Date: Sept. 28, 2010 **Item No.** 19
File No.

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

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Completed by: Chris Rustom **Date:** Sept, 23, 2010

***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.

ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

Date: August 17, 2010

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

From: John St. Croix, Executive Director
By: Richard Mo, Chief Enforcement Officer

Re: Regulations regarding Enforcement of Sunshine Ordinance Complaints

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I. Introduction

On June 7, 2010, staff presented to the Ethics Commission ("Commission") a memorandum regarding the formulation of regulations governing the Commission's handling of complaints alleging a violation of the Sunshine Ordinance, San Francisco Administrative Code Chapter 67 ("Ordinance"). The memorandum contained a discussion of three policy directives, which were cast as separate decision points.

At its June 14, 2010 meeting, the Commission discussed these policy directives and adopted the following three decision points:

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

2. The Commission has jurisdiction to establish penalties for violations of the Ordinance, including whether to find official misconduct, impose monetary fines or other penalties. Unless the Respondent is an elected official or a department head, the penalty may not include a finding of official misconduct.

3. For all Task Force referrals received pursuant to Administrative Code section 67.30(c), the Commission will hold an enforcement hearing. The real party in interest (the original complainant) and the Respondent may

appear. Because the Task Force will have already determined that the Respondent violated the Ordinance, Respondent will have the burden of proof to show that he or she did not violate the Ordinance.

Guided by these three policy directives, staff has drafted a separate set of regulations that would govern all complaints alleging a violation of the Ordinance and referrals from the Task Force. *See Attachment A.* These proposals have been forwarded to the Task Force for its review and comments. The Commission will not consider the draft proposals until after the Task Force has had a chance to discuss and/or take action on them. The following is a summary of each section of the proposed regulations, cast as a series of decision points.

II. Relevant Provisions of the Sunshine Ordinance

Three provisions of the Sunshine Ordinance are relevant to the discussion of the aforementioned policy directives. They are set forth below.

1. ***From S.F. Administrative Code section 67.30(c):***
   The Task Force shall make referrals to a municipal office with enforcement power under this ