

Date: May 10, 2011

Item No. 3

File No. _____

SUNSHINE ORDINANCE TASK FORCE

Compliance and Amendments Committee

AGENDA PACKET CONTENTS LIST*

EC's proposal on Sunshine related complaints

Completed by: Chris Rustom

Date: May 6, 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



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DS EDITS – 2/20/2011

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

Effective Date: _____, 20102011

DS NOTES / EDITS:

1. Generally. This draft attempts to reconcile Allen Grossman's draft of October 2010, my draft of November 2010, and the comments of the Compliance and Amendments Committee, who met and discussed these issues twice between November 2010 and February 2011.

2. What is Different. The draft restores much of the excellent work Mr. Grossman did in his original draft, but which I eliminated in my November 2010 draft. There are a few things I have not retained from Mr. Grossman's suggestions, including his provisions on what Ethics Commission records are public, discussed immediately below. I do not mean to disrespect Mr. Grossman's meticulous and creative approach – nor the extensive work he did. It merely reflects what I think should be a more minimalist approach.

Mr. Grossman and I have discussed the way Ethics Commission's regulations should define the openness of the body's investigative records. We disagree on this. I think the committee should discuss this issue, and our disagreement, as a first priority. Here's my attempt to describe our differences. Mr. Grossman's approach is very robust and aggressive – his definition essentially says that all investigative records are public, period. My definition is more cautious or measured (however you want to put it). My definition basically says that the investigatory files are public according to public records laws. My reasoning is that the Ethics Commission can't override state law on what constitutes a public record. It can't, for example, make public attorney-client privileged documents or attorney work product. In my view, there can be no harm, for sunshine purposes, to simply say: everything in the Commission's investigatory files is public according to state law. Mr. Grossman's

view, on the other hand, is that the commission's regulations should not leave it to the Executive Director's discretion to guess what might be nondisclosable under state law. Since we have no power to actually pass these regulations, I think we should give the Ethics Commission a draft that is more measured. In my opinion, it is just not credible (or enforceable) to say in the Ethics Commission regulations that ALL paper in their file is public, necessarily and regardless of what state (or local) law might say.

Our differing definitions. Mr. Grossman's draft combated the Ethics Commission's draft's very broad assertion of secrecy by saying: "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 by the Code of Civil Procedure . . .), 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."

This says, in essence: "Everything the Commission touches in its investigation is a public record." It think we can accomplish almost all of this by simply incorporating existing sunshine law into the regulations. (I also don't think that the Ethics Commission, comprised largely of lawyers, is going to go for a regulation which explicitly says that all attorney work product or attorney-client privileged information is discloseable – no matter how sunshine-friendly they are, they're still lawyers.) So my suggestion, as you will see below in Section IV.B and VI.B., is to say: "All Complaints, investigative records of whatever nature or description, and all information contained therein, including any work product, shall be public records in accordance with the Sunshine Ordinance, the California Public Records Act and the United States Constitution."

In my view, our primary goal here should be to prevent the Ethics Commission from passing regulations which are directly antithetical to the goals of sunshine. Their current draft is that. It is a bad set of regulations (although better than what they were doing before). The attached draft attempts, in minimalist fashion, to remedy the most egregious oversights.

3. **What is New.** This draft attempts to create something of a two-track process. On one track are SOTF Referrals. On the other are Complaints. See Section III – V, below. Section IV, on investigations, applies ONLY to Complaints, not to SOTF Referrals. What our draft regulations propose is that the Ethics Commission do NO independent investigating of SOTF Referrals. As for Complaints, however, this draft proposes we change almost nothing about how the Commission investigates those. This is in keeping with what was (I think) the consensus of the Compliance and Amendments Committee (and Mr. Grossman) at our last meeting. Let them have their procedures for Complaints, the thinking went. We can't control that anyway.

As for SOTF Referrals, these regulations envision an extremely limited role for the Ethics Commission. There are no procedures for investigations of SOTF Referrals because, as this draft now notes, "[T]he Commission's sole determinations at a hearing on an SOTF Referral shall be the nature and scope of the penalties or other enforcement actions against the Respondent(s)." Section V.B.4. This is Mr. Grossman's language. I just made it more prominent in that section.

4. **Disclaimer.** I am sure I have left some thing(s) out. I re-read Mr. Grossman's notes and memos, and my notes from the Compliance and Amendments Committee meeting, but I am sure I

neglected some points, maybe important ones. Let me know, and let's try to make these regs Sunshine friendly and effective. Please forgive any typos or egregious errors. I've done my best to proofread this, but I have never claimed to be a good, or even competent, copy editor.



