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Item No. 11

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

## SUNSHINE ORDINANCE TASK FORCE

Compliance and Amendments Committee

AGENDA PACKET CONTENTS LIST\*

Next steps on Ethics Commission proposed policy

Completed by: Chris Rustom

Date: July 8, 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.*"