

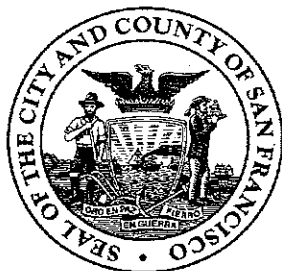
MEMORANDUM TO THE SOTF MEMBERS

Re: July 27, 2010 Meeting Agenda #27 “Ethics Commission proposed policy for handling sunshine-related complaints (30 minutes) (discussion and possible action).”

In connection with this Agenda Item #27, I am forwarding the three documents, consisting of (1) the Ethics Staff Memorandum dated June 7, 2010, a copy of which you probably received shortly before the Ethics Commission meeting on June 14, 2010 when it was taken up, (2) my Memorandum to the Ethics Commissioners dated June 10, 2010, which was discussed at the June 14, 2010 meeting and (3) a Memorandum I prepared for and discussed with Susan Harriman, one of the Commissioners, with whom I met on July 13, 2010.

My purpose in sending these to you is to give you my perspective on what the “sunshine” rules issued by the Ethics Commission should contain, and some sense of their current status. Even though the Ethics Commission adopted the three decision points in the Staff Memo, they agreed that they would revisit them once they had the SOTF’s comments on them.

Allen Grossman



ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

JAMIENNE S. STUDLEY
CHAIRPERSON

Date: June 7, 2010

SUSAN J. HARRIMAN
VICE-CHAIRPERSON

To: Members, Ethics Commission
Members, Sunshine Ordinance Task Force

EILEEN HANSEN
COMMISSIONER

From: John St. Croix, Executive Director

BENEDICT Y. HUR
COMMISSIONER

By: Richard Mo, Chief Enforcement Officer

CHARLES L. WARD
COMMISSIONER

Re: Regulations regarding Enforcement of the Sunshine Ordinance

JOHN ST. CROIX
EXECUTIVE DIRECTOR

I. Introduction

On May 4, 2010, staff presented the Ethics Commission ("Commission") a memorandum containing draft regulations regarding the Commission's handling of complaints alleging a violation of the Sunshine Ordinance, San Francisco Administrative Code Chapter 67 ("Ordinance"). The memorandum contained staff recommendations, which were cast as eight separate decision points.

At its May 10, 2010 meeting, the Commission decided, by a vote of 4-0, to create and adopt a separate set of regulations to govern the investigations and enforcement of complaints that allege a violation of the Ordinance. The Commission decided to table the discussion of the decision points so that it could give staff additional guidance.

Based on input from the Commission, staff now presents the following three policy directives that, if adopted, will guide the formulation of the regulations governing complaints alleging a violation of the Ordinance: (1) the Commission has jurisdiction over all alleged violations of the Ordinance; (2) the Commission, pursuant to its authority under the Charter, may adopt regulations setting forth penalties that apply to violations of the Ordinance; (3) the Commission will be required to hold an enforcement hearing for all referrals from the Sunshine Ordinance Task Force.

II. Relevant Law

A. Relevant provisions of the San Francisco Charter

San Francisco Charter section 15.102 states, in relevant part, the following regarding the duties of the Ethics Commission:

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.

B. Relevant provisions of the Sunshine Ordinance

Three provisions of the Sunshine Ordinance are relevant to the discussion of the policy directives discussed in this memo. They are set forth below.

1. ***From S.F. Administrative Code section 67.30:***
The Task Force shall make referrals to a municipal office with enforcement power under this ordinance or under the California Public Records Act.
2. ***S. F. Administrative Code section 67.34:***
The willful failure of any elected official, department head, or other managerial city employee to discharge any duties imposed by the Sunshine Ordinance, the Brown Act or the Public Records Act shall be deemed official misconduct. 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.
3. ***S.F. Administrative Code section 67.35:***
 - (a) Any person may institute proceedings 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 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.
 - (b) A court shall award costs and reasonable attorneys' fees to the plaintiff who is the prevailing party in an action brought to enforce this Ordinance.
 - (c) 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.
 - (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.

III. Policy Directives

A. The Commission's jurisdiction regarding alleged violations of the Ordinance

In its May 4, 2010 memorandum, staff had proposed that the Commission accept and process all complaints and referrals that allege any violation of the Ordinance, regardless of whether the alleged violation was willful in nature.

