the Executive Director or c(3) a finding of no violation of that the Respondent has not willfully violated the Sunshine Ordinance and dismissal. The recommendation that the Complaint be dismissed.

Comment: While some members of Staff may be lawyers, the SOTF believes that the staff's investigation and factual findings should be the extent of their report to the Commission. If an attorney's explanation of applicable law is needed, the DCA assigned to the Commission can provide it, much as the DCA assigned to the SOTF does with respect to each complaint filed with it. Since the report will be short or long depending on the extent and complexity of the investigation, a page limit seems inappropriate.

C. The draft report shall be delivered to the Commission.

a. **Finding of Violation** Complainant and the Respondent, each of whom, within 20 days after receipt of **Sunshine Ordinance and Penalties**. If the report recommends a finding of violation and penalties, the Executive Director shall schedule a hearing pursuant to Section IV.C. of these Regulations.

Finding of Violation of Sunshine Ordinance and Proposed Stipulation, Decision and Order. If the report recommends a finding of violation and settlement, the Executive Director shall so inform the Commission. Thereafter, any two or more Commissioners

may cause the draft report, may submit comments and proposed changes to the draft report to the matter to be calendared for consideration by the full Commission in open session at the next Commission meeting held no sooner than ten days after the date the Executive Director informs the Commission of the proposed stipulation, decision and order. During the meeting at which the Commission considers the proposed stipulation, Commissioners may ask staff questions and shall take one of the following actions, each of which requires the vote of three Commissioners: 1) accept the proposed stipulation; 2) reject the proposed stipulation and instruct staff to seek a different settlement amount; or 3) reject the proposed stipulation and instruct staff to schedule a hearing pursuant to Section IV.C. of these Regulations. Executive Director and to the other. Within 10 days after receipt of any such comments and proposed changes, the Executive Director shall meet and confer with the submitting party regarding them. Following such meetings the Executive Director may revise and shall complete the report and submit it to the Commission, the Complainant and the Respondent. The Complainant and Respondent may each submit to the Commission written exceptions to the report at least 10 days before the meeting at which the report is scheduled to be heard. Copies of such exceptions shall also be sent to the Executive Director and the other party.

Comment: The changes to this paragraph are intended to give the parties an opportunity to review the draft report for errors and convince the ED to modify it before it goes to the Commissioners.

D. If the Executive Director's report recommends a finding of willful violation(s) and proposes any order and/or the imposition of any penalties, the Executive Director shall schedule a hearing by the full Commission at its next regular meeting to be held no sooner than 20 days after the date the Commission receives the report.

If two or more members of the Commission do not request the matter to be calendared, the Executive Director shall: 1) sign the stipulation; 2) have the Commission Chairperson sign the stipulation; 3) have the Respondent sign the stipulation; and 4) inform the Complainant of the finding of violation and stipulated order.

Comment: This paragraph ensures that there will be a hearing whenever the ED recommends a finding of willful violation and penalties. The Respondent is entitled to a hearing, as the consequences are potentially too severe not to have the Commission itself make the final decision.

E. If the Executive Director's report recommends a finding of willful violation(s) and approval of a proposed settlement in the form of a stipulation signed by the Complainant and the Respondent, the Executive Director shall schedule a hearing by the full Commission at its next regular meeting to be held no sooner than 20 days after the date the Commission receives the report. Following the hearing, the Commission, by the vote of at least three Commissioners, shall either: (a) approve the proposed settlement and enter any orders and/or impose any penalties consistent with it; (b) reject the proposed settlement and instruct the Executive Director to seek a different settlement; or (c) reject the proposed settlement and instruct the Executive Director to schedule a

hearing in by the full Commission at its next regular meeting. If the Commission approves the settlement, the stipulation shall be and become fully enforceable and the order(s) and penalties provided for therein shall be deemed orders issued and penalties imposed by the Commission, effective the date of such approval with the same force and effect as an order issued or penalty imposed by the Commission.

