

Date: Feb. 8, 2011

Item No. 7

File No. _____

SUNSHINE ORDINANCE TASK FORCE

Compliance and Amendments Committee

AGENDA PACKET CONTENTS LIST*

- Ethics Commission proposed policy
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Completed by: Chris Rustom

Date: Feb 1, 2011

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

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

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

ATTACHMENT A

San Francisco
Ethics Commission



25 Van Ness Ave., Suite 220
San Francisco, CA 94102
Phone 252-3100 Fax 252-3112

ETHICS COMMISSION REGULATIONS FOR COMPLAINTS ALLEGING VIOLATIONS OF THE SUNSHINE ORDINANCE

Effective Date: _____, 2010

DS EDITS, NOVEMBER 2011

Main changes / questions as of 11/21

1. Replaces all "executive director" with "commission.

The problem with doing that is that the Ethics Commission only hears matters brought to it either by the SOTF (enforcement) or by the Executive Director (willful violation complaints filed directly with the EC). It has a "department" run by the ED that handles all the administrative and investigatory functions, so substituting the EC for ED simply doesn't work.

1-2. Deletes confidentiality provisions, replaces with compliance with SO and CPRA.

Not sure where these were in my draft. I thought I had eliminated them whenever appropriate. However, referring to the SO and the CPRA will open up questions for the ED or the EC to resolve. I don't think that is a good idea. I put the full disclosure language in VIII-A of my draft. It applies to any records of any kind in the EC's Staff's files.

1-3. Adds Commission hearings for all ED report recommendations, not just for violations.

This allows for full Commission consideration of all decisions.

Not sure exactly what the point is here. On SOTF referrals the ED makes no recommendations. On directly filed "Complaints" – which can only be for "willful violations", the ED has to do an investigation, etc, all as set out in IV of my draft. As for the EC consideration of all ED

decisions on all his recommendations (of "willful vs. "non-willful"). I also covered that in IV D and IV F of my draft.

1-4. Eliminates hearing panel procedure. Ask AG: necessary?

The Ethics draft provided that the EC could appoint either an Ethics Commissioner or an outside hearing officer to hear a Complaint proceeding, make a report, etc. My view, as drafted into my revision, is that the use of an "outside "hearing officer is not a good idea; that it would probably be OK if a Commissioner heard the matter, but three is probably preferred because (1) there will be the practical equivalent of a full EC hearing, but will facilitate prompt scheduling even if one or two of the Commissioners who are too busy to participate in a formal hearing – in addition to the regular EC business and (2) if the panel agrees on the result, it will probably mean that the full hearing may not even be necessary.

1-5. Probably the most sweeping change is deletion of the stipulated order procedure, formerly section VII. The thrust of our changes is to make the process of hearing Sunshine complaints a public one, involving as much as possible the members of the full Ethics Commission. This procedure allows for things to just be ignored.

Whether there should a procedure that allows the affected parties to resolve a Complaint for a willful violation and satisfies the complainant through a stipulation does raise the question of how much time and effort should be spent in a full blown hearing – which could end up as a "no violation" decision - in order to make the public and the city employees aware of the dangers of violating the Sunshine Ordinance. My revision (IV-G) does require that the full EC approve the stipulated settlement and does not relieve the respondent employee of all responsibility. The SOTF should decide whether it should stay or go out.

6. Section IV.A V.B and VLD – important revisions re SO and CPRA – defaulting toward, not away from, openness.

Much of these sections were revised or eliminated in my revision, so, I agree with your approach.

1-7. Allen – why only WILLFUL?

The EC does not have "original" jurisdiction to hear garden-variety complaints of violations of the open government laws. § 67.34 -- "Complaints involving allegations of willful violations of this ordinance, ... by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission "--, is the only section that refers to complaints to be filed with Ethics. See my other comments in ¶(1) of my October 26, 2010 Memo, copy attached, that went with my revised draft of the proposed Regs.

DRAFT

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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 only to complaints alleging violations of the Sunshine Ordinance and referrals from the Sunshine Ordinance Task Force. 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 or its delegee.

Who would be the "delegee" and what function would that person have under the Regs?

D. "Complaint" means a document filed with the Commission in any form of media, including any electronic format, alleging a willful violation of the Sunshine Ordinance.