Under a plain reading of the above three sections of the Sunshine Ordinance, the Ethics Commission has enforcement jurisdiction over three categories of violations: (1) alleged willful

violations of the Sunshine Ordinance by elected officials and department heads; (2) referrals of alleged violations of the Ordinance from the Sunshine Ordinance Task Force; and (3) complaints brought directly to the Ethics Commission alleging a violation of the Ordinance. Because category (3) complaints that are brought directly to the Commission could conceivably cover complaints under category (1) as well as alleged non-willful violations of the Ordinance by employees and members of boards and commissions, the Commission has jurisdiction over all allegations of a violation of the Ordinance, whether the violation is willful or not.

This policy clarifies the Commission's jurisdiction with respect to complaints of violations of the Ordinance.

B. The Commission's jurisdiction to establish penalties for violations of the Ordinance

With respect to alleged willful violations by elected officials and department heads, the Commission may order the elected official or department head to comply with the Ordinance or make a finding of official misconduct if there is no compliance. If the Commission makes a finding of official misconduct, it will then adhere to San Francisco Charter section 15.105, which governs suspension and removal.

With respect to any alleged violation of the Ordinance, willful or not, by an employee or member of a board or commission, Administrative Code section 67.35 provides the Commission jurisdiction to take enforcement action as well as to impose penalties, if no enforcement action is taken by a City or State official 40 days after a complaint is filed. Under Charter section 15.102, in order to carry out its enforcement authority over alleged violations of the Ordinance, the Commission may determine what the penalties are. Thus, the Commission may determine whether to impose monetary fines or lesser penalties. However, pursuant to Administrative Code section 67.34, unless the respondent is an elected official or a department head, the penalty may not include a finding of official misconduct.

This policy clarifies the Commission's jurisdiction to establish penalties for a violation of the Ordinance.

C. Enforcement Hearings for Referrals from the Task Force

For all Task Force referrals pursuant to Administrative Code section 67.30, the Commission will hold an enforcement hearing. The real party in interest (i.e., original complainant) and the respondent may appear. Because the Task Force will have already determined that respondent violated the Ordinance, respondent will have the burden of proof to show that he or she did not violate the Ordinance. This recommendation means that all Task Force referrals will bypass the Commission staff prior to the Commission's consideration, although the Commission may direct staff to provide additional information and recommendations before rendering a decision.

This policy clarifies the Commission's handling of referrals from the Task Force.

IV. Conclusion and Decision Points

Depending on whether the Commission decides to adopt one, two or all three or none of these policy directives, staff will either: 1) present a revised set of proposed regulations; or 2) present its original proposed regulations as set forth in the May 4, 2010 memorandum.

Decision Point 1:

Shall the Commission approve the policy directive as set forth in item III.A above, related to the Commission's jurisdiction over alleged violations of the Sunshine Ordinance?

Decision Point 2:

Shall the Commission approve the policy directive as set forth in item III.B above, related to the Commission's jurisdiction to establish penalties for violations of the Sunshine Ordinance?

Decision Point 3:

Shall the Commission approve the policy directive as set forth in item III.C above, related to the Commission's handling of referrals from the Sunshine Ordinance Task Force?

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MEMORANDUM

Date: June 10, 2010

To: Ethics Commissioners and John St. Croix, Executive Director

From: Allen Grossman

Re: Ethics Commission's Staff June 7, 2010 Memorandum to Ethics Commissioners, "Regulations regarding Enforcement of the Sunshine Ordinance."

Introduction:

The Memorandum, prepared by Richard Mo, "Chief Enforcement Officer" for Mr. St. Croix, Executive Director, is directed to the members of both the Ethics Commission and the Sunshine Ordinance Task Force (SOTF). The SOTF's next regularly scheduled meeting is June 22, 2010. It is unlikely that that an SOTF Special Meeting can be called to consider and respond in any formal way to the Memorandum before the Ethics Commission meets next Monday, June 14. Under the circumstances it may be appropriate to postpone any final decision on the policy directives, until the Commission has the SOTF's comments in hand.