Comment: This paragraph generally follows the Staff's, with some further specifics regarding the hearing since the fact of a "willful violation" by an Official or department head requires the Commission's attention, although a complaint may be satisfied.

b.—Finding of No Violation of Sunshine Ordinance and Dismissal.— If the Executive Director's report recommends a finding of no violation and that the Respondent has not willfully violated the Sunshine Ordinance and dismissal of the Complaint, the Executive Director shall so inform the Commission. Thereafter, any two or more Commissioners may cause the matter to be calendared for consideration schedule a hearing by the full Commission in open session at theits next Commission regular meeting to be held no sooner than ten²⁰ days after the date the Executive Director informs Commission receives the Commission of report. Following the dismissal recommendation. During hearing on the meeting at which report, the Commission considers the dismissal recommendation, Commissioners may ask staff questions and, by the majority vote, shall take one of either: (a) enter an order of dismissing the following actions, each of which requires the vote of three Commissioners: 1) accept the dismissal recommendation; 2) Complaint; (b) reject the dismissal recommendation and instruct the Executive Director to seek a settlement; or (c) reject the dismissal recommendation and instruct staff to seek a settlement; or 3) reject the dismissal recommendation and instruct staff the Executive Director to schedule a hearing pursuant to Section IV.C. of these Regulations.

A Commissioner's request to calendar on the matter for consideration Complaint by the full Commission must be received by the Executive Director no fewer than five days prior to the date of the meeting, so that the Executive Director may comply with the applicable notice and agenda requirements.

at its next regular meeting. If two or more members of the Commission do not request the matter to be calendared, a hearing is scheduled the Executive Director shall take no further action except that he or she shall inform the notify the Respondent and Complainant and the Respondent of the finding of no violation and dismissal.

Comment: This paragraph ensures that there will be a hearing whenever the ED recommends a finding of no willful violation. The complainant is entitled to a day in court and the maintaining of a level playing field is too important not to have the

Commission itself make the final decision.

C. — Delivery of Report and Notice of Hearing. If a hearing is scheduled pursuant to section IV.B., the Executive Director shall deliver to each Respondent and the Complainant a copy of the report summarizing the Ethics Commission's investigation, with written notice of the date, time and location of the hearing, at least 4528 days in advance of the hearing date. The notice shall inform each Respondent that he or she has the right to be present and represented by counsel at the hearing.

Comment: As noted in the Memorandum, under the Sunshine Ordinance, the City Attorney may be disqualified from representing the respondent.

G. At any time after the Commission receives a Complaint, the Executive Director may enter into negotiations with Respondent and the Complainant for the purpose of settling the allegations in a Complaint, the terms of which, including a proposed Commission order and/or penalties, would be incorporated into a stipulation.

D. — Response to the Report.

1. If a hearing is scheduled, each Respondent may submit a written response to the report. The response may contain legal arguments, a summary of evidence, and any mitigating information. The response shall not exceed 10 pages excluding attachments. Any stipulation, shall explicitly state that:

2. If any Respondent submits a response, he or she must deliver the response no later than 20 days prior to the date of the hearing. The Respondent must deliver eight copies of the response to the Executive Director. The Executive Director must then immediately distribute copies of the response(s) to the Commission. The Respondent must deliver one copy of the response to every other Respondent named in the report.

E. — Rebuttal.

1. The Executive Director may submit a written rebuttal to any response. If the Executive Director chooses to do so, the Executive Director must deliver the rebuttal to the Commission and each Respondent named in the report no later than seven days prior to the date of the hearing. The rebuttal shall not exceed five pages excluding attachments.

