

Date: July 14, 2009

Item No. 6

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

**SUNSHINE ORDINANCE TASK FORCE**  
**Compliance and Amendments Committee**  
**AGENDA PACKET CONTENTS LIST\***

- Proposed amendments
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Completed by: Chris Rustom

Date: July 8, 2009

**\*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.



"martin.macintyre@juno.com"  
<martin.macintyre@juno.com  
>

06/20/2009 07:41 PM

To rak0408@earthlink.net

cc SOTF@sfgov.org, kimocrossman@gmail.com,  
kimo@webnetic.net, mail@csrsf.com,  
grossman356@mac.com

bcc

Subject corrections of Draft ordinance

Dear Richard,

A few more corrections are attached.

Martin

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[Criminal Lawyers - Click here.](#)

----- Message from Unknown on Unknown -----



SOTF revision.docx

This section is my creation

(3). The Chair May Allow a Designated Speaker(s)<sup>1</sup>

(A). If allowed by the chair [,] members of the public may, for any item which is  
[insert a comma between chair and members]

(C). The Chair shall, by show of hands, determine that a designated  
speaker has the consent of six members of the public who are present and  
prepared [,] to speak on an issue, and shall announce the designated speaker(s).

[delete the comma]

(4) Rules for the Order of Speakers.<sup>2</sup>

A chair shall accept public testimony in a fair and evenhanded way, without  
manipulation in the order of speakers, absent good cause. [space added] Each policy  
body shall adopt regulations for the order of speaking, which shall include but not be  
limited to the following:

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<sup>1</sup> Creates new procedure for designated public speaker(s).

<sup>2</sup> Provides additional guidance and limitations on order of speakers.



Allen Grossman  
 <grossman356@mac.com>  
 07/07/2009 07:51 AM

To SOTF <sotf@sfgov.org>  
 cc Erica Craven-Green <ecravengreen@gmail.com>, "Richard  
 A. Knee" <rak0408@earthlink.net>, doyle johnson.  
 <doylegenie@gmail.com>, Kimo Crossman  
 bcc

Subject Proposed Sunshine Ordinance Amendment

History: This message has been forwarded.

Mr. Rustom,

Although there is no agenda yet posted for next Tuesday's Compliance & Amendment Committee meeting, I understand that the June 2008 version of the proposed amendment will be discussed at that meeting.

Attached are (1) a memorandum to the members of the Committee with my comments, (2) a marked version of Sections 67.39 to 67.44 and (3) a "clean" version of those sections. Please include these three documents (in the order listed) in the "package" to the Committee members. If there is any problem in your doing that, please let me know immediately.

Thank You,

Allen Grossman



Memo SOTF re June 2008 Draft (V2).doc Sections 67.39 et seq (AG REV MKD).doc Sections 67.39 et seq (AG REV CLEAN).doc

## Memorandum to SOTF Members

**From:** Allen Grossman  
**Re:** June 2008 Sunshine Ordinance Amendments  
**Date:** July 2, 2009

Except with respect to Sections 67.39 through 67.44, inclusive, marked and clean drafts of which are attached, I have not suggested specific edit changes to a draft 100 plus page amendment that has been through a significant review and whose authors are probably not prepared to go line by line to determine whether a word deletion or addition here or there is appropriate. Rather, except for the attached sections, my comments are more substantive in nature, with only a few suggested text changes. Here they are:

1. Since this is really a restatement of the entire law, why can't it be called something else, such as "San Francisco Open Government Law", or "San Francisco Sunshine Law" with a provision that it amends, restates and replaces the existing "Sunshine Ordinance." That will also prevent the City Attorney from asserting that "after all it is just another ordinance and thus it is trumped by the City charter". Mr. Llorente, as well as Ms. Jesson, the Public Records Supervisor, have stated this position. However that position is not correct for many reasons, which I would be pleased to provide you, if requested.
2. Proposition G used the following text: "Part I of the San Francisco Municipal Code (Administrative Code) is hereby amended in Chapter 67 to read as follows:" [it then sets out the entire text showing the deletions and additions]. If this law is really a standalone law, with equal dignity to the City charter, continuing to keep it as part of the Administrative Code, which is populated with garden-variety ordinances adopted by the BOS, doesn't reflect that unique status. If possible I would suggest that it be treated as a separate Code, within the Municipal Codes, in the same way the City charter is a separate "code".
3. The first section of the law should state that it is adopted pursuant to Section 54953.7 of the Brown Act and Section 6254(e) of the CPRA, which allow for greater public access to meetings and public records, respectively, at the local level; that the law is an extension and expansion of the constitutionally protected rights of the people to access public meetings and public records, as embodied in Section 3(b)(1) of Article I of the California Constitution; and that in accordance with the provisions of Section 3(b)(2) of that Article, this law "shall be broadly construed" as it furthers the people's right of access.
4. Somewhere in Article III, why not include a requirement that no official, department, etc., may, at any time, whether in denying or limiting access (e.g. through redactions) to public records or before the Sunshine Commission may assert that those actions are based on advice from the City Attorney unless it has a written opinion from the CA to that effect, copies of which were made available to the requestor/complainant and, if a complaint is filed, to the members with the respondent's written response (per the SOTF Rules). It should also be made clear that the City Attorney's opinion is advisory only and the CA cannot assist the respondent in any other way in connection with the proceeding before the Commission or in otherwise assisting the respondent in the matter.
5. In response to requests for readily identifiable public records, both the Ethics Commission and the City Attorney's Office have not only denied access to records which are "responsive" to the requests, but they have refused to identify what those records are, whether nature/kind, i.e. an email or memorandum, subject, date, author(s) and such information. This practice is contrary to both