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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.
- D. "Complaint" means a ~~written document~~ filed with the Commission in any form of media, including any electronic format, alleging a willful violation of the Sunshine Ordinance filed with the Commission by an elected official or department head of the City and County of San Francisco. "Complaint" does not refer to SOTF Referrals, defined below.
- E. "Complainant" means a person or entity that files a ~~complaint~~ Complaint.
- 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.~~
- G. "Enforcement Action" means an 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 an SOTF Referral or (2) a Supervisor of Records Order that has not been complied with by the Respondent to whom issued.
- H.I. ~~"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. "Mitigating information" means information tending to excuse or reduce the culpability of the Respondent's conduct.~~

~~K. "J. "SOTF Order of Determination" means a final recommendation an Order issued by the Task Force concerning a violation of the Sunshine Ordinance. 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 and requiring the Respondent to correct the violation.~~

~~MK. "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.~~

~~L. "Respondent" means a person who is alleged or identified in a complaint to have committed a violation of the Sunshine Ordinance.~~

~~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.~~

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

~~N. "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.~~

~~PN. "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./ SOTF REFERRALS / ENFORCEMENT PETITIONS

A. Any person or entity may file a Complaint with the Commission. Each Complaint shall be heard and administred 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.

~~A. Any person, including Commission staff, may file a complaint with the Commission or the Task Force alleging a violation of the Sunshine Ordinance. When the Executive Director receives 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 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.

When the Executive Director receives a referral from the Task Force, the Executive Director shall B. When the Executive Director receives an SOTF Referral or an Enforcement Petition, the Executive Director shall (1) immediately schedule a hearing at the next regular meeting of the Commission to be held more than 21 days after receipt thereof, provided that: and (2) the Executive Director issue a written give notice to each Respondent and the original Complainant (as the real party in interest) 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.

C. No enforcement action shall be taken on an SOTF Referral or an Enforcement Petition 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 an Enforcement Petition.

CD. 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.

IV. COMPLAINT INVESTIGATIONS; REPORT AND RECOMMENDATION

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

B. Report of Investigation.

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

2. The report shall also include the Executive Director's recommendation, which shall be comprised of one of the following: a) a finding that Respondent violated the Sunshine Ordinance and proposed penalties; b) a finding that Respondent violated the Sunshine Ordinance and a proposed stipulation, decision and order; or c) a finding of no violation of the Sunshine Ordinance and dismissal. The report shall be delivered to the Commission:

- a. Finding of Violation 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.

~~b. **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 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.~~

~~A Commissioner's request to calendar the matter for consideration 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.~~

~~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.~~

~~c. **Finding of No Violation of Sunshine Ordinance and Dismissal.** If the report recommends a finding of no violation and dismissal, the Executive Director shall so inform the Commission. Thereafter, any two or more Commissioners may cause 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 dismissal recommendation. During the meeting at which the Commission considers the dismissal recommendation, 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 dismissal recommendation; 2) reject the dismissal recommendation and instruct staff to seek a settlement; or 3) reject the dismissal recommendation and instruct staff to schedule a hearing pursuant to Section IV.C. of these Regulations.~~

~~A Commissioner's request to calendar the matter for consideration 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.~~

~~If two or more members of the Commission do not request the matter to be calendared, the Executive Director shall take no further action except that he or she~~

shall inform the Complainant and the Respondent of the finding of no violation and dismissal.

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 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. 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.

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.

V. — HEARING

A. Scope. This section shall apply only to Complaints, not to SOTF Referrals.

[LEAVE TEXT AS IT WAS IN EC RECOMMENDATIONS, OR DELETE ALL AND INSERT RECOMMENDATIONS HERE OR IN INTRO MEMO?]

V. HEARINGS

A. General Rules and Procedures -- Complaints.

1. Public Hearing

[LEAVE TEXT AS EC HAD IT? OR DELETE ENTIRELY AND ADD OUR COMMENTS HERE?]

B. General Rules and Procedures – SOTF Referrals / Enforcement Petitions

~~The hearing~~ 1. All hearings on SOTF Referrals and Enforcement Petitions shall be open to the public. The Commission may shall hold the hearing, or the Commission may assign one of its members or a hearing officer 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.

~~a. For Task Force referrals, the following parties~~ 2. 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 Commission policy.

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

4. The Commission's sole determinations at a hearing on an SOTF Referral or Enforcement Petitions shall be the nature and scope of the penalties or other enforcement actions against the Respondent(s). At or prior to a hearing on an SOTF Referral or Enforcement Petition, 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.

5. No formal rules of evidence shall apply to testimony given at a hearing or to documents or records submitted as exhibits, but the Commission may require that all testimony taken in a hearing be given under oath and any exhibits presented properly authenticated.

- ~~i. Original Complainant (real party in interest); and~~
- ~~ii. Respondent(s).~~
- ~~iii. No other live testimony shall be permitted.~~

~~b. For complaints alleging a violation of the Sunshine Ordinance, the following parties have the right to appear and speak on his or her own behalf:~~

- ~~i. Executive Director; and~~
- ~~ii. Respondent(s).~~
- ~~iii. No other live testimony shall be permitted.~~

~~2. Standard of Proof~~

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.

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.

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.

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 shall have the right to introduce exhibits and to rebut any evidence presented.

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.

7. — Failure to Appear

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

BC. Finding of Violation.

If the Commission conducts the hearing, the ~~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 is concluded, as described in section VI.E of these Regulations. Thereafter, the Commission shall determine, no later than 45 days after the date the report and recommendation is delivered, whether the Respondent has committed a violation of the Sunshine Ordinance.~~

The votes of at least three Commissioners are required to find that a Respondent has committed a violation of the Sunshine Ordinance. The finding of a 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.

1. The votes of at least three Commissioners are required to impose orders and penalties for a violation of the Sunshine Ordinance.