My definition tracked §67.34, since only elected officials or department heads are subject to those complaints.

E. "Complainant" means a person or entity that files a complaint.

Do you mean the person who files a defined "Complaint" or something else? I also included an original complainant who filed before the SOTF because that person has to appear and otherwise be involved in the enforcement proceeding. The purpose of the definition is to make clear what it means in this document and to make the term consistent in its use.

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. "Order of Determination" means an Order of Determination issued by the Task Force to a Respondent requiring compliance with a provision of the Sunshine Ordinance, finding a violation of the Sunshine Ordinance and requiring the Respondent to correct the violation.

By eliminating the definitions of a "Supervisor of Records Order" and then dropping that concept from the Regs entirely, you created a "hole" in the enforcement process that springs

from the Sunshine Ordinance. See ¶(6) of my Memorandum.

H. "Referral" means a referral by the Task Force to the Commission for enforcement of its Order and/or penalties from the Task Force to the Commission for a Respondent's non-compliance with an its Order of Determination.

Eliminating the definitions of "Enforcement Action", "Enforcement Petition", widens the hole that is created when the Supervisor of Record's Order that is not enforced.

I. "Respondent" means a person who is either (a) alleged or identified in a complaint Complaint to have willfully violated the Sunshine Ordinance or (b) identified in the Order of Determination in a Referral, as applicable. [This is a variation on my redraft of this definition.]

As noted previously, wherever the word "Complaint" or for that matter, any other defined term is used, is used it should be capitalized, as it is a defined term.

J. "Sunshine Ordinance" means San Francisco Administrative Code section 67.1, et seq.

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

L. "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.

Frankly, I don't see the point in accepting a definition- of "willful violation" that Mr. St. Croix and his cohorts dreamt up, when, as noted in my Memorandum ¶ (3), there is a more than adequate definition in the Penal Code—no doubt with cases construing it. I covered that in VI-A of my revision. I know Rick wanted to add the Brown Act and/or CPRA, but I don't see the point of doing that if you accept my suggestion to use the statutory definition.

III. COMPLAINTS ALLEGING VIOLATIONS OF THE SUNSHINE ORDINANCE

COMPLAINTS/ SOTF REFERRALS

A. Any person or entity may file a ~~complaint~~ Complaint with the Commission. Each Complaint shall be administered in accordance with Section [REDACTED] 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 Commission receives a referral from the Task Force, the Commission shall immediately schedule a hearing at its next regular meeting. The Commission shall further give written notice to each Respondent and the original Complainant (real party in interest) of the

date, time and location of the hearing, at least 15 days in advance of the hearing date. The Commission 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.

In my revision I added this ¶ C. to allow for the periods stated in the Sunshine Ordinance to elapse after the required notice to the DA and CA Attorney General expires:

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. INVESTIGATIONS; REPORT AND RECOMMENDATION

A. **Factual Investigation.** The Commission-Executive Director shall investigate each Complaint. The investigation shall include, but shall not be limited to, -interviews of the Complainant(s) [why plural?] and Respondent(s) [why plural?] and any witnesses, and the review of documentary and other evidence.

Why not add to that sentence, as I did, "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" Plus, I would add "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." I think the latter point is very important, given Mr. St. Croix's history of prevarication.

-The investigation shall be completed no later than 60 days after the Complaint is filed. The investigation shall be conducted in accordance with the Sunshine Ordinance and shall not conflict with the California Public Records Act, California Government Code section 6250 et seq.

The conduct of investigations is not covered by the Sunshine Ordinance and the investigation cannot "conflict" with the CPRA, a public records access law. Those laws only cover the records generated in the investigation.

Any records resulting from the investigation shall be made public in accordance with the Sunshine Ordinance and the California Public Records Act, California Government Code section 6250 et seq.

-You already have my comments on this sentence. It could be totally straightforward as I proposed in VIII-B of my draft.

B. **Report of Investigation.**

From this Section 1 and continuing, I think it would be useful if you considered the ways in which I approached what would go into the report. -- that would be in IV- B through IV -F. I believe that St. Croix's ability to be creative should be restricted to the fullest extent possible. You should also make sure that each of these sections relate only to "Complaints" dealing with "willful violations."