CPRA Section 6253.1 and Sunshine Ordinance 67.21(c). Additional language should be inserted in Section 67.21(c) to nail down that if a custodian has any public record responsive to a request, it must identify its nature or kind, its format, its date and title, its author, its subject and any recipients.

6. Section 67.23 dealing with "oral public information" hasn't been changed in any significant way. It still appears limited to "operations, plans, policies and positions." There has been some debate whether a "requestor" should be able to meet with a specific employee who has personal knowledge of particular public information and how much time that employee need spend in the meeting. That is an area that definitely should be considered.

7. One of the recurring problems with some departments, e.g. DBI, is that a respondent's representative colors the truth and ends up misleading the SOTF. Perhaps, there should be some sanctions somewhere to penalize any department or the individual who is not truthful.

8. It would help if a couple of definitions were added:

For example, in some places "department" is used; in others the defined (in §67.19) term "Department"; and in other places "agency" (which probably includes a "department") is used. If possible, the various "entities" that are covered, such as departments, offices/officials, agencies, policy bodies and/or passive policy bodies, could be grouped together under some defined term as often references to more than one are made. Maybe a variation of the definition of "State agency" in the CPRA could be used:

(f) "State [City] agency" means every state [City] office, officer, department, division, bureau, board, and commission or other state [City policy] body. [Delete - "or agency"]

Also, why not cover all three public access laws, the Sunshine Ordinance, the CPRA and the Brown Act in a single definition, such as "Public Access Laws"? The definition could also include any other State laws that provide for access to records. This would avoid having to repeat all three in the various places they are referred to and, possibly pick up any of other State laws.

9. I wonder whether the powers - in Section 67.39(b) - to take testimony under oath, subpoena witnesses, etc. will stand up, given that the only way to enforce these powers may be by court action and potential questions such as the right to counsel, the need for available complete transcripts, appeals (where?) and the like are bound to be raised.

10. The Section 62.42 provisions for enforcement by Ethics of referred SOTF Orders provisions should go further. If it were up to me, I would (a) eliminate entirely any "investigations" by Ethics staff, (b) make the Order and factual findings of the Sunshine Commission binding on Ethics in the absence of a preponderance of evidence (or similar high standard) provided by the respondent, (c) make the Sunshine legal interpretations binding on Ethics, unless the respondent provides law that is otherwise conclusive, (d) require Ethics to make all files related to these referred cases fully disclosable public records and (e) require Ethics to conduct every hearing on **every** referred case as on open hearing. After all, Ethics has several full-time staffers.

11. It may be possible to include an amendment to the Ethics provisions in the City charter to incorporate some specific sanctions directed to violations of the Ordinance, or possibly do it in the new Ordinance by giving those choices to Ethics when matters are referred to Ethics. By shifting enforcement to Ethics with "teeth", better compliance should become the norm.

12. It is quite clear that "official misconduct" findings or charges sent to the Ethics Commission require completely different handling than enforcement of SOTF Orders. They can originate from any one of five or six policy bodies, including the SOTF, and are sent for a decision ("adjudication") by the Ethics Commission, as I read the charter. The Ed Jew case is the only case sent to Ethics other than the 10 or so from the SOTF, as far as I can tell. So I don't believe that the amendment should speak to what happens once the "official misconduct" finding/charge reaches the Ethics Commission.

13. With regard to sending "official misconduct" findings to the District Attorney or the State AG, from a quick search of the Government Code, I found only one that used "official misconduct". Most use other phrases, such as "willful omission to perform duty." So any referral to the DA or State AG may have to be tailored to the particular provision in the state law. But even these provisions are generally job-specific. It seems to me that providing for these optional enforcement routes is simply setting up the future SOTF with unsuitable or unsatisfactory alternatives.

14. Some other miscellaneous provisions should be added:

(a) Require video coverage of all Sunshine Commission and Ethics Commission (and any of their committees) hearings/meetings;

(b) Specifically state that (1) destruction of any public record before the State law mandated period (currently two years) is a violation and (2) the destruction of any public record relevant to a pending request at any time is a violation.

(c) Where personal information is included in a public record by choice or where not otherwise required by the agency to whom provides, such personal information cannot be redacted under a claim of "privacy."

