

Date: June 14, 2011

Item No. 9

File No. \_\_\_\_\_

## SUNSHINE ORDINANCE TASK FORCE

### AGENDA PACKET CONTENTS LIST\*

- Next steps on Ethics Commission proposed policy**
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Completed by: Chris Rustom

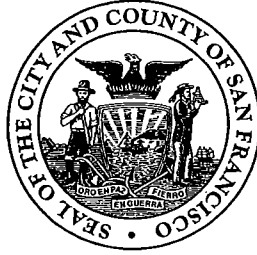
Date: June 10, 2011

**\*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.

SUNSHINE ORDINANCE  
TASK FORCE



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MEMORANDUM

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**Date:** June 14, 2011  
**To:** Ethics Commission  
**From:** Sunshine Ordinance Task Force  
**Subject:** Ethics Commission Staff's August 17, 2010 draft "Regulations for Complaints Alleging Violations of the Sunshine Ordinance."

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Introduction:

The Sunshine Ordinance Task Force (SOTF), through its five member Compliance and Amendments Committee<sup>1</sup> has reviewed, considered, and adopted suggested changes to the Commission staff's August 17, 2010 draft "Regulations for Complaints Alleging Violations of the Sunshine Ordinance" (Staff's Draft) Developed during many meetings of the Committee, some devoted almost exclusively to that task, the suggested changes also reflect extensive public comments taken at those meetings.

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

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

## Statutory Background:

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

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

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

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

## The Commission's Jurisdiction:

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

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

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<sup>2</sup> Article I, Section 3: Authority, Statutory Requirements, other Laws and Policies.

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

<sup>3</sup> **SEC. 67.36. SUNSHINE ORDINANCE SUPERSEDES OTHER LOCAL LAWS.**  
The provisions of this Sunshine Ordinance supersede other local laws. Whenever a conflict in local law is identified, the requirement that would result in greater or more expedited public access to public information shall apply.

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

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

Staff’s position that the Commission has jurisdiction over complaints alleging non-willful violations of the Ordinance is based on its mistaken reading of subdivision (d) of Section 67.35<sup>4</sup> of the Ordinance:

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

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

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

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

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<sup>4</sup> References to Sections in this Memorandum are to Sections of the Sunshine Ordinance.

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

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

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

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

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

#### Comparison of Non-Willful Violation Complaint Procedures.

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

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

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

Changes to Staff's Draft in the SOTF Draft:

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

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

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

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

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

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

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

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

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

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<sup>6</sup> "Willfully" is defined in section 7 of the Penal Code as: "the word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to injure another, or to acquire any advantage."

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

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

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Attachment A:

SOTF Proposed Revised Version of Staff's Draft.

Attachment B:

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

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



**ATTACHMENT A**  
**to SOTF Memorandum**

SOTF Proposed Revised Version  
[JUNE 14, 2011]

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

*Effective Date:* \_\_\_\_\_, 2011

DRAFT

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DRAFT

## **I. PREAMBLE**

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

## **II. DEFINITIONS**

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

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

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

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

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

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

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

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

### **III. COMPLAINTS / SOTF REFERRALS / ENFORCEMENT PETITIONS**

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

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

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

### **IV. COMPLAINT INVESTIGATIONS, REPORT, AND RECOMMENDATION**

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

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

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

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

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

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

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

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

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

1. Any stipulation, shall explicitly state that:

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

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

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

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

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

## V. HEARINGS: GENERAL

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

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

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

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

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

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

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

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

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

## **VI. DETERMINATION OF WILLFUL VIOLATIONS**

A. When determining whether a Respondent's actions constitute a "willful violation" of the Sunshine Ordinance, the Commission shall apply the definition of "willfully" in Penal Code section 7. [Note: "Willfully" is defined in section 7 of the Penal Code as: "the word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to injure another, or to acquire any advantage."]