(a) The Respondent knowingly and voluntarily waives any and all procedural rights under law and these Regulations;

(b) The Respondent understands and acknowledges that neither the settlement nor any terms in the stipulation are binding on any other agency or body, and does not preclude the Commission or its staff from referring the matter to, cooperating with, or assisting any other agency or body with regard to the matter, or any other matter related to it; and

(c) In the event the Commission does not approve the proposed settlement and, accordingly, a hearing before the Commission or a Hearing Panel on the Complaint becomes necessary, no Commissioner shall be disqualified because of prior consideration of the stipulation.

2. The stipulation shall set forth the pertinent facts and may include an agreement by Respondent as to any order issued or penalty imposed that anything by the Commission for a willful violation of the Sunshine Ordinance.

H. All written submissions to the Commission or any Hearing Panel shall be on one side of letter size pages with margins of at least one inch at the left, right, top and bottom of the page, double-spaced in no smaller than 12 point type. Each page and any attachments shall be consecutively numbered.

Comment: These "stipulation" provisions were moved to this part of Section V and generally follow the Staff's Draft.

V. HEARINGS: GENERAL

A. General Rules and Procedures

1. Public Hearing

The hearing shall be open to the public. All hearings on Complaints and Enforcement Actions shall be public hearings. The Commission may shall hold the hearing, or the Commission unless the hearing is on a Complaint, in which case, it may assign one of its members or a hearing officer a Hearing Panel to hold the hearing and submit a report and recommendation to the Commission. If the Commission holds the hearing, the Commission may assign an outside hearing officer as the presiding officer at the hearing, as set forth in section VI.E.3.

For Task Force referrals, the following parties have the right to appear and speak on his or her own behalf:

a. B. Except as otherwise provided herein, whenever the Commission assigns a Hearing Panel to hear a Complaint, the assigned Hearing Panel shall have the same authority, subject to the same restrictions, as the Commission.

Original

C. A Hearing Panel shall submit its report to the Commission, no later than 30 days after the date the Complaint hearing is concluded. The report shall include proposed findings of fact, proposed conclusions of law and any proposed orders or penalties. Upon receipt of the report, the Executive Director shall (a) deliver copies to the Complainant (and each Respondent and (b) schedule a hearing on the report at the next regular Commission meeting to be held which is more than 15 days after the date the report is received by the Commission.

i. D. At hearings on Enforcement Actions, the Complainant (as the real party in interest); and Respondent(s) shall have the right to appear and speak on his or her own behalf. In addition, other individuals may testify in support of either of them. At the conclusion of the testimony, public comment shall be had in accordance with the Commission policy.

E. At hearings on Complaints, the Executive Director, the Complainant and the Respondent(s):

ii. No other live testimony shall be permitted.

For complaints alleging a violation of the Sunshine Ordinance, the following parties each have the right to appear and speak on his or her own behalf. In addition, other individuals may testify in support of either the Complainant or Respondent(s). At the conclusion of the testimony, public comment shall be had with a maximum of five minutes per speaker and otherwise in accordance with the Commission policy.

Comment: The forgoing paragraphs open up the hearing to the public and the parties so that the concept of an open and full hearing, as is the practice of the SOTF, is emulated. The restrictions on speakers, including the public is not consistent with that concept.

Executive Director; and

i. F. For the purposes of these Regulations, a hearing concludes on the last date on which the Commission or the Hearing Panel hears argument or testimony in the proceeding and closes the hearing.

ii. Respondent(s).

iii. No other live testimony shall be permitted.

G. At or prior to a hearing on an Enforcement Action, no evidence presented, heard or considered in connection with (1.) its hearings on the original complaint or subsequent proceedings before the Task Force prior to the SOTF Referral or (2. Standard of Proof) the petition to the Supervisor of Records giving rise to its Order, as the case may be, shall be admissible or considered by the Commission, all of which Orders shall be deemed final and conclusive for all purposes hereunder. The Commission's sole determinations shall be the nature and scope of the penalties or other enforcement actions against the Respondent(s).

Comment: This new section reflects the principle that an "enforcement" hearing cannot be used to retry the underlying facts that lead to the Enforcement Order that has not been complied with. Staff's proposal to simply shift the burden of proof - see paragraph 3 below - reopens the entire process when the complaint was one for a non-willful violation. It is because of the respondent's inaction, after several hearings before the SOTF, that the case is being heard by the Commission.

The Commission may determine that a Respondent has committed a violation of the Sunshine Ordinance only if a person of ordinary caution and prudence would conclude, based on a preponderance of the evidence, that the Respondent has committed the violation.

Comment: This provision was eliminated, as the SOTF believes the Commissioners can determine for themselves what level of proof or standard is suitable.

H. No formal rules of evidence shall apply to testimony given at a hearing or to documents or records submitted as exhibits, but the Commission or a Hearing Panel may require that all testimony taken in a hearing be given under oath and any exhibits presented properly authenticated. When hearing a Complaint, the Commission or a Hearing Panel may examine *in camera* any public record that a Respondent asserts is wholly exempt from disclosure under a specifically identified exemption available under the Sunshine Ordinance.

Comment: The provision to apply the Administrative Procedure Act to hearings has been dropped. (See paragraph 4 below.) Since complainants are not expected to know those rules and the evidence is generally simple and not controverted, giving the Commission the right to decide how much of it should meet some evidentiary standard seemed sufficient.

3. Burden of Proof. A Respondent who fails to appear at a hearing on a Complaint shall be deemed to have willfully violated the Sunshine Ordinance as alleged in such Complaint.

Comment: This provision was moved from Section VI.A.7 below.

If the matter is a Task Force referral, the Respondent will bear the burden of proof to show that he or she did not violate the Sunshine Ordinance. In such cases, the Respondent must refute or rebut the evidence to show that he or she did not violate the Sunshine Ordinance.

VI. DETERMINATION OF WILLFUL VIOLATIONS.

If the matter is not a Task Force referral, the Executive Director bears the burden of proof and must meet the standard set forth in Section V.A.2. of these Regulations in order for the Commission to find that the Respondent has committed a violation of the Sunshine Ordinance.

A. When determining whether a Respondent's actions constitute a "willful violation" of the Sunshine Ordinance the Commission shall apply the California Penal Code definition of "willfully" currently California Penal Code section 7.

Comment: See Memorandum.

4. Rules of Evidence

All evidence admissible in an administrative proceeding governed by the California

Administrative Procedure Act shall be admissible in the hearing. The Executive Director or the original Complainant (for Task Force referrals) and each Respondent and shall have the right to introduce exhibits and to rebut any evidence presented.

Comment: See Comment to Section V.H. above.

5. — Exhibits

Where the Executive Director or the original Complainant (for Task Force referrals) and the Respondent stipulate to the admissibility of an exhibit, they shall so advise the Commission in advance of the hearing. For all other exhibits, either the Executive Director or the original Complainant (for Task Force referrals) or the Respondent may move to admit a particular exhibit at the hearing, and the non-moving party shall have an opportunity to object prior to the Commission ruling on the admission.

6. — Oral Argument

At the hearing, the Executive Director or original Complainant (for Task Force referrals) and each Respondent shall be allowed oral argument. The Commission, assigned Commissioner, or hearing officer shall determine the appropriate length for the arguments.

Comment: The rules for the conduct of the hearing can be adopted ad hoc by the Commission or in its By-laws, rather than being spelled out in detail in the Regulations, based on its experience hearing these cases.

7. — Failure to Appear

A Respondent who fails to appear may be deemed to have admitted the violation(s) brought against him or her.