2. 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 for good cause;

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

(c) whether the Respondent consulted with counsel prior to committing the alleged violation.

3. 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;

(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 up to not less than five hundred dollars (\$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 committed a willful violation of the Sunshine Ordinance, the Commission may also issue a finding of official misconduct and so inform the Mayor or appointing authority proceed in accordance with the applicable provisions of Article XV of the City Charter.

5. 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;
- (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 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 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.

VI. MISCELLANEOUS PROVISIONS

A. Ex Parte Communications.

Once a ~~complaint~~ Complaint is filed with the Commission or referred ~~an SOTF Referral is received by the Task Force Commission~~, no Commissioner shall engage in oral or written communications of any kind 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. the Complaint or SOTF Referral.

B. Public Records.

All Complaints, investigative records of whatever nature or description, and all information contained therein, including any work product, shall be public records in accordance with the Sunshine Ordinance, the California Public Records Act and the United States Constitution.

BC. Access to Complaints and Related Documents and Deliberations.

1. 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 and the United States Constitution. 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.~~

CD. 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.~~

~~(a) 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.~~

GE. Recordings.

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

HF. 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.

~~(i) 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 at 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.

Comparison Details	
Title	pdfDocs compareDocs Comparison Results
Date & Time	2/28/2011 8:36:26 AM
Comparison Time	12.13 seconds
compareDocs version	v3.3.2.63

Sources	
Original Document	[#403055844] [v1] Ethics Sunshine-Regs (original).doc
Modified Document	[#403317032] [v2] DS Draft 2 - Ethics Sunshine Regs (clean copy).doc

Comparison Statistics	
Insertions	47
Deletions	41
Changes	26
Moves	10
TOTAL CHANGES	124

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Name	Standard
<u>Insertions</u>	
Deletions	
<u>Moves / Moves</u>	
Inserted cells	
Deleted cells	
Formatting	Color only.
Changed lines	Mark left border.
Comments color	ByAuthor
Balloons	False

compareDocs Settings Used	Category	Option Selected
Open Comparison Report after Saving	General	Always
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Character Level	Word	False
Include Headers / Footers	Word	True
Include Footnotes / Endnotes	Word	True
Include List Numbers	Word	True
Include Tables	Word	True
Include Field Codes	Word	False
Include Moves	Word	True
Show Track Changes Toolbar	Word	False
Show Reviewing Pane	Word	False
Update Automatic Links at Open	Word	False
Summary Report	Word	End
Include Change Detail Report	Word	End
Document View	Word	Print
Remove Personal Information	Word	False

ATTACHMENT A

San Francisco
Ethics Commission



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DS EDITS – 2/20/2011

ETHICS COMMISSION REGULATIONS FOR ENFORCEMENT OF THE SUNSHINE ORDINANCE

Effective Date: _____, 2011

DS NOTES / EDITS:

1. **Generally.** This draft attempts to reconcile Allen Grossman's draft of October 2010, my draft of November 2010, and the comments of the Compliance and Amendments Committee, who met and discussed these issues twice between November 2010 and February 2011.
2. **What is Different.** The draft restores much of the excellent work Mr. Grossman did in his original draft, but which I eliminated in my November 2010 draft. There are a few things I have not retained from Mr. Grossman's suggestions, including his provisions on what Ethics Commission records are public, discussed immediately below. I do not mean to disrespect Mr. Grossman's meticulous and creative approach – nor the extensive work he did. It merely reflects what I think should be a more minimalist approach.

Mr. Grossman and I have discussed the way Ethics Commission's regulations should define the openness of the body's investigative records. We disagree on this. I think the committee should discuss this issue, and our disagreement, as a first priority. Here's my attempt to describe our differences. Mr. Grossman's approach is very robust and aggressive – his definition essentially says that all investigative records are public, period. My definition is more cautious or measured (however you want to put it). My definition basically says that the investigatory files are public according to public records laws. My reasoning is that the Ethics Commission can't override state law on what constitutes a public record. It can't, for example, make public attorney-client privileged documents or attorney work product. In my view, there can be no harm, for sunshine purposes, to simply say: everything in the Commission's investigatory files is public according to state law. Mr. Grossman's view, on the other hand, is that the commission's regulations should not leave it to the Executive Director's discretion to guess what might be nondisclosable under state law. Since we have no power

to actually pass these regulations, I think we should give the Ethics Commission a draft that is more measured. In my opinion, it is just not credible (or enforceable) to say in the Ethics Commission regulations that ALL paper in their file is public, necessarily and regardless of what state (or local) law might say.

Our differing definitions. Mr. Grossman's draft combated the Ethics Commission's draft's very broad assertion of secrecy by saying: "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 by the Code of Civil Procedure . . .), 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."

This says, in essence: "Everything the Commission touches in its investigation is a public record." It think we can accomplish almost all of this by simply incorporating existing sunshine law into the regulations. (I also don't think that the Ethics Commission, comprised largely of lawyers, is going to go for a regulation which explicitly says that all attorney work product or attorney-client privileged information is discloseable – no matter how sunshine-friendly they are, they're still lawyers.) So my suggestion, as you will see below in Section IV.B and VI.B., is to say: "All Complaints, investigative records of whatever nature or description, and all information contained therein, including any work product, shall be public records in accordance with the Sunshine Ordinance, the California Public Records Act and the United States Constitution."