Overview of Staff's Approach:

- (1) Staff continues to refer to all matters brought to the Commission as "complaints" or as "violations." This suggests that the staff has not yet completely understood that there are three distinct and different paths to the Commission: (a) original complaints filed directly with the Commission under either under §67.34 (second sentence) for a "willful violation" or under 67.35 (d) for "enforcement and penalties"; (b) "enforcement" of an SOTF referred Order of Determination pursuant to §67.30(c); and (c) an SOTF finding of "official misconduct" under §67.34 (first sentence) forwarded to the Commission for action.
- (2) Staff fails to describe other basic provisions that should be included in the proposed Regulations and others that should not be included. These are described below.
- (3) Staff's analysis of the availability of the removal/suspension penalties for a respondent's failure to comply with the Commission's order is incomplete.
- (4) There are principles that staff should recognize in formulating the proposed Regulations so they are consistent with the statutory underpinnings of the Sunshine Ordinance.

What the Regulations Cannot Include:

- (1) The Regulations cannot include any provisions for investigations nor to keep "confidential" any records relating to open government matters: Under Appendix Section C3.699-13, subdivision (a), the Commission's investigative power and ability to keep records confidential extends only to "...alleged violations of this charter and City ordinances relating to

campaign finance, lobbying, conflicts of interest and governmental ethics.” No reference to alleged violations of open government laws.

(2) The Regulations cannot delegate any authority or power to the Executive Director to do anything more than administer those Regulations because the Commission is acting solely in a judicial capacity with respect to open government matters brought before it, whether (a) enforcing SOTF referrals, (b) finding facts and hearing complaints for “willful violations” or other violations or (c) conducting a “trial” of an official or other public officer found to have committed official misconduct. Thus, although staff recommends that all Task Force referrals “...bypass the Commission staff prior to the Commission’s consideration”, staff suggests that “...the Commission may direct staff to provide additional information and recommendations before rendering a decision.” The staff cannot be allowed to independently develop any factual information or make any recommendations, as such actions would impair the judicial nature of the proceedings before the Commission.

(3) Staff proposes a policy directive that “... respondent will have the burden of proof to show that he or she did not violate the Ordinance” because the SOTF has already found the violation. The Regulations cannot include any provisions that would authorize the Commission to review, reject, deny or refuse to accept any SOTF finding or conclusion in any referred enforcement case. Since its role is to “enforce” the non-compliance with Orders of the SOTF, a duly constituted body given the express power under the Sunshine Ordinance to issue those Orders, based on its findings, the underlying facts and its conclusions cannot be re-litigated before the Commission.

(4) The Regulations cannot include any provisions dealing with SOTF findings of official misconduct under §67.34 (first sentence); those findings must be governed by a separate set of generic rules that apply whenever there is a finding of “official misconduct” which falls within Ethics’ jurisdiction as provided in §15.05(e) of the City Charter. A separate set of generic rules is required because there are at least six other instances under the city charter for such “official misconduct” findings, in addition to those found directly by the Commission pursuant to §15.105(e) and none should be tailored for those found by the SOTF. For obvious reasons, that procedure would necessarily involve significant due process elements.

What the Regulations Should Include.

(1) For SOTF enforcement referrals of its non-compliance with Orders, provisions for a summary “show cause” proceeding shortly after the referral is received by the Commission. Advice from the City Attorney’s Office cannot be given as reason for non-compliance. The summary aspect is compelled by two factors. One, before the SOTF referral is made to the Commission, there are no less than four hearings before the SOTF and its Committees, including two relating solely to the respondent’s compliance with an SOTF Order of Determination; the respondent has had ample opportunity to make the case for non-compliance. Two the public policy is to provide fast and efficient access to public records, as embodied in CPRA §6258 “...The times for responsive pleadings and for hearings in these proceedings shall be set by the judge ... with the object of securing a decision as to these matters at the earliest possible time ” and 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.”

(2) For complaints filed initially with the Commission pursuant to Sunshine Ordinance §67.34 for “willful violations” or for other violations pursuant to § 67.35(d), the parties before the Commission would be the complainant and the respondent department/official/agency. The Executive Director would act as the “administrator” and provision included for a single or a three Commissioner panel to hear the jurisdictional issues and any other matters before the full Commission hearing on the merits. The SOTF Complaint/Hearing Procedure could act as a “model” with similar time limitations.