B. Finding of Violation.

If the Commission conducts the ~~The Commission shall determine, no later than 30 days after (a) the date a hearing, the Commission shall determine, no later than 45 days after the date the hearing is concluded, whether the Respondent has committed a violation of the Sunshine Ordinance. If the Commission assigns one of its members or an outside hearing officer to conduct the hearing, the assigned member or hearing officer shall submit a report and recommendation to the Commission no later than 30 days after the date the hearing on a Complaint conducted by it is concluded, as described in section VI.E of these Regulations. Thereafter, the Commission shall determine, no later than 45 days after or (b) the date it receives the date-report and recommendation of the report and recommendation is delivered~~ Hearing Panel that conducted a hearing on a Complaint, whether the Respondent(s) has committed a willful violation of the Sunshine Ordinance.

C. ~~The votes~~ vote of at least three Commissioners ~~are~~ shall be required to find that a Respondent has ~~committed a violation of~~ willfully violated the Sunshine Ordinance. ~~The~~ A finding of a willful violation of the Sunshine Ordinance shall be supported by findings of fact and conclusions of law ~~and shall be based on~~. Prior to taking the entire record of the proceedings. ~~Each vote, a Commissioner who participates in~~ did not attend the hearing held by the decision ~~shall certify on~~ Commission or by the record ~~Hearing Panel shall certify~~ that he or she personally heard the testimony (either in person or by listening to a tape or recording of the proceeding) and reviewed the evidence, or otherwise reviewed the entire record of the proceedings, including an audio recording of the hearing.

C. ~~Administrative Orders and Penalties; Warning Letters.~~

VII. ADMINISTRATIVE ORDERS AND PENALTIES

1.A. ~~The votes~~ majority vote of at least three Commissioners ~~are~~ shall be required to ~~(a) dismiss a Complaint or (b) issue any order or impose orders and any penalties (1) for a willful violation of the Sunshine Ordinance.~~

~~or (2) To determine whether a violation) enforcing a SOTF Order of Determination or an Order of the Sunshine Ordinance is willful, the Commission shall consider all the relevant circumstances surrounding the case, including but not limited~~ Supervisor of Records.

B. ~~The Commission may issue an order to:~~

~~(a) whether the, and/or impose penalties on a Respondent complied with all aspects of the Sunshine Ordinance, but failed who willfully violated the Sunshine Ordinance or who is the subject of an Enforcement Action requiring such Respondent to (a) immediately cease and desist the willful violation or comply with the order, (b) cure and correct the willful violation through whatever action is necessary, (c) immediately comply within the appropriate time frame for good cause;~~

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

~~(c) whether with (1) the Complainant's request that was the subject of the Complaint or (2) the SOTF Order or the Supervisor of Records Order that was the Respondent consulted with counsel prior to committing subject of the alleged violation.~~

3. ~~If the Commission finds that Respondent committed a willful violation of SOTF Referral or the Enforcement Petition, as the Sunshine Ordinance, the Commission may issue orders and penalties requiring the Respondent to:~~

~~(a) cease and desist the violation;~~

(b) disclose any documents or records required by law; and/or

(e) ~~case may be and/or (d) as a penalty, pay a monetary penalty (out of non- City funds) to the general fund of the City within 30 days from the date of imposition an amount up to not less than five hundred (\$500.00) nor more than five thousand dollars (\$5,000) for each violation. The Respondent may not use City monies to pay such penalties.~~ willful violation or failure to comply with an SOTF Order of Determination or Supervisor of Records Order. In addition, the Commission may refer a Respondent who willfully violated the Sunshine Ordinance to the San Francisco District Attorney for possible criminal action.

4C. If the Commission finds that a Respondent who is an elected official or a department head committed a willful violation of willfully violated the Sunshine Ordinance, the Commission may also issue a finding of ~~find~~ official misconduct by such Respondent and so inform the Mayor or appointing authority.

5. ~~When deciding penalties, proceed in accordance with the applicable provisions of Article XV of the Commission shall consider all the relevant circumstances surrounding the case, including but not limited to: City Charter.~~

Comment: Most of these paragraphs have been edited for better understanding, with no significant changes in their substantive effect. The exception is the requirement in paragraph 5 to "consider all the relevant circumstances" which, with its subparagraphs, has been eliminated. See §V.