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

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

## **VII. ADMINISTRATIVE ORDERS AND PENALTIES**

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

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

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

## **VIII. MISCELLANEOUS PROVISIONS**

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

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



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

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

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

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

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

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

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

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

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

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

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

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**ATTACHMENT B**  
**to SOTF Memorandum**

**SOTF Proposed Revised Version**

**[May 19, 2011]**

***SOTF Additions are in bold blue/ Deletions are red strike throughs.***

***Comments are bold blue italicized and highlighted.***

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

***Effective Date:*** \_\_\_\_\_, **20102011**

DRAFT

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## I. PREAMBLE

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

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

## II. DEFINITIONS

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

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

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

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

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

- F. "Day" means calendar day unless otherwise specifically indicated. If a deadline falls on a weekend or City holiday, the deadline shall be extended to the next business day.
- G. "Deliver" means transmit by U.S. mail or personal delivery to a person or entity.

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

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

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

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

**Same comment.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **IV. COMPLAINT INVESTIGATIONS; REPORT AND RECOMMENDATION**

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

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

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



is available to the parties and the public.

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

**B. Report of Investigation.**

B. After the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~b. **Finding of No Violation of Sunshine Ordinance and Dismissal.** If the Executive Director's report recommends a finding of no violation and that the Respondent has not willfully violated the Sunshine Ordinance and dismissal of the Complaint, the Executive Director shall so inform the Commission. Thereafter, any two or more Commissioners may cause the matter to be calendared for consideration schedule a hearing by the full Commission in open session at the its next Commission regular meeting to be held no sooner than ten<sup>20</sup> days after the date the Executive Director informs Commission receives the Commission of report. Following the dismissal recommendation. During hearing on the meeting at which report, the Commission considers the dismissal recommendation, Commissioners may ask staff questions and, by the majority vote, shall take one of either: (a) enter an order of dismissing the following actions, each of which requires the vote of three Commissioners: 1) accept the dismissal recommendation; 2) Complaint; (b) reject the dismissal recommendation and instruct the Executive Director to seek a settlement; or (c) reject the dismissal recommendation and instruct staff the Executive Director to schedule a hearing pursuant to Section IV.C. of these Regulations.~~

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

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

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

Commission itself make the final decision.

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

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

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

**D. — Response to the Report.**

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

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

**E. — Rebuttal.**

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

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

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

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

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

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

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

## V. HEARINGS: GENERAL

### A. General Rules and Procedures.

#### 1. Public Hearing

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

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

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

Original

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

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

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

ii. No other live testimony shall be permitted.

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

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

**Executive Director; and**

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

ii. Respondent(s).

iii. No other live testimony shall be permitted.

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

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

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

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

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

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

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

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

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

## VI. DETERMINATION OF WILLFUL VIOLATIONS.

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

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

*Comment: See Memorandum.*

4. Rules of Evidence

All evidence admissible in an administrative proceeding governed by the California

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

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

5. — Exhibits

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

6. — Oral Argument

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

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

7. — Failure to Appear

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

**B. Finding of Violation.**

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



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

**C. — Administrative Orders and Penalties; Warning Letters.**

**VII. ADMINISTRATIVE ORDERS AND PENALTIES**

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

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

B. The Commission may issue an order to:

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

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

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

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

(a) cease and desist the violation;

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

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

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

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

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

(a) — the severity of the violation;

## **VIII. MISCELLANEOUS PROVISIONS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Comment: See above Comment and Memorandum.**

## **VI. MISCELLANEOUS PROVISIONS**

### **A. Ex Parte Communications.**

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

### **B. Access to Complaints and Related Documents and Deliberations.**

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

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

### **C. Oaths and Affirmations.**

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

### **D. Selection of Designee by the Executive Director.**

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

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

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

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

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

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

**F. ~~Extensions of Time and Continuances.~~**

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

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

**G. Recordings.**

Every hearing shall be electronically recorded.

**H. Place of Delivery.**

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

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

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

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

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

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

**I. Page Limitations and Format Requirements.**

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

**J. Conclusion of Hearing.**

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

**VII. STIPULATED ORDERS**

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

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

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

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

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

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

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

C. — Once the Executive Director enters into a stipulation with a Respondent, the Executive Director shall inform the Commission of this stipulation and shall place the matter on the agenda 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.

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.