(3) The Regulations dealing with SOTF enforcement referrals and complaints filed directly with the Commission must provide that the entire process is open and all records are fully disclosable. This requirement is mandated because (a) the so-called “confidentiality” provision in Appendix §C3.699-13 (a) do not apply to open government “investigations” –and (b) there is no justification to “exempt” from disclosure any public records concerning the Commission’s handling of open government matters, given that the records in a SOTF or in any superior court proceeding -- the other ways a person can seek remedial action to obtain a public record -- do not exempt any records (other than the record in dispute).

Statutory Constraints:

(1) The regulations cannot restrict or limit any “access” requirements in the CPRA or the Brown Act. They may, however, provide for greater access to public meetings [Brown Act § 54953.7] or faster, more efficient, or greater access to records [CPRA § 6253(e)].

(2) The Regulations have to be consistent with the San Francisco Sunshine Ordinance for two reasons: (a) in its by-laws, the Commission has undertaken to comply with the SFSO and (b) the Sunshine Ordinance has primacy over any other inconsistent local laws in the aspects of open government that it covers.

Penalties and Fines.

Staff properly concludes that the Commission has the power to impose penalties and that the suspension and removal of a respondent requires a finding of official misconduct by the Commission, but incorrectly limits that penalty to elected officials and department heads because §67.34 (first sentence) of the Ordinance is the only applicable provision. That is incorrect in two respects. §67.34 also includes “other managerial city employee(s)” whose willful failure can constitute “official misconduct.” Once that finding is made, the person so found becomes subject to suspension under §15.105(e) of the City Charter which provides, in part: “When any City law provides that a violation of the law constitutes or is deemed official misconduct, the conduct is covered by this definition and may subject the person to discipline and/or removal from office.” Noteworthy too is that “official misconduct” is defined in §105(e) as “any wrongful behavior by a public officer in relation to the duties of his or her office... that “may subject the person to discipline and/or removal from office.” There may be other respondent “public officers” in

addition to elected officials, department heads and managerial employees whose failure constituted official misconduct.

Other Comments.

(1) The whole purpose of an individual member of the public seeking administrative relief to gain access to public records or to correct meetings violations is to make it quicker, cheaper, easier and more efficient than litigation. For that reason, the Regulations must make the process simple, efficient, and easy for the complainant and not require a lawyer's assistance. If the complainant has already spent two months or so before the SOTF to obtain an Order, only to have it ignored by the respondent, enforcement of that Order has to be swift. Of the 14 referrals that were last dismissed by the Commission, one was held 18 months and none less than seven months.

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

MEMORANDUM

July 12, 2010

ETHICS COMMISSION'S AUTHORITY TO ISSUE RULES RELATING TO OPEN GOVERNMENT.

The Commission's authority to issue Rules and Regulations governing open government matters is found in Article XV of the City charter, § 15.102, second sentence, to wit:

".... 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."

This authority to carry out the "purposes and provisions" of the Sunshine Ordinance provides the Commission with a broad power to construct rules and regulations that will (1) give the public a prompt, efficient and effective means to obtain public records and remedy public meeting violations, (2) establish the Commission as the body that will unqualifiedly enforce and support the Sunshine Ordinance and the SOTF and (3) penalize those city officials, department heads and agencies who use improper tactics and create obstacles to negate the public's rights to access to public records and for lawfully conducted open meetings. In other words, the Commission has to be on the side of the public in this arena, not against it, which it has been for many years.

I read this charter provision as enabling the Commission to go beyond those specific provisions of the Sunshine Ordinance that set out the Commission's jurisdiction and its enforcement powers, and give it the power, through rules and regulations designed to carry out the "purposes" of the Sunshine Ordinance and to enforce any provision in the Sunshine Ordinance that needs enforcement.

WHAT ARE PROVISIONS THAT VEXED THE COMMISSIONERS WHEN DISCUSSED AT THE JUNE MEETING?

First, what is the significance of Section 67.35(d) and how is to be implemented? That subsection reads:

"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 or state official 40 days after a complaint is filed."