1. After the Commission has completed its investigation, the Commission shall prepare a written report summarizing its factual and legal findings. The report shall contain a summary of the legal provisions cited by the Complaint and the evidence gathered through the investigation. In the report, the Commission 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.

[Why limit the report length? It seems to me that if an official or department head has his job on the line, there should be as complete and full report as the situation demands.]

I was wondering why you left out a provision I added that seemed to me to be pretty important -- the one set out in IV-C of my revision -- that I thought would help the Commissioners make an informed decision reflecting the positions of the real parties --in-interest.

2. The report shall also include the Commission's recommendation, which shall be one of the following:

- a. **Finding of Violation of Sunshine Ordinance and Penalties.** If the report recommends a finding of violation and penalties, the Commission shall schedule a hearing pursuant to Section IV.C. of these Regulations.
- b. **Finding of Violation of Sunshine Ordinance and Proposed Stipulation, Decision and Order.** If the report recommends a finding of violation and settlement, the recommendation and report shall be calendared for consideration by the full Commission.

Finding of No Violation of Sunshine Ordinance and Dismissal. If the report recommends a finding of no violation and dismissal, the recommendation and report shall be calendared for consideration by the full Commission.

C. Delivery of Report and Notice of Hearing. When a hearing is scheduled pursuant to section IV.B., the Commission 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 45 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.

D. Response to the Report.

1. When a hearing is scheduled, each Respondent may submit a written response to the report. The response shall not exceed 10 pages excluding attachments.
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 Commission. The Respondent must deliver one copy of the response to every other Respondent named in the report.

E. Rebuttal.

1. The Commission may submit a written rebuttal to any response. If the Commission chooses to do so, the Commission 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.

V. HEARING

Here too, I think that my somewhat more structured approach as to how the hearings are conducted has the benefit of distinguishing between the hearings on Enforcement Actions and those on Complaints. That is really important. If you review what I have done when the Enforcement Action is heard, you will see that I have tried to completely shut the door to any retrial of the original case heard by the SOTF. That is why there should not be a "burden of proof" hearing, but only a penalty phase hearing. See V-G of my draft. This was discussed at an Ethics meeting and at least one of the C & A meetings and I took it up with one of the Commissioners—Susan Harriman—who, for better or worse, resigned a couple of months ago.

I also wonder how far we want to push a set of rules on Complaints for "willful violations" since the report and hearing issues really belong to the EC. The SOTF does not hear those cases, even though it often—wrongly – asserts that the refusal to comply with an Order is a "willful violation". It may be, but that has nothing to do with the enforcement process before the EC.

A. General Rules and Procedures.

1. Public Hearing

The hearing shall be open to the public. The Complainant(s) (as the real party interest) and Respondent(s) shall have the right to appear. At the conclusion of the testimony, public comment shall be heard. In the case of a willful violation hearing, I understood that some members thought that the Respondent should have the right to counsel.

2. Standard of Proof

The Commission may determine that a Respondent willfully violated the Sunshine Ordinance only if a person of ordinary caution and prudence would so conclude, based on a preponderance of the evidence. Really up to the EC to decide what standard to adopt.

3. Burden of Proof

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. See prior comment.

If the matter is not a Task Force referral, the Commission 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 willfully violated the Sunshine Ordinance. Really up to the Commission to decide, so do we want to agree or disagree?

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 Commission or the original Complainant (for Task Force referrals) and each Respondent shall have the right to introduce exhibits and to rebut any evidence presented. Requiring that the APA be followed really means that a lawyer is needed by the Respondent. Why is that necessary in an enforcement proceeding?

6. Oral Argument

At the hearing on a Complaint, the Commission – why not the complainant as well - or original Complainant (for Task Force referrals) and each Respondent shall be allowed oral argument. The Commission shall determine the appropriate length for the arguments. General public comment shall be permitted. The Commission shall determine the appropriate length for the arguments.

7. Failure to Appear

A Respondent who fails to appear may be deemed to have admitted the (wilfull?) violation(s) brought against him or her. Is this in a Complaint case only?

B. Finding of Violation.

The Commission shall determine, no later than 30 days after the date the hearing is concluded, whether the Respondent has willfully violated the Sunshine Ordinance.