These are my suggested changes to Sections 67.39 through 67.44, with my comments. A clean version is attached to show how it would read with the changes incorporated in it.

In it I have used a couple of defined terms as suggested in my Memorandum: "City Agency" describes the respondent department, board, commission, official's office etc., "Open Government Laws" all the open meetings and public records laws and "Law" the "San Francisco Sunshine Law", which I suggest be the name of the amended law. Also somewhere in §67.39, I would define an Order of Determination as an "Order."

**SECTION 67.39. HEARINGS AND ORDERS OF DETERMINATION.<sup>1</sup>**

(a) The COMMISSION shall conduct administrative hearings on complaints of alleged violations of this Ordinance, the California Public Records Act, or the Brown ActOpen Government Laws either by an individual custodian of public records reports or by a City Agency. A complaint filed against an individual custodian shall be deemed filed against the City Agency to whom he or she reports. The COMMISSION may issue an Orders of Determination following the hearing on a particular complaint to the Complainant and the Respondent. If the COMMISSION determines on the basis of substantial evidence presented prior to and during the hearing that a violation of the any one or more Open Government Laws Ordinance, the California Public Records Act or the Brown Act has occurred, it shall issue an OrderThe Order of Determination shall include with written findings of fact and conclusions of law. The Each Order of Determination shall issue to the Complainant and the Respondent and shall be posted on the Commission's COMMISSION'S website forthwith on issuance.

(b) To the extent not prohibited by State law, the COMMISSION may take testimony and other evidence, administer oaths and affirmations, subpoena witnesses, and compel their attendance and testimony, administer oaths and affirmation, take evidence and require by subpoena the production of any books, papers, records or

<sup>1</sup> New section incorporates language moved from Articles II and III in order to clarify and streamline the Ordinance and revises language to specify levels of evidence necessary to sustain findings of violation and Orders of Determination.

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other items ~~material~~ relevant to the performance of the COMMISSION'S duties or exercise of its powers. [What other powers?]<sup>2</sup>

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(c) An authorized representative of the ~~r~~Respondent employee, official, department, agency, policy body, or custodian of public record City Agency who has with personal knowledge of the matters alleged in the complaint shall attend each COMMISSION hearing and COMMISSION committee hearing to explain the City Agency's response to the complaint ~~request for access to public meetings or public information~~, as well as provide a detailed description of the records search conducted, and the ~~statutory or case law~~ basis for any decision to withhold or redact the records requested as applicable a copy of any opinion of the City Attorney on which it is relying.<sup>3</sup>

#### SECTION 67.40. ADMINISTRATIVE ENFORCEMENT PROVISIONS.<sup>4</sup>

(a) Upon issuance of an Order of ~~Determination~~ finding that a public record should ~~is to be released~~ disclosed or other action should ~~is to be~~ taken by an employee, official, department, agency, policy body or the Respondent, the City Agency so ordered custodian of public records, the Sunshine Commission shall immediately ~~order the person or entity to~~ shall forthwith comply with the such Order of Determination. If the person or entity City Agency fails to so comply with any such Order within 5 business days after its issuance, the ~~Sunshine Commission~~ COMMISSION may ~~shall~~ refer the matter Order for enforcement to one or more of the

<sup>2</sup> Based on legal advice provided by DCA Ernest Llorente that Commission as currently appointed and constituted could appropriately have such powers, revision provides subpoena power if necessary to secure sufficient evidence to reach a determination on a complaint.

<sup>3</sup> Expands on provision in former 67.21 requiring attendance at hearings and clarifies that respondent's representative must have personal knowledge of the facts and legal authority underlying its response.

<sup>4</sup> New section incorporates language from Articles II and III in order to clarify and streamline Ordinance.

San Francisco Ethics Commission, Board of Supervisors, District Attorney, or the State Attorney General or another appropriate enforcement body. The official or body to whom such referral is made ~~who may shall~~ take whatever measures they deem necessary to insure compliance with enforce the Order of Determination.<sup>5</sup>

(b) Upon issuing ~~in its~~ an Order of Determination, the COMMISSION may also require the affected City Agency, if overseen by a governing or policy body, the governing entity to which the person or entity that has violated the Ordinance reports, to schedule ~~agendize the Order for discussion and response at the~~ its governing or policy entity's body's next regularly scheduled meeting, ~~the Order of Determination for its discussion and response.~~<sup>6</sup>

(c) Upon issuing ~~an~~ in its Order of Determination, the COMMISSION may also require ~~the~~ the affected City Agency, if it maintains a website, governing entity or department to which the person or entity that has violated the Ordinance reports, to post ~~immediately post the Order of Determination prominently on the entity's or department's~~ sits website for at least 60 days.<sup>7</sup>

(d) ~~(1)~~ Upon finding a serious and willful violation of this Ordinance ~~law~~, the COMMISSION by not less than a two-thirds vote of the ~~voting members,~~ may appoint retain outside counsel to prosecute ~~remedy such the~~ violation(s) of the Ordinance by bringing an action in the Civil Courts ~~to the extent permitted by the City Charter~~ San Francisco Superior Court, subject to the following:<sup>8</sup>

<sup>5</sup> Revises list of bodies to whom referrals can be made to in order to clarify and make Ordinance consistent.