In my view, our primary goal here should be to prevent the Ethics Commission from passing regulations which are directly antithetical to the goals of sunshine. Their current draft is that. It is a bad set of regulations (although better than what they were doing before). The attached draft attempts, in minimalist fashion, to remedy the most egregious oversights.

3. **What is New.** This draft attempts to create something of a two-track process. On one track are SOTF Referrals. On the other are Complaints. See Section III – V, below. Section IV, on investigations, applies ONLY to Complaints, not to SOTF Referrals. What our draft regulations propose is that the Ethics Commission do NO independent investigating of SOTF Referrals. As for Complaints, however, this draft proposes we change almost nothing about how the Commission investigates those. This is in keeping with what was (I think) the consensus of the Compliance and Amendments Committee (and Mr. Grossman) at our last meeting. Let them have their procedures for Complaints, the thinking went. We can't control that anyway.

As for SOTF Referrals, these regulations envision an extremely limited role for the Ethics Commission. There are no procedures for investigations of SOTF Referrals because, as this draft now notes, "[T]he Commission's sole determinations at a hearing on an SOTF Referral shall be the nature and scope of the penalties or other enforcement actions against the Respondent(s)." Section V.B.4. This is Mr. Grossman's language. I just made it more prominent in that section.

4. **Disclaimer.** I am sure I have left some thing(s) out. I re-read Mr. Grossman's notes and memos, and my notes from the Compliance and Amendments Committee meeting, but I am sure I neglected some points, maybe important ones. Let me know, and let's try to make these regs Sunshine friendly and effective. Please forgive any typos or egregious errors. I've done my best to proofread this, but I have never claimed to be a good, or even competent, copy editor.

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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.
- 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 by an elected official or department head of the City and County of San Francisco. "Complaint" does not refer to SOTF Referrals, defined below.
- E. "Complainant" means a person or entity that files a Complaint.
- 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 an 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 an 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. "SOTF Order of Determination" means an Order issued by the Task Force finding a violation of the Sunshine Ordinance and requiring the Respondent to correct the violation.

- K. "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.
- L. "Respondent" means a person who is alleged or identified in a complaint to have committed a violation of the Sunshine Ordinance.
- M. "Sunshine Ordinance" means San Francisco Administrative Code section 67.1, et seq.
- N. "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.
- N. "Task Force" means the Sunshine Ordinance Task Force, established by San Francisco Administrative Code section 67.30.

III. COMPLAINTS / SOTF REFERRALS / ENFORCEMENT PETITIONS

- A. Any person or entity may file a Complaint with the Commission. Each Complaint shall be heard and 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 an SOTF Referral or an Enforcement Petition, the Executive Director shall (1) immediately schedule a hearing at the next regular meeting of the Commission to be held more than 21 days after receipt thereof, and (2) give notice to each Respondent and Complainant (as the real party in interest) of the date, time and location of the hearing. The Executive Director shall also provide notice to the Task Force. Such hearings shall otherwise be governed by the provisions of Section [] of these Regulations.
- C. No enforcement action shall be taken on an SOTF Referral or an Enforcement Petition 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 an Enforcement Petition.
- D. 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.

IV. COMPLAINT INVESTIGATIONS; REPORT AND RECOMMENDATION

- A. **Scope.** This section shall apply only to Complaints, not to SOTF Referrals.

[LEAVE TEXT AS IT WAS IN EC RECOMMENDATIONS, OR DELETE ALL AND INSERT RECOMMENDATIONS HERE OR IN INTRO MEMO?]

V. HEARINGS

A. **General Rules and Procedures -- Complaints.**

[LEAVE TEXT AS EC HAD IT? OR DELETE ENTIRELY AND ADD OUR COMMENTS HERE?]

B. **General Rules and Procedures – SOTF Referrals / Enforcement Petitions**

1. All hearings on SOTF Referrals and Enforcement Petitions shall be open to the public. The Commission shall hold the hearing.
2. 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 Commission policy.
3. For the purposes of these Regulations, a hearing concludes on the last date on which the Commission hears argument or testimony in the proceeding and closes the hearing.
4. The Commission's sole determinations at a hearing on an SOTF Referral or Enforcement Petitions shall be the nature and scope of the penalties or other enforcement actions against the Respondent(s). At or prior to a hearing on an SOTF Referral or Enforcement Petition, 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.
5. No formal rules of evidence shall apply to testimony given at a hearing or to documents or records submitted as exhibits, but the Commission may require that all testimony taken in a hearing be given under oath and any exhibits presented properly authenticated.

C. **Finding of Violation.**

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.

The votes of at least three Commissioners are required to find that a Respondent has committed a violation of the Sunshine Ordinance. The finding of a 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.

1. The votes of at least three Commissioners are required to impose orders and penalties for a violation of the Sunshine Ordinance.

2. 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 for good cause;

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

(c) whether the Respondent consulted with counsel prior to committing the alleged violation.