The votes of at least three Commissioners are required to find that a Respondent has willfully violated the Sunshine Ordinance. The 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 the entire

record of the proceedings. Each Commissioner who participates in the decision shall certify on the record 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.

C. Administrative Orders and Penalties; Warning Letters.

I believe strongly that there should be a bright line distinction between an enforcement case and a finding of a willful violation by an official or department head throughout the Regs. Here too, I tried to set out the types and nature of the EC Orders and penalties. There is no need for me to give you specific comments. If you follow what I did I think you should be able to figure out where there are differences in what you did to the EC Staff's draft and what I did.

1. The votes of at least three Commissioners are required to dismiss a complaint or issue any order or impose penalties for a violation of the Sunshine Ordinance. Just an example of the confusion between an enforcement case and a willful violation case.
2. If the Commission finds that Respondent committed a willful violation of the Sunshine Ordinance, the Commission may issue orders and penalties requiring the Respondent to:
 - (a) immediately cease and desist the violation or comply with the order;
 - (b) cure and correct the willful violation through whatever action is necessary
 - (b) disclose any documents or records required by law; and/or
 - (c) pay a monetary penalty to the general fund of the City in an amount not less than five hundred (\$500) and not more than five thousand dollars (\$5,000) for each violation. The Respondent may not use City monies to pay such penalties.
4. If the Commission finds that an elected official or a department head willfully violated the Sunshine Ordinance, the Commission may find official misconduct and proceed in accordance with the applicable provisions of Article XV of the City Charter.
6. If the Commission finds that Respondent – in a an enforcement case? Not possible. – has violated the Sunshine Ordinance but has not committed any willful violation, the Commission may issue warning letters urging the Respondent to:
 - (a) cease and desist the violation; and/or
 - (b) disclose any documents or records required by law.
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.

D. Finding of No Violation.

If the Commission determines that there is insufficient evidence to establish that the Respondent has committed a willful violation of the Sunshine Ordinance, the Commission shall inform each Respondent and the Complainant or original Complainant (for Task Force referrals) of the Commission's determination.

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 shall not be a defense against an alleged violation of the Sunshine Ordinance, where such confidentiality provisions conflict with the Sunshine Ordinance, the California Public Records Act, Government Code section 6250 et seq. or any other applicable open-government laws.

Why should this -provision even in the Regs? The Ethics staff wanted to make it a defense, so it should be dropped. But this provision simply confuses the issue of a "willful" violation, as the issue of a "defense" cannot arise in a Referral.

VI. MISCELLANEOUS PROVISIONS

Looking at what you retained in this Section VI from the Ethics draft and what I had inserted in my draft, it is not apparent why you decided not to include any of mine. Some explanation would be helpful at this point.

A. Ex Parte Communications.

Once a complaint is filed with the Commission or referred by the Task Force, -- confusion here again between a "Complaint" and the original complaint filed with the SOTF -- the Task Force does not "refer complaints" -- 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 be disclosed as required by the California Public Records Act (Government Code section 6250, et seq.) or the San Francisco Sunshine Ordinance.

C. Oaths and Affirmations.

The Commission may administer oaths and affirmations.

D. Extensions of Time and Continuances.

The Commission 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 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.

E. Recordings

Every hearing shall be electronically audio recorded and made available on the Commissions' website within 48 hours after the hearing ends.

F. Place of Delivery.

1. Whenever these Regulations require delivery to the Commission or its members, 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.
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.

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.

MEMORANDUM TO SOTF C&A COMMITTEE

RE: SOTF REVISION OF PROPOSED SUNSHINE REGS.

Attached is a draft revision of the proposed Ethics Commission Regulations dealing with the enforcement of violations of the Sunshine Ordinance. Because of the basic restructuring and elimination of many provisions in the Ethics draft, any attempt to mark the changes from the Ethics draft would have resulted in an almost unreadable document.

When reviewing the revision, please note the following:

(1) All references to complaints, investigations, hearings and such relating to simple (i.e. not willful) violations of the Sunshine Ordinance (the "SO") were eliminated because:

(a) It became clear that Ethics has no jurisdiction under the SO to hear original complaints other than those for willful violations and then only by "elected officials or department heads of the City and County of San Francisco" per § 67.34 -- "Complaints involving allegations of willful violations of this ordinance, ... by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission"--, the only section that refers to complaints to be filed with Ethics.