<sup>6</sup> New provision to require public hearing by Commissions and policy bodies on Orders of Determination issued by Commission.

<sup>7</sup> New provisions providing for public disclosure of Order of Determination issued by Commission.

<sup>8</sup> New provisions providing for appointment and funding of outside counsel to allow Commission to enforce serious and willful violations of the Ordinance against respondents who fail to comply with Orders of Determination.

(21) ~~The amount of expenditure expended for such outside counsel to prosecute these cases shall not exceed, in the aggregate, \$50,000 per City fiscal year or such greater amount as is authorized by the Board of Supervisors (the "litigation fund"). Outside counsel may be retained on a fully contingent or partially contingent fee basis. The COMMISSION shall include it, in its bylaws, selection criteria and oversight of appointed retained outside counsel and charges to expenditures the litigation fund.~~

(32) ~~If Any attorney fees are recovered in litigation any proceedings initiated under this provisionsubsection, fees in the amount paid out of the litigation fund to outside counsel for the litigation shall be first credited back intoapplied to reimburse the litigation fund for charges to it in connection with the proceeding and any excess paid as additional fees to the outside counsel.~~

(e) ~~The administrative remedies provided under this Ordinance Law do not and shall in not no way limit in any way (1) the availability provision of other administrative remedies provided available to any person with respect to any officer or individual or employee of any City Agency agency, executive office, department or policy body; nor shall the administrative remedy provided by this section in any way limit or (2) the availability provision of judicial remedies otherwise available to any person. If a custodian of a public record refuses or fails to comply with the request of any person for inspection or copy of a public record or with an Order of Determination under this Ordinance, the Superior Court shall have jurisdiction to order compliance.<sup>9</sup>~~  
[Included in §67.43(b)]

(f) ~~An Order of Determination shall be presumptive evidence of a violation of this Ordinance or other applicablethe open-Open government Government law Law(s) specified in such Order in any other administrative or judicial proceeding, and~~

<sup>9</sup> Provision moved from former 67.21(f).

~~factual findings made during the hearing included in any such Order shall be reviewed solely for abuse of discretion.<sup>10</sup>~~

**SECTION 67.3441. WILLFUL FAILURE SHALL BE OFFICIAL MISCONDUCT.**

~~The willful failure of any elected official, department head, or other managerial city employee to person, office or entity to discharge any duties imposed by the Sunshine Ordinance, the Brown Act or the California Public Records Act any Government Law shall be deemed official misconduct for purposes of this Law Ordinance and of any other applicable provisions of the City Charter charter, local law Ordinances, and State law. If the The Commission COMMISSION'S charge makes a determination that any person or entity has willfully failed to discharge any such duties, of official misconduct, then the Commission shall refer with written findings of fact and conclusions of law and fact the matters shall be referred to the Ethics Commission for enforcement adjudication. The Commission may also refer the matter by to the Board of Supervisors, District Attorney or the State Attorney General for investigation and enforcement. Complaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records Act by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission.<sup>11</sup> (Added by Proposition G, 11/2/99)~~

**SECTION 67.42. REFERRALS AND ENFORCEMENT BY THE ETHICS COMMISSION.<sup>12</sup>**

<sup>10</sup> ~~New provision provides specific standard for review of Commission Orders of Determination in subsequent administrative, municipal, or legal proceedings.~~

<sup>11</sup> ~~Clarifies that findings of willful failure to comply with Ordinance may be referred to Ethics Commission, but also other entities for further proceedings.~~

<sup>12</sup> ~~New provision specifies procedures by which referrals from the Commission shall be investigated and enforced by the Ethics Commission. Adds new enforcement mechanisms and penalties that may or must be imposed by the Ethics Commission.~~

The Ethics Commission, as it should, is presently considering the adoption of a separate set of Regulations/Rules for its handling of SOTF referrals. Presumably provision will be made for notifying the SOTF and the original complainant as the enforcement process progresses and allowing the SOTF's designated representatives and the original complainant to dispute or challenge whatever "evidence" the respondent produces.

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Under those separate Regulations, there cannot be another "investigation", as the Order's factual findings and legal conclusions are presumptively correct and the respondent agency has the burden to prove otherwise through an open process, including hearings.

(a) The Ethics Commission is authorized to enforce the Orders of Determination of the ~~Sunshine Commission~~ COMMISSION. Upon referral of any Order of Determination to the Ethics Commission, the following procedures and standards shall apply.

(i) The Chair or Vice-Chair of the COMMISSION and the underlying complainant in whose favor the COMMISSION'S Order of Determination was issued, shall both be considered the "complainant of record" for purposes of Ethics Commission investigations and enforcement of Orders of Determination. See above comments.