(a) ~~the severity of the violation;~~

VIII. MISCELLANEOUS PROVISIONS

(b) ~~the presence or absence of any intention to conceal, deceive, or mislead;~~

~~A. Once a Complaint is filed with the Commission or an Enforcement Action is received by the Commission, no Commissioner shall engage in communications of any kind outside of a Commission meeting or Hearing Panel hearing regarding the merits of the Complaint or the Enforcement except for procedural communications.~~

(c) ~~whether the violation was an isolated incident or part of a pattern;~~

(d) ~~whether the Respondent has a prior record of violations; and~~

(e) ~~the degree to which the Respondent cooperated with the investigation and demonstrated a willingness to remedy any violations.~~

6. ~~If the Commission finds that Respondent has violated the Sunshine Ordinance but has not committed B. All Complaints, investigative records of whatever nature or~~

description, as well as all records relating to Enforcement Actions, in whatever form, all information contained therein, including any work product (as defined in Code of Civil Procedure §2018.030), in the custody of the Commission and its staff, including internal notes taken by the Executive Director or any willful violation, the Commission may issue warning letters urging the Respondent to:

(a) cease staff member constitute public information and desist the violation; fully disclosable non-exempt public records, except and/or

(b) disclose solely to the extent disclosure thereof is specifically prohibited pursuant to any documents provision of the California Public Records Act or records required by of any other State law, provided that the specific statutory authority for such withholding is cited in writing in accordance with subdivision (b) of Section 67.27 of the Sunshine Ordinance.

Comment: See §V (5) of the Memorandum. The confidentiality provisions of the City Charter relied on by Staff in the draft – see the last deleted paragraph in deleted Section VI below – do not apply to open government cases “investigated” by the Commission or to any individual Respondent, who is required to be familiar with the Sunshine Ordinance provisions that broaden the public’s access to public records and meetings.

7. Unless otherwise ordered by the Commission, any penalties imposed by the Commission must be paid in full by the Respondent within 90 days of the Commission's decision

C. The Commission and individual Commissioners assigned to conduct hearings may administer oaths and affirmations.

D. ~~Finding of No Violation.~~ The Executive Director, the Complainant or any Respondent may request the continuance of the date of a scheduled hearing on a Complaint. The Respondent or the Complainant in an Enforcement Action may request the continuance of the date of a scheduled hearing on the Enforcement Action. The request shall be submitted to the Executive Director and copies provided to all other parties no later than 14 days before the date of the scheduled hearing. The Commission Chair or the Chair of the Hearing Panel, as the case may be, shall approve or deny a timely request within seven days of the submission of the request and, in addition, shall have the discretion to consider and rule on untimely requests for continuances.

If the Commission determines that there is insufficient evidence to establish that the Respondent has committed a violation of the Sunshine Ordinance, the Commission shall publicly announce this fact. The Commission's announcement may but need not include findings of law and fact. Thereafter, the Commission shall take no further action on the complaint. The Executive Director shall inform each Respondent and the Complainant or original Complainant (for Task Force referrals) of the Commission's determination.

The application of any of the confidentiality provisions of the San Francisco Charter, including but not limited to sections Appendix C, section C3.699-13, and Appendix F, sections F1.107, F1.110, and F1.111, unless such provision conflicts with an express non-confidentiality provision in California Government Code section 6250 et seq. (California Public Records Act) or section 54950 et seq. (Ralph M. Brown Act), is a defense against an alleged violation of the Sunshine Ordinance.

Comment: See above Comment and Memorandum.

VI. MISCELLANEOUS PROVISIONS

A. Ex Parte Communications.

Once a complaint is filed with the Commission or referred by the Task Force, no Commissioner shall engage in oral or written communications outside of a Commission meeting regarding the merits of an enforcement action with the Commission's staff, the Respondent, the Complainant, original Complainant (for Task Force referrals), any member of the Task Force or any person communicating on behalf of the Respondent, Complainant, original Complainant (for Task Force referrals) or any member of the Task Force except for communications, such as scheduling matters, generally committed between a court and a party appearing before that court.