3. 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;

(b) cure and correct the willful violation through whatever action is necessary;

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

(c) pay a monetary penalty to the general fund of the City in an amount not less than five hundred dollars (\$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 committed a willful violation of the Sunshine Ordinance, the Commission may also issue a finding of official misconduct and proceed in accordance with the applicable provisions of Article XV of the City Charter.

5. 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;
- (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 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.

VI. MISCELLANEOUS PROVISIONS

A. Ex Parte Communications.

Once a Complaint is filed with the Commission or an SOTF Referral is received by the Commission, no Commissioner shall engage in communications of any kind outside of a Commission meeting regarding the merits of the Complaint or SOTF Referral.

B. Public Records.

All Complaints, investigative records of whatever nature or description, and all information contained therein, including any work product, shall be public records in accordance with the Sunshine Ordinance, the California Public Records Act and the United States Constitution.

C. Access to Complaints and Related Documents and Deliberations.

- 1. 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 and the United States Constitution.

D. Oaths and Affirmations.

The Commission may administer oaths and affirmations.

E. Recordings.

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

F. 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.
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.

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.

ATTACHMENT A

San Francisco
Ethics Commission



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Phone 252-3100 Fax 252-3112

SOTF Proposed Revised Version
[Date]

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

Effective Date: _____, 2010

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II. Definitions.

III. Complaints/SOTF Referrals/Enforcement Petitions.

IV. Complaint Investigations; Report and Recommendation...

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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.

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.



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

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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.
- D. "Complaint" means a written document alleging a violation of the Sunshine Ordinance filed with the Commission.
- E. "Complainant" means a person or entity that files a complaint.
- 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.
- 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. "Mitigating information" means information tending to excuse or reduce the culpability of the Respondent's conduct.
- K. "Order of Determination" means a final recommendation issued by the Task Force concerning a violation of the Sunshine Ordinance.
- 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.
- M. "Respondent" means a person who is alleged or identified in a complaint to have committed a violation of the Sunshine Ordinance.
- 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.
- 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 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.

- A. Any person, including Commission staff, may file a complaint with the Commission or the Task Force alleging a violation of the Sunshine Ordinance. When the Executive Director receives 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 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.
- B. When the Executive Director receives a referral from the Task Force, the Executive Director shall schedule a hearing at the next regular meeting of the Commission, provided that: 1) the Executive Director issue a 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 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.

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.

IV. INVESTIGATIONS; REPORT AND RECOMMENDATION

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

B. **Report of Investigation.**

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

2. The report shall also include the Executive Director's recommendation, which shall be comprised of one of the following: a) a finding that Respondent violated the Sunshine Ordinance and proposed penalties; b) a finding that Respondent violated the Sunshine Ordinance and a proposed stipulation, decision and order; or c) a finding of no violation of the Sunshine Ordinance and dismissal. The report shall be delivered to the Commission.

- a. **Finding of Violation 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.
- b. **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 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.

A Commissioner's request to calendar the matter for consideration 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.

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.

- c. **Finding of No Violation of Sunshine Ordinance and Dismissal.** If the report recommends a finding of no violation and dismissal, the Executive Director shall so inform the Commission. Thereafter, any two or more Commissioners may cause 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 dismissal recommendation. During the meeting at which the Commission considers the dismissal recommendation, 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 dismissal recommendation; 2) reject the dismissal recommendation and instruct staff to seek a settlement; or 3) reject the dismissal recommendation and instruct staff to schedule a hearing pursuant to Section IV.C. of these Regulations.

A Commissioner's request to calendar the matter for consideration 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.

If two or more members of the Commission do not request the matter to be calendared, the Executive Director shall take no further action except that he or she shall inform the Complainant and the Respondent of the finding of no violation and dismissal.

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 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. 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.
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.

V. 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 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.

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

- i. Original Complainant (real party in interest); and
- ii. Respondent(s).
- iii. No other live testimony shall be permitted.

- b. For complaints alleging a violation of the Sunshine Ordinance, the following parties have the right to appear and speak on his or her own behalf:

- i. Executive Director; and
- ii. Respondent(s).
- iii. No other live testimony shall be permitted.

2. Standard of Proof

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.

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.

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.

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 shall have the right to introduce exhibits and to rebut any evidence presented.

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.

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 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 is concluded, as described in section VI.E of these Regulations. Thereafter, the Commission shall determine, no later than 45 days after the date the report and recommendation is delivered, whether the Respondent has committed a violation of the Sunshine Ordinance.

The votes of at least three Commissioners are required to find that a Respondent has committed a violation of the Sunshine Ordinance. The finding of a 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.

1. The votes of at least three Commissioners are required to impose orders and penalties for a violation of the Sunshine Ordinance.
2. 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 for good cause;
 - (b) the volume of records requested, and the extent to which they were practically accessible; and/or
 - (c) whether the Respondent consulted with counsel prior to committing the alleged violation.
3. 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) cease and desist the violation;
 - (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 up to 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 committed a willful violation of the Sunshine Ordinance, the Commission may also issue a finding of official misconduct and so inform the Mayor or appointing authority.

5. 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;
- (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 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 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.

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 at 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.