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(ii) Any public officer, employee, agency, policy body or department that willfully fails to discharge any duties imposed by the Sunshine Ordinance, the Brown Act or the California Public Records Act shall be deemed to have committed official misconduct. [Already covered above in §67.41.]

The following sections dealing with the fines, etc for "official misconduct" may be a problem because Section 15.105 of the City charter spells out what the consequences are of an Ethics' finding of an official misconduct charge sent to it. That section is not all that clear, but adding to the Ethics "tool kit" on possible penalties may not be effective. This definitely needs careful review.

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(iii) Any public officer or employee individual found to have committed official misconduct under this Ordinance Law shall be fined at least not less than \$500, and up to not more than \$5,000 depending upon the seriousness of the misconduct. Any such fine shall be paid personally by the officer or employee and not from City funds.

(iv) Any agency, policy body or department found to have committed official misconduct under this Ordinance shall be fined at least \$500, and up to \$5,000 depending upon the seriousness of the misconduct. *[The official misconduct provisions in the city charter only apply to individuals.]*

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(v) Upon referral the In its referral, Sunshine Commission COMMISSION may, in a referral of a finding of official misconduct, recommend the level of fines that may be imposed imposed.

[(vi) The Ethics Commission may impose any additional [other?] penalty authorized by law for official misconduct.] *See comment regarding the specific provisions in the charter.*

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(vii) Any such fines imposed by the Ethics Commission under this provision Section, shall be placed in added to the COMMISSIONS litigation fund.

(b) The COMMISSION'S Order of Determination and, as applicable, finding of willful violation constituting official misconduct, shall be evidence of a violation of this Ordinance or other applicable open government law in any Ethics Commission investigation or proceeding. Factual findings made during COMMISSION hearings and in its orders shall be reviewed for abuse of discretion. Repeats §67.34(f).

#### SECTION 67.3543. PUBLIC ENFORCEMENT PROVISIONS.<sup>13</sup>

<sup>13</sup> New provision incorporates existing language from Articles II and III in order to clarify and streamline Ordinance.

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(a) In any court proceeding under any Open Government Law (1) pursuant to this Ordinance there shall be a presumption that the public information sought in any public record is fully disclosable, (2) that any meeting or portion of a meeting should be open to the public as well as and the records of such meeting, fully disclosable and (3) the burden shall be upon the respondent City Agency to prove rebut the relevant presumption that it has not complied with specificity by a preponderance of evidence that they it have has fully complied with the request that is the subject of such proceeding and/or that a specific exemption to disclosure conclusively applies.

(b) Any person may ~~institute~~ commence proceedings ~~bring an action~~ for injunctive relief, declaratory relief, or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this Ordinance as provided in this Law, or to enforce his or her right to attend any meeting required under this Ordinance Law to be open, or to compel such meeting to be open or to otherwise enforce this Law. Filing a complaint with the ~~Sunshine Commission~~ COMMISSION or exhausting the ~~Commission's~~ its complaint and hearing procedures is not a prerequisite to filing an action under this subsection.<sup>14</sup>

(c) Any person may ~~commence proceedings~~ bring an action for injunctive relief, declaratory relief, or writ of mandate in any court of competent jurisdiction for purposes of obtaining a judicial determination that an action taken by an official or an policy body agency in violation of this Ordinance is null and void, under this section. Nothing in this chapter shall be construed to prevent a policy body from curing or correcting an action challenged pursuant to this section.<sup>15</sup> *This is not needed.*

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<sup>14</sup> ~~Revises and clarifies existing language in Ordinance.~~  
<sup>15</sup> ~~New provision creating a right to judicial review of alleged public meeting violations, but only after cure and correct provisions are complied with. Provides method by which members of public can seek enforcement of enhanced public meeting~~

Once in court, all bets are off because if the agency cures/corrects it has to so by an admission in the case and the plaintiff gets fees.

It is not clear whether the prerequisites in subsection (d) are intended to apply to filing a lawsuit under subsection (b) or subsection (c), against the offending official or agency. If under (b), while those conditions may be OK, under the Brown Act, they probably violate the CPRA, as they limit -- with time delays and other requirements -- rather than expand the rights of the public to file a lawsuit for public records. This what the CPRA says:

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6258. Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter. The times for responsive pleadings and for hearings in these 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.

Thus, the emphasis is on getting a resolution as soon as possible. Requiring the requestor to make a demand within 30 days suggests that if he doesn't he can't sue. Giving the agency 45 days to respond is a forced delay on the requestor. And requiring that he go to the SOTF first is clearly not permissible. I am not sure whether the conditions would be permitted if meant to apply to subsection (c) lawsuits.

If I want to file an action for declaratory relief relating to actions of a policy body it is hard to imagine I could be forced to go through these hoops before I can do that. In fact, I can probably do it as a taxpayer in a Section 526a lawsuit.