B. Access to Complaints and Related Documents and Deliberations.

Complaints, investigative files and information contained therein shall not be disclosed except as necessary to the conduct of an investigation or as required by the California Public Records Act (Government Code section 6250, et seq.) or the San Francisco Sunshine Ordinance. In order to guarantee the integrity of the investigation, internal notes taken by the Executive Director or his or her staff regarding complaints shall not be disclosed until one of the following has occurred:

1. the Commission has accepted staff's dismissal recommendation;
2. the Commission has approved a stipulation, decision and order; or
3. the Commission has issued its final decision following the hearing.

C. Oaths and Affirmations.

The Commission, and individual Commissioners and hearing officers assigned to conduct hearings, may administer oaths and affirmations.

D. Selection of Designee by the Executive Director.

Whenever the Executive Director designates an individual other than a member of the Commission staff to perform a duty arising from the Charter or these Regulations, the

Executive Director shall notify the Commission of the designation no later than the next business day.

E. Powers and Duties of Individual Commissioners and Hearing Officers.

1. Unless otherwise provided, whenever the Commission assigns an individual Commissioner or hearing officer to hear any matter under these Regulations, the assigned Commissioner or hearing officer shall have the same authority, and be subject to the same restrictions, as the Commission.

2. When an individual Commissioner or a hearing officer is assigned to conduct a hearing under these Regulations, he or she shall submit a report and recommendation for decision by the Commission. The report and recommendation shall contain proposed findings of fact and conclusions of law. Copies of the report and recommendation shall be delivered to the Commission, Executive Director, each Respondent, and the original Complainant (for Task Force referrals) no later than 30 days after the date the hearing is concluded. Thereafter, the Executive Director shall calendar the matter for consideration at the next Commission meeting not less than 15 days after the date the report and recommendation is delivered to the Commission.

3. When the Commission sits as the hearing panel to hear a case, with an outside hearing officer presiding, the hearing officer shall rule on procedural matters and on the admission and exclusion of evidence only, and shall have no role in the decision on the merits.

F. Extensions of Time and Continuances.

The Executive Director or original Complainant (for Task Force referrals) or any Respondent may request the continuance of a hearing date. The requester must deliver the request to the Commission Chair or the individual Commissioner or hearing officer assigned to hold the hearing, and provide a copy of the request to all other parties no later than ten business days before the date of the hearing. The Commission Chair or the individual Commissioner or hearing officer assigned to hold the hearing shall have the discretion to consider untimely requests.

The Commission Chair or the individual Commissioner or hearing officer assigned to hold the hearing shall approve or deny the request within five business days of the submission of the request. The Commission Chair or the individual Commissioner or hearing officer assigned to hold the hearing may grant the request only upon a showing of good cause.

G. Recordings.

Every hearing shall be electronically recorded.

H. Place of Delivery.

1. Whenever these Regulations require delivery to the Commission, its members, or the Executive Director, delivery shall be effected at the Commission office.

2. Whenever these regulations require delivery to a Respondent, delivery shall be effective and sufficient if made by U.S. mail, personal delivery or any other means of delivery agreed upon by the parties under section II, subsection G, to:

a. If the Respondent is a City employee, to the employee's City office address or to the address listed with the (Controller/ Payroll) as the employee's current address.

b. If the Respondent is a former City employee, to the address listed with the City's retirement system.

c. If neither subsections (a) nor (b) are applicable, to an address reasonably calculated to give notice to and reach the Respondent.

3. Delivery is effective upon the date of delivery, not the date of receipt.

I. Page Limitations and Format Requirements.

Whenever these Regulations impose a page limitation, a "page" means one side of an 8½ inch by 11 inch page, with margins of at least one inch at the left, right, top and bottom of the page, typewritten and double spaced in no smaller than 12 point type. Each page and any attachments shall be consecutively numbered.