VIII. MISCELLANEOUS PROVISIONS

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~~constitute fully disclosable public information and ~~accordingly, constitute 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 and the specific statutory authority for such withholding is cited in writing in accordance with subdivision (b) of Section 67.27 of the Sunshine Ordinance.~~

VIII. MISCELLANEOUS PROVISIONS

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~~constitute fully disclosable public information and ~~accordingly, constitute 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.~~

MEMORANDUM RE: SOTF REVISION OF PROPOSED SUNSHINE REGS.

To: SOTF C&A Committee

From: Allen Grossman

Date: October 26, 2010

Attached is a draft revision of the proposed Ethics Commission Regulations dealing with the enforcement of violations of the Sunshine Ordinance. Completely revising the Ethics draft made more sense to me than picking and choosing which whole sections to rewrite, including expanded use of the definitions. Also, as a result of the basic restructuring and elimination of many provisions in the Ethics draft, I decided not to attempt to mark the changes from the Ethics draft, as that would have resulted in an almost unreadable document. In the end it should make for a more focused discussion of what belongs in the final Regs from SOTF's point of view.

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 is clear to me 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 complaints to Ethics.

(b) From a policy point of view (and likely based a statutory construction analysis), the SOTF is THE body named in the SO to handle these disputes and, from a practical point of view, capable of handling simple complaints--its members know the SO well and it has a ten year history of applying it to many different situations. 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 and very time consuming for Ethics staff.

(c) Moreover, 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 proposed 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 given the right to speak at the hearing. In addition, 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 California 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 to all parties concerned as well as the public, even if “legal”.

(5) Ethics’ proposal shifting the ‘burden of proof’ in enforcement hearings, thereby effectively allowing the respondent to retry the matter, has been eliminated. A hearing on an enforcement case is now been 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 the respondent or to minimize the penalty. A provision prohibits introduction of any evidence 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 specifically what and whose action 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 not exempt under the SO, a complete defense to any claimed violation has been eliminated. Ethics’ staff will no doubt claim that the Charter “trumps” of the Charter vs. the SO. There is ample law that the SO is not trumped by the Charter, although the City Attorney will no doubt disagree. 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.

MEMORANDUM #2 TO SOTF MEMBERS:

August 29, 2010

RE: Ethics Commission's proposed "Regulations for Complaints Alleging Violations of the Sunshine Ordinance".

Ethics staff issued the proposed Regulations, and a covering Memorandum to the Ethics Commissioners and the SOTF Members, on August 17, 2010. As stated in that Memorandum, "These proposals have been forwarded to the Task Force for its review and comments. The Commission will not consider the draft proposals until after the Task Force has had a chance to discuss and/or take action on them."

Rather than commenting on each of the sections in the proposed Regulations or the covering Memorandum, what follows is a look at what the Ethics staff proposes from a somewhat broader perspective.

(1) In its covering Memorandum the Ethics staff describes the three decision points adopted at the Commission's June 14, 2010 meeting. Those decisions, while made to assist the staff in redrafting the Regulations, were not final. At that meeting the Commissioners discussed whether to adopt these points or wait until the Commission had the SOTF's comments. The chair stated and it was understood that these decisions would be revisited once they had the SOTF comments. Accordingly, the SOTF should feel free to take issue with any part of the Regulations based on those "decisions."

(2) Staff limits the scope of the Regulations to "complaints" filed directly with the Commission and to SOTF referrals. The Regulations do not cover SOTF referred findings of "official misconduct." However, the Commission's jurisdiction to hear "complaints" should be limited to complaints for "willful violations" per Sunshine Ordinance §67.34. The main issue is whether the enforcement provision in §67.35(d) gives it jurisdiction over complaints that allege a "simple" violation. In addition, there should be a separate set of regulations governing the handling of SOTF "official misconduct" findings, as those findings can come from other sources under the Charter and must satisfy serious due process requirements.

(3) Most of the Regulations deal with the "complaints" filed directly with the Commission and sets out the whole procedure authorizing the Executive Director's investigation, reporting and participation in any hearings on those complaints, effectively establishing the ED as the "prosecutor" and turning the complainants into bystanders. For example, at the hearing on a complaint, the Executive Director appears and speaks in support of the complaint, the respondent on its own behalf and "no other live testimony is permitted". (Regs §V.A.1.b.) Moreover, the procedure is cumbersome, very lengthy, formal and skewed to favor respondents – who, for example, can rebut the ED's reports.

The position of the SOTF should be that the Regulations cannot delegate any authority or power to the Executive Director to do anything more than administer the Regulations because the

Commission is acting solely in a judicial capacity with respect to open government matters brought before it. Its process and hearing should mimic that of the SOTF. The two parties before the Commission must be the original complainant (as the real party in interest) and the Respondent.

The Staff's explanation of how it addresses the non-role of the complainant is almost embarrassing:

“Although the Complainant will not have a formal role in the hearing, providing the Complainant with a copy of the written report serves two important purposes: a) it proactively allows the Complainant to learn what the Commission staff has done with his or her complaint – the report is a public document and providing it to the Complainant addresses past criticism from the Task Force and members of the public that the Commission’s handling of Sunshine complaints is done without public scrutiny; ...”