(d) Prior to any action being commenced pursuant to subsection (b)(c)???, the person shall make a demand on the policy body City Agency to cure or correct the action alleged to have been taken in violation of this Ordinance Law. The demand shall be in writing and clearly describe the challenged action of the policy body and the nature of the alleged violation.

provisions in the Sunshine Ordinance through procedures that are consistent with the procedural requirements of the Brown Act.



- (i) Written demand shall be made within 30 calendar days from the date the action was taken.
- (ii) Within 45 calendar days of receipt of the demand, the policy body shall cure or correct the challenged action and inform the complainant in writing of its actions to cure or correct or inform the complainant in writing of its decision not to cure or correct the challenged action.
- (iii) If the policy body takes no action within the 45-calendar-day period, the inaction shall be deemed a decision not to cure or correct the challenged action.
- (iv) The complainant who receives notice of the policy body's decision not to cure or correct the challenged action, or if the policy body takes no action within the 45-calendar-day period, may file a complaint with the Sunshine Commission. If the Sunshine Commission finds that the policy body violated the Ordinance, the complainant may commence an action pursuant to subsection (b). The Sunshine Commission shall not have authority to void an action of a policy body, but filing a complaint and exhausting the Commission's complaint and hearing procedures is a prerequisite to filing an action under subsection (b).

(e) A court shall award costs and reasonable attorneys' fees to the plaintiff who if that person or entity is the prevailing party in an action brought to enforce this Ordinance. Law. Actually the lawsuits in subsection (b) are limited to public meeting and public records violations, not to enforcing the Law generally.

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(f) If a court finds that an action filed pursuant to this section is frivolous, the City and County may assert its rights to be paid its reasonable attorneys' fees attorneys fees and costs.

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(g) Any person may institute proceedings for enforcement and penalties under this act in any court of competent jurisdiction or Ordinance or Law before the

Ethics Commission if enforcement action is not taken by a city or state official 40 days after a complaint is filed 60 calendar days after an Order of Determination was issued by the Sunshine Commission, the City department, entity, official, body or employee has not complied with the Order of Determination issued by the Sunshine Commission.<sup>16</sup> (Added by Proposition G, 11/2/99)

The changes to this subsection (g) destroy and obstruct its original purpose. Originally it was intended to allow for direct filings of sunshine complaints with the Ethics Commission, whose authority to handle them was not all that clear in 1999. With the changes, that alternative is cut-off, instead requiring the complainant to go through the entire procedure through the SOTF and be successful. If he is, then why should he file a complaint with Ethics to enforce an SOTF Order – isn't that what the SOTF is supposed to do?

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#### **SECTION 67.3644. SUNSHINE ORDINANCE SUPERSEDES OTHER LOCAL LAWS.**

Whenever the provisions of this Sunshine Ordinance Law conflict with those of another local law, supersede other local laws, including by but not limited to the city charter, the provisions of this Law shall supersede such local law's conflicting -  
Whenever a conflict in local law is identified, provisions, if and to the extent the requirement the provisions of this Law which would result in greater or more expedited public access to public information and and public meetings shall apply. (Added by Proposition G, 11/2/99)

#### **SECTION 67.3745. SEVERABILITY.**

The provisions of this chapter Law are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section or portion of

<sup>16</sup> Provides a longer time period within which respondents must comply with Orders of Determination before a complainant can go directly to the Ethics Commission.

this ~~chapter~~Law, or the invalidity of the application thereof to any person or circumstances, shall not affect the validity of the remainder of this ~~chapter~~Law, or the validity of its application to other persons or circumstances. (~~Added by Ord. 265-93, App. 8/18/93; amended by Proposition C, 11/2/99~~)

*These are my suggested changes to Sections 67.39 through 67.44, with my comments. A clean version is attached to show how it would read with the changes incorporated in it.*

*In it I have used a couple of defined terms as suggested in my Memorandum: "City Agency" describes the respondent department, board, commission, official's office etc., "Open Government Laws" are all the open meetings and public records laws and "Law" the "San Francisco Sunshine Law", which I suggest be the name of the amended law. Also somewhere in §67.39, I would define an Order of Determination as an "Order."*

### **SECTION 67.39. HEARINGS AND ORDERS OF DETERMINATION**

(a) The COMMISSION shall conduct administrative hearings on complaints of alleged violations of Open Government Laws either by an individual custodian of public records reports or by a City Agency. A complaint filed against an individual custodian shall be deemed filed against the City Agency to whom he or she reports. The COMMISSION may issue an Order of Determination following the hearing on a particular complaint to the Complainant and the Respondent. If the COMMISSION determines on the basis of substantial evidence presented prior to and during the hearing that a violation of any one or more Open Government Laws has occurred. The Order shall include findings of fact and conclusions of law. Each Order shall be posted on the COMMISSION'S website forthwith on issuance.