J. Conclusion of Hearing.

For the purposes of these Regulations, a hearing concludes on the last date on which the Commission hears argument or testimony in the proceeding.

VII. STIPULATED ORDERS

A. At any time after the Commission takes jurisdiction over a complaint, the Executive Director may enter into negotiations with Respondent for the purpose of resolving the factual and legal allegations in a complaint by way of a stipulation, decision and order. Any proposed stipulation, decision and order shall explicitly state that:

(1) the proposed stipulation, decision and order is subject to approval by the Commission;

(2) the Respondent knowingly and voluntarily waives any and all procedural rights under the law and these Regulations;

(3) the Respondent understands and acknowledges that the stipulation is not binding on any other agency, and does not preclude the Commission or its staff from referring the matter to, cooperating with, or assisting any other agency with regard to the matter, or any other matter related to it;

(4) the Respondent agrees that in the event the Commission refuses to approve the proposed stipulation, it shall become null and void; and

(5) in the event the Commission rejects the proposed stipulation and a full hearing before the Commission becomes necessary, no member of the Commission shall be disqualified because of prior consideration of the stipulation.

B. The stipulation shall set forth the pertinent facts and may include an agreement as to anything that could be ordered by the Commission under section V, subsection C of these Regulations.

C. Once the Executive Director enters into a stipulation with a Respondent, the Executive Director shall inform the Commission of this stipulation and shall place the matter on the agenda of the next Commission meeting occurring no sooner than ten days from the date the Executive Director informs the Commission of the stipulated agreement.

D. Stipulations must be approved by the Commission and, upon approval, must be announced publicly. The stipulated order shall have the full force of an order of the Commission.

IX SEVERABILITY

If any provision of these Regulations, or the application thereof to any person or circumstance is held invalid, the validity of the remainder of the Regulations and the applicability of such provisions to other persons and circumstances shall not be affected thereby.

E. Every hearing on a Complaint and Enforcement Action shall be electronically audio recorded and made available on the Commission's website within 48 hours after the hearing ends.

F. All notices and other communications hereunder (any of which is a "notice") to be effective shall be in writing. Notice shall be delivered by one or more of the following

means: (a) personally, including delivery by a recognized national overnight courier with a signed acknowledgement of receipt, (b) if mailed, by priority first class certified mail, return receipt requested, postage prepaid or (c) by confirmed facsimile, electronic or digital means other than email (any of which shall be deemed a "writing" for purposes hereof), in each case as follows:

1. To the Commission, any of the Commissioners or the Executive Director, at the Commission office.
 2. To a Respondent, (a) if the Respondent is then a City Official or other City employee, to the such Respondent's City office address, if any, and if none, to the address listed with the (Controller/ Payroll) as such Respondent's current address or (b) if the Respondent is a former City official or other employee, to the address listed for such Respondent in the City's retirement system or (c) if the Respondent is neither a current or former City official or other City employee, to such Respondent's last known residence address or an address that is reasonably believed to reach the Respondent.
 3. To a Complainant in a Complaint, to the address given in the Complaint for receipt of notices and other communications relating to the Complaint.
 4. To a Complainant in an Enforcement Action, to the address given in the original complaint filed with the Task Force or in the Petition filed with the Supervisor of Records, as the case may be.
- C. At the time a Complaint or Enforcement Action is filed with or received by the Executive Director, the address for receipt of notices of each of the affected parties shall be confirmed by the Executive Director. Any affected party to any Complaint or Enforcement Action may supplement or change the address for notice by giving notice conforming to the above to the other affected parties.
5. All notices shall be deemed delivered on the business day received, or on the business day received when received by confirmed facsimile. Any notice received after 5:00 P.M. on a business day shall be deemed received the next business day.