(4) Even though the Commission has no power to investigate or keep confidential any records in open government cases under Charter Appendix Section C3.699-13, subdivision (a), the Regulations give investigative power to the Executive Director and keep the investigative work confidential until case is finally disposed of. (Regs §§IV.A, and VI.B), although § V.B. requires disclosure as “required by the... Sunshine Ordinance “ but not “internal notes taken by the ED or the staff”. Thus, it is not clear whether the investigative files can be kept confidential while the case is pending. Since the Commission’s specific authority is derived from the charter, it cannot expand the specific charter provisions that limit its authority. Moreover, there is no justification to “exempt” from disclosure any public records concerning the Commission’s handling of open government matters, given that the records in a SOTF or in any superior court proceeding -- the other ways a person can seek remedial action to obtain a public record -- do not exempt any records (other than the record in dispute) from disclosure.

(5) Moreover, the hearing procedure itself is daunting for the “original Complainant in the SOTF referral case”, who not only has to prove his case all over again, but will need a lawyer to help him. This is what staff says:

“If the hearing concerns a Task Force referral, the real party in interest, the original Complainant, will be given an opportunity to speak before the Commission, as will the Respondent. **No other live testimony will be permitted.** The Task Force, which has already heard the matter, does not play a role in the Commission’s hearing. Its members may, if they wish, speak only during public comment at the hearing.”

Add to that:

“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.” (§V.A.4.)

“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.” (§V.A.5.)

“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.” (V.A.6.)

(6) Another serious hurdle for the complainant filing directly with the Commission is found in the second paragraph of §V.D. and described in the staff Memorandum [item #6, page 7]. That section creates “an absolute defense against an alleged violation of the Ordinance” if the Commission finds that if any of the confidentiality provisions of the Charter is applicable, including Appendix C, section C3.699-13, and Appendix F, sections F1.107, F1.110, and F1.111, unless such Charter provision conflicts with an express non-confidentiality provision in the CPRA or the Brown Act.

The vice of this absolute defense is that it ignores the Sunshine Ordinance provisions that limit or eliminate certain “confidentiality” exemptions in the CPRA and the Brown Act. It is ironic that these Regulations intended to provide relief to complainants who file under the Sunshine Ordinance are denied the full benefit of that law. Moreover, to what extent does this absolute defense undercut an Order issued by the SOTF that relies on a provision in the Ordinance that eliminates or limits the confidentiality exemption to find the violation. This absolute defense can also be construed as a rule that limits the scope of the CRPA as expanded by the Sunshine Ordinance and thus must pass Prop 59’s requirement that a rule “... adopted 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. All proceedings before the SOTF and a court asked to force the disclosure of a public record are open, so Ethics has no justification for doing it here.

Finally, the Commission’s bylaws require it to “... 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.), ...” That compliance would certainly include all its proceedings dealing with violations of the Ordinance.

(7) It is not clear why no “testimony” is permitted at the hearing on the merits of a complaint or an SOTF referral other than of the complainant and the respondent. Only public comment is allowed in the case of a SOTF Referral and, although not stated, in the case of a complaint filed directly with the Commission. (§V.A.1.)

(8) With respect to SOTF referrals, based on the Commission’s tentative decision at its June 2010 meeting, the Regulations provide “... respondent will have the burden of proof to show that he or she did not violate the Ordinance” because the SOTF has already found the violation, (§V.A.3.). As staff explains: “... In such cases, the assumption is that the Respondent violated the Ordinance. Respondent must refute or rebut the evidence relied on by the Task Force to

show that he or she did not violate the Ordinance.” At the June 10 2010 meeting, the public comment unanimously opposed this standard and the Commissioners voted 3 to 2 to accept it, so the issue will definitely be revisited when these proposed Regs are before the Commission. The opposing view (and the correct one) is that the Regulations cannot include any provisions that would authorize the Commission to review or refuse to accept any SOTF finding or legal conclusion in any referred enforcement case; in effect, to re-litigate it. The law is clear that its role is to “enforce” the non-compliance with Orders of the SOTF. The SOTF is a duly constituted body, with equal or higher authority to that of the Ethics Commission, with respect to matters brought before it, which was given the express power under the Sunshine Ordinance to issue those Orders, based on its findings, the underlying facts, its legal conclusions and its determinations.

(9) Since the Regulations’ “burden of proof” shifting for enforcement of SOTF Orders is unacceptable, another procedure should be presented to the Commission as an alternative. That question came up at the June 2010 meeting. The proceeding could be either:

One similar to a penalty phase hearing, at which the respondent tries to make a case why there should be no or only a limited penalty imposed, as, for example, the respondent has since turned over the records and offered to reimburse the requestor for the time spent and any costs incurred, including lawyers’ fees, in obtaining the records; or

One, a “limited show cause” hearing in which the respondent will be penalized for failure to comply with the Order, unless the respondent can show it has a legally supportable basis for non-compliance not presented to the SOTF. The failure to comply was willful - intentional - so the assertion that it was not willful/intentional as a ground for dismissal is unsupported; nor would reliance on the City Attorney’s advice not to comply, whether oral or written, is not a basis for dismissal as the City Attorney cannot “trump” the SOTF’s determination nor may the CA assist a respondent in denying the public access to a public recorder, per §67.21(i).

Whichever is chosen, the goal of a swift effective proceeding would be met and the consequences known, as both the time table for a complete resolution within a period of say, 30 days, after the referral, and the penalties should be spelled out in the Regulations.