(b) To the extent not prohibited by State law, the COMMISSION may take testimony and other evidence, administer oaths and affirmations, subpoena witnesses and compel their attendance and testimony, and require by subpoena the production of any books, papers, records or other items relevant to the performance of the COMMISSION'S duties or exercise of its powers. *[What other powers?]*

(c) An authorized representative of the Respondent City Agency with personal knowledge of the matters alleged in the complaint shall attend each COMMISSION and COMMISSION committee hearing to explain the City Agency's

response to the complaint, as well as provide a detailed description of the records search conducted, and a copy of any opinion of the City Attorney on which it is relying.

#### **SECTION 67.40. ADMINISTRATIVE ENFORCEMENT PROVISIONS.**

(a) Upon issuance of an Order that a public record is to be disclosed or other action is to be taken by the Respondent, the City Agency so ordered shall forthwith comply with such Order. If the City Agency fails to so comply with any such Order within 5 business days after its issuance, the COMMISSION shall refer the Order for enforcement to one or more of the San Francisco Ethics Commission, Board of Supervisors, District Attorney, the State Attorney General or another appropriate enforcement body. The official or body to whom such referral is made shall take whatever measures necessary to enforce the Order.

(b) In its Order, the COMMISSION may also require the affected City Agency, if overseen by a governing or policy body, to agendaize the Order for discussion and response at its governing or policy body's next regularly scheduled meeting.

(c) In its Order, the COMMISSION may also require the affected City Agency, if it maintains a website, to immediately post the Order prominently on its website for at least 60 days.

(d) Upon finding a serious and willful violation of this Law, the COMMISSION by not less than a two-thirds vote of the members, may retain outside counsel to remedy such violation(s) by bringing an action in the San Francisco Superior Court, subject to the following:

(1) The amount expended for such outside counsel shall not exceed, in the aggregate, \$50,000 per City fiscal year or such greater amount as is authorized by the Board of Supervisors (the "litigation fund"). Outside counsel may be retained on a fully contingent or partially contingent fee basis. The COMMISSION shall include in

its bylaws, selection criteria and oversight of retained outside counsel and charges to the litigation fund.

(2) Any attorney fees recovered in any proceedings initiated under this subsection, shall first applied to reimburse the litigation fund for charges to it in connection with the proceeding and any excess paid as additional fees to the outside counsel.

(e) The administrative remedies provided under this Law do not and shall not limit in any way (1) the provision of other administrative remedies available to any person with respect to any individual or any City Agency or (2) the provision of judicial remedies otherwise available to any person.

(f) An Order shall be presumptive evidence of a violation of the Open Government Law(s) specified in such Order in any other administrative or judicial proceeding, and factual findings included in any such Order shall be reviewed solely for abuse of discretion.

#### **SECTION 67.3441. WILLFUL FAILURE SHALL BE OFFICIAL MISCONDUCT.**

The willful failure of any person, to discharge any duties imposed any Government Law shall be deemed official misconduct for purposes of this Law and of any applicable provisions of the City charter, local law and State law. The COMMISSION'S charge of official misconduct, with findings of fact and conclusions of law shall be referred to the Ethics Commission for adjudication.

#### **SECTION 67.42. REFERRALS AND ENFORCEMENT BY THE ETHICS COMMISSION.**

*The Ethics Commission, as it should, is presently considering the adoption of a separate set of Regulations/Rules for its handling of SOTF referrals. Presumably provision will be made for notifying the SOTF and the original complainant as the enforcement process progresses and allowing the*

*SOTF's designated representatives and the original complainant to dispute or challenge whatever "evidence" the respondent produces.*

*Under those separate Regulations, there cannot be another "investigation", as the Order's factual findings and legal conclusions are presumptively correct and the respondent agency has the burden to prove otherwise through an open process, including hearings.*

The Ethics Commission is authorized to enforce Orders of Determination of the COMMISSION. Upon referral of any Order to the Ethics Commission, the following procedures and standards shall apply.

[(i) The Chair or Vice-Chair of the COMMISSION and the underlying complainant in whose favor the COMMISSION'S Order of Determination was issued, shall both be considered the "complainant of record" for purposes of Ethics Commission enforcement of Orders of Determination.]

*The following sections dealing with the fines, etc for "official misconduct" may be a problem because Section 15.105 of the City charter spells out what the consequences are of an Ethics' finding of an official misconduct charge sent to it. That section is not all that clear, but adding to the Ethics "tool kit" on possible penalties may not be effective. This definitely needs careful review.*

(ii) Any individual found to have committed official misconduct under this Law shall be fined not less than \$500, and not more than \$5,000 depending upon the seriousness of the misconduct. Any such fine shall be paid personally by the officer or employee and not from City funds.

(v) In its referral, COMMISSION may recommend the level of fines that may be imposed.

[(vi) The Ethics Commission may impose any additional [other?] penalty authorized by law for official misconduct.]

(vii) Any such fines imposed by the Ethics Commission under this Section, shall be added to the COMMISSION'S litigation fund.