(b) From a policy point of view (and quite possibly based a statutory construction analysis), the SOTF is the only body capable of handling simple complaints -- it has a ten year history and it is THE body named in the SO to handle these disputes. Why would Ethics want to get all tangled up, for example, in whether a particular record is exempt or not. The hearing procedures it likes are very formal and carefully spelled out -- creating major gauntlets for any non-lawyer complainant to overcome.

(c) From a practical point of view, Ethics proposal for concurrent jurisdiction on simple complaints creates some serious problems in the unlikely instance that some complainant would file with both the SOTF and Ethics. The Ethics ED can handle the complaint under its Section IV -- a procedure that is directly opposite that of the SOTF -- such as the ED's authority to investigate, etc. and come to the directly opposite conclusion from that of the SOTF, which would have implications when the SOTF tries to get its Order enforced. The complainant is not even the right to speak at the hearing. Moreover, Ethics §IV.C. gives the Respondent the right to be represented by counsel at the hearing -- and we know who that would be -- directly contrary to the SOTF hearing procedure and §67.21(i) of the Sunshine Ordinance.

(2) All references to the use of "hearing officers" and such have been eliminated, given the importance of either an enforcement or willful violation hearing and the need for the Commission to be directly involved. The implications for the Respondent are quite dramatic. For that reason, the Commission or a panel of three Commissioners should hear these cases. The 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.

(3) Ethics staff's proposal to define "willfully" and to provide excuses for violations through "exculpatory information" and "mitigating information" have been eliminated in favor of the CA penal code statutory definition of "willfully."

(4) All restrictions on 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 would be unacceptable as a matter of fairness even if "legal".

(5) Ethics' proposal shifting the 'burden of proof' in enforcement hearings, effectively allowing the respondent to retry the matter, has been eliminated. A hearing on enforcement cases is now limited to a "penalty" phase hearing. This should be a simple summary hearing with as no new "evidence" on the original violation or the refusal to comply, allowing only evidence that will remedy the original violation or provide some reason not to penalize or to minimize the penalty. A provision prohibits introduction of any evidence that was presented to the SOTF or the Supervisor of Records prior to issuance of the order.

(6) Because the Ethics Commission was wrestling with how to implement section 67.34(d) – **"Any person may institute proceedings for enforcement and penalties under this act ... before the Ethics Commission** if enforcement action is not taken by a city or state official 40 days after a complaint is filed " – the question of what exactly would be enforced became an issue. The draft makes it clear – through the definitions and the text – it is either an SOTF order not referred to Ethics or an order issued by the Supervisor of Records.

(7) The provision in the Ethics draft that sought to make "confidentiality" of a public record under the City Charter but which would not be exempt under the SO, a complete defense to any claimed violation has been eliminated. This will set up "trumping" issue of the Charter vs. the SO. In addition, the provision to keep confidential some of Ethics' investigative records relating to these open government matters has been eliminated. There is neither a legal basis for doing so nor any policy supporting it in an open government setting, as these cases are.

(8) All the provisions that go to the Ethics Commission's decision making, such "circumstances surrounding the case" spelled out in the Ethics draft have been eliminated. The Commission presently has five members, four of whom are lawyers. No doubt they can figure out what the "circumstances" should be on their own.

ATTACHMENT A

San Francisco
Ethics Commission



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San Francisco, CA 94102
Phone 252-3100 Fax 252-3112

SOTF Proposed Revised Version

[Date]

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

Effective Date: _____ 2010

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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) 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.
- 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 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 §§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.

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A. Any person or entity may file a Complaint with the Commission. Each Complaint shall be administered in accordance with Section [--] 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. The SOTF Referral and Enforcement Petition shall otherwise be governed by Section [--] of these Regulations.

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 pursuant to Section [---] of these Regulations.

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 in accordance with to Section [---] of these Regulations. 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 the majority vote, shall either: (a) enter an order of 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 in accordance Section [--] of these Regulations. 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 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.

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 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 majority 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 (\$500.00) nor more than five thousand dollars (\$5,000) for each willful violation or failure to comply with an SOTF Order of Determination or Supervisor of Records Order.

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 contain fully disclosable public information and accordingly constitute fully disclosable non-exempt public records.

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 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.

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