Because recourse to a court of competent jurisdiction is already granted to a person seeking vindication of open government rights under Section 67.35(a),

(a) Any person may institute proceedings 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 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.

and for public records under CPRA §6259(a) and (b),

(a) Whenever it is made to appear by verified petition to the superior court of the county where the records ... are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why he or she should not do so.

(b) If the court finds that the public official's decision to refuse disclosure is not justified under Section 6254 or 6255, he or she shall order the public official to make the record public...

Section 67.35(d) can only mean what it says -- that the "court of competent jurisdiction" or the "Ethics Commission" is charged with "enforcement and penalties under this Act". To make sense of what either a court or the Commission would be enforcing, one must assume that it would be an order, decree or some determination by another body, as otherwise the provision would simply be duplicating the other two laws.¹ The only body that has the power to issue orders and make determinations "under this act" is the SOTF. "Any person" certainly includes the complainant whose complaint was heard and decided by the SOTF. While the SOTF can refer its Order for enforcement to the Ethics Commission under Section 67.30(c) it has not always done so. It has on occasion sent referrals to the State Attorney General, who has declined to handle them because they are "local matters." Moreover, the aggrieved complainant might prefer to go to the Commission to enforce the order and impose penalties.

However, there is a condition to be met before either the court or the Commission can take enforcement action, to wit: "enforcement action is not taken by a city or state official 40 days after a complaint is filed." This condition creates some complications for the aggrieved complainant. With which "city or state official" does he file a "complaint" -- the City Attorney, the District Attorney or the Attorney General? Does the complaint merely state that the order has not been complied with and request action by the official to enforce it? At what point does he file it, when the SOTF enters it or, as provided in Section 67.21(e), when the five day period for compliance ends and the SOTF is to notify either the District Attorney or the Attorney General for help with compliance? In its role as the enforcer, the Commission can answer all these questions in its "rules and regulations." The rules and regulations can also spell out the penalties.

It should be noted that Government Code Section 1222, which makes certain "willful omissions to perform a duty" a misdemeanor, may provide a basis for rather stiff penalties. The attached letter I sent a few years ago to an SOTF member explains why.

Second, what sort of proceeding should be held when the matter is a referral by the SOTF to enforce its non-complied with Order? Several come to mind. The proceeding could be:

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

¹ This was noted by Commissioner Hur when commenting on the need for brevity in the enforcement proceeding and the meaning of Section 67.35(d).

The other, a “limited show cause” hearing in which the respondent will be penalized for failure to comply with the Order, unless the respondent can show (a) it has a legally supportable basis for non-compliance not presented to the SOTF; (b) it did not do so “willfully”, but advice from the City Attorney’s Office, whether oral or written, cannot be given as the reason it was not “willful.”

Whichever is chosen, the goal of a swift effective proceeding would be met and the consequences known, as both the time table and the penalties would be spelled out in the “Rules and Regulations”.

Third, how should the Commission “handle” a complaint for a “willful violation” filed directly with it pursuant to Section 67.34?

The Commission could follow somewhat the same time periods and other aspects of SOTF’s complaint procedure, but raising the bar for what constitutes a “willful violation” as contrasted with a simple “violation”. The Commission could require greater factual specificity and support in the original complaint on the issue of “willfulness” and the jurisdictional hearing would become a significant event because that hearing would determine whether there are enough facts to justify hearing the merits. If the Commission then found a “willful violation” it could enforce that finding as “official misconduct” – for which it will have a separate set of rules. Relevant is how “willful” is defined and applied in Government Code Section 1222 context, as noted in the attached letter, page 2.

Lastly, a question was raised whether the Commission could use the “official misconduct” route if the Commission had entered an order of its own and there was non-compliance; that the “official misconduct” route was only available if the finding was made by the SOTF. Official misconduct is defined in §15.102(e), in part, as “any wrongful behavior by a public officer in relation to the duties of his or her office, willful in its character, including any failure, refusal or neglect of an officer to perform any duty enjoined on him or her by law...” That certainly cover the failure of a “public officer” to abide by the Commission’s order, even if the SOTF did not itself make the finding. However, given that the definition only applies to “public officers” and the line to be drawn may not be clear, the rules and regulations can spell out the penalties for a respondent’s failure to comply with one of its orders without relying on the nuclear option.