## SECTION 67.3543. PUBLIC ENFORCEMENT PROVISIONS.

(a) In any court proceeding under any Open Government Law (1) there shall be a presumption that the public information sought in any public record is fully disclosable, (2) any meeting or portion of a meeting should be open to the public and the records of such meeting, fully disclosable and (3) the burden shall be upon the City Agency to rebut the relevant presumption that it has not complied with by a preponderance of evidence that it has fully complied with the request that is the subject of such proceeding and/or that a specific exemption to disclosure conclusively applies.

(b) Any person may bring an action for injunctive relief, declaratory relief, or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records as provided in this Law, or to enforce his or her right to attend any meeting required under this Law to be open or to compel such meeting to be open or to otherwise enforce this Law.

Filing a complaint with COMMISSION or exhausting its complaint and hearing procedures is not a prerequisite to filing an action under this subsection.

(c) Any person bring an action for injunctive relief, declaratory relief, or writ of mandate in any court of competent jurisdiction for purposes of obtaining a judicial determination that an action taken by an official or an agency in violation of this Ordinance is null and void. *This subsection is not needed. Once in court, all bets are off because if the agency cures/corrects it has to so by an admission in the case and the plaintiff gets fees.*

*It is not clear whether the prerequisites in subsection (d) are intended to apply to filing a lawsuit under subsection (b) or subsection (c), against the offending official or agency. If under (b), while those conditions may be OK, under the Brown Act, they probably violate the CPRA, as they limit -- with time delays and other requirements -- rather than expand the rights of the public to file a lawsuit for public records. This what the CPRA says:*



6258. Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter. The times for responsive pleadings and for hearings in these 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.

Thus, the emphasis is on getting a resolution as soon as possible. Requiring the requestor to make a demand within 30 days suggests that if he doesn't he can't sue. Giving the agency 45 days to respond is a forced delay on the requestor. And requiring that he go to the SOTF first is clearly not permissible. I am not sure whether the conditions would be permitted if meant to apply to subsection (c) lawsuits.

If I want to file an action for declaratory relief relating to actions of a policy body it is hard to imagine I could be forced to go through these hoops before I can do that. In fact, I can probably do it as a taxpayer in a Section 526a lawsuit.

(d) Prior to any action being commenced pursuant to subsection (c)???, the person shall make a demand on the City Agency to cure or correct the action alleged to have been taken in violation of this Law. The demand shall be in writing and clearly describe the challenged action of the policy body and the nature of the alleged violation.

- (i) Written demand shall be made within 30 calendar days from the date the action was taken.
- (ii) Within 45 calendar days of receipt of the demand, the policy body shall cure or correct the challenged action and inform the complainant in writing of its actions to cure or correct or inform the complainant in writing of its decision not to cure or correct the challenged action.
- (iii) If the policy body takes no action within the 45-calendar-day period, the inaction shall be deemed a decision not to cure or correct the challenged action.

(iv) The complainant who receives notice of the policy body's decision not to cure or correct the challenged action, or if the policy body takes no action within the 45-calendar-day period, may file a complaint with the Sunshine Commission. If the Sunshine Commission finds that the policy body violated the Ordinance, the complainant may commence an action pursuant to subsection (b). The Sunshine Commission shall not have authority to void an action of a policy body, but filing a complaint and exhausting the Commission's complaint and hearing procedures is a prerequisite to filing an action under subsection (b).

(e) A court shall award costs and reasonable attorneys fees to the plaintiff ~~who~~ if the prevailing party in an action brought to enforce this Law.

*Actually the lawsuits in subsection (b) are limited to public meeting and public records violations, not to "enforcing" the Law generally.*

(f) If a court finds that an action filed pursuant to this section is frivolous, the City and County may assert its rights to be paid its reasonable attorneys fees and costs.

(g) Any person may institute proceedings for enforcement and penalties under this Law before the Ethics Commission if 60 calendar days after an Order was issued by the COMMISSION, the City Agency has not complied with the Order issued by the Sunshine Commission.

*The changes to this subsection (g) destroy and obstruct its original purpose. Originally it was intended to allow for direct filings of sunshine complaints with the Ethics Commission, whose authority to handle them was not all that clear in 1999. With the changes, that alternative is cut-off, instead requiring the complainant to go through the entire procedure through the SOTF and be successful. If he is, then why should he file a complaint with Ethics to enforce an SOTF Order – isn't that what the SOTF is supposed to do?*

**SECTION 67.3644. SUNSHINE ORDINANCE SUPERSEDES OTHER LOCAL LAWS.**

Whenever the provisions of this Law conflict with those of another local law, including but not limited to the city charter, the provisions of this Law shall supersede such local law's conflicting provisions, if and to the extent the provisions of this Law would result in greater or more expedited public access to public information and public meetings.

**SECTION 67.3745. SEVERABILITY.**

The provisions of this Law are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section or portion of this Law, or the invalidity of the application thereof to any person or circumstances, shall not affect the validity of the remainder of this Law, or the validity of its application to other persons or circumstances.