(10) Section V.C.2.(c) is troublesome because it allows the respondent whose alleged violation is “willful” to use the fact that he or she “consulted with counsel prior to committing the alleged violation” as a mitigating factor. History has shown that invariably the respondent who does not want to disclose a particular public record will ask the City Attorney whether it must be disclosed and, almost invariably, when the answer is “no”, the record is not disclosed. This provision, while not an absolute “get out of jail free” card, is close to it. It is particularly a problem because it probably violates the non-assistance provision in §67.21(i) of the Sunshine Ordinance.

MEMORANDUM #1 TO SOTF MEMBERS:

August 29, 2010

RE: Ethics Commission's proposed "Regulations for Complaints Alleging Violations of the Sunshine Ordinance".

Before your July 27, 2010 SOTF Meeting, I forwarded to you, among other documents, a copy of my June 10, 2010 Memorandum to the Ethics Commissioners and Mr. St. Croix, its Executive Director with comments on the staff's June 7, 2010 Memorandum. At the June 14, 2010 Ethics Commission meeting some of the points raised in that Memorandum were discussed. The Ethics staff has moved forward with a set of proposed regulations dealing with sunshine matters brought to the Commission. My second Memorandum of this date has my comments on those proposed Regulations. However, to give you some flavor of how the staff viewed my earlier comments when preparing the proposed Regulations, here is the scorecard:

What the Regulations Cannot Include:

"(1) The Regulations cannot include any provisions for investigations nor to keep "confidential" any records relating to open government matters: Under Appendix Section C3.699-13, subdivision (a), the Commission's investigative power and ability to keep records confidential extends only to "...alleged violations of this charter and City ordinances relating to campaign finance, lobbying, conflicts of interest and governmental ethics." No reference to alleged violations of open government laws. "

The proposed Regulations are replete with provisions for investigations and maintaining confidentiality of investigations.

"(2) The Regulations cannot delegate any authority or power to the Executive Director to do anything more than administer those Regulations because the Commission is acting solely in a judicial capacity with respect to open government matters brought before it, whether (a) enforcing SOTF referrals, (b) finding facts and hearing complaints for "willful violations" or other violations or (c) conducting a "trial" of an official or other public officer found to have committed official misconduct."

The Executive Director is the *de facto* "prosecutor" on complaints filed with the Commission and had given broad authority to investigate, report to the Commission on his findings and legal conclusions and make recommendations to the Commission, which if become final unless, within five days from the receipt of the report, at least two Commissioners ask that it be scheduled for a hearing.

"(3) Staff proposes a policy directive that "... respondent will have the burden of proof to show that he or she did not violate the Ordinance" because the SOTF has already found the violation. The Regulations cannot include any provisions that would authorize the Commission to review, reject, deny or refuse to accept any SOTF finding or conclusion in any referred enforcement case."

The Commissioners approved this directive by a 3 to 2 vote, but agreed to revisit the issue once they had the SOTF's comments on it.

“(4) The Regulations cannot include any provisions dealing with SOTF findings of official misconduct under §67.34 (first sentence); those findings must be governed by a separate set of generic rules that apply whenever there is a finding of “official misconduct” which falls within Ethics’ jurisdiction as provided in §15.05(e) of the City Charter.”

There are no provisions in the proposed Regulations dealing with “official misconduct” findings by the SOTF.

What the Regulations Should Include.

“(1) For SOTF enforcement referrals of its non-compliance with Orders, provisions for a summary “show cause” proceeding shortly after the referral is received by the Commission. Advice from the City Attorney’s Office cannot be given as reason for non-compliance. “

The regulations adopt the “tentative” decision to shift the burden of proof to the respondent.

“(2) For complaints filed initially with the Commission pursuant to Sunshine Ordinance §67.34 for “willful violations” or for other violations pursuant to § 67.35(d), the parties before the Commission would be the complainant and the respondent department/official/agency.”

As noted, the Executive Director is the de facto “prosecutor” on complaints filed with the Commission. The complainant has no role and is not even allowed to speak on the merits at any hearing, assuming the matter gets that far.

“(3) The Regulations dealing with SOTF enforcement referrals and complaints filed directly with the Commission must provide that the entire process is open and all records are fully disclosable.”

As noted, the proposed Regulations maintain the confidentiality of investigations/ staff notes until the case is disposed of.

Other Comments.

“(1) The whole purpose of an individual member of the public seeking administrative relief to gain access to public records or to correct meetings violations is to make it quicker, cheaper, easier and more efficient than litigation. For that reason, the Regulations must make the process simple, efficient, and easy for the complainant and not require a lawyer’s assistance.”

The Regulations are quite the opposite, to the point that even a lawyer who has not regularly appeared before an administrative body would have to spend considerable time dealing with the "rules" set up for the hearings.

"(2) The SOTF cannot be a party to any proceedings before the Commission. It has no authority to do so and its doing so would change the character of that proceeding. The fight is and always will be between the original complainant (the real party in interest) who seeks the records and the respondent department, agency or official..."

The SOTF is not a party under the proposed Regulations and has no role to play before the Commission on its referrals. The fight is between the original complainant and the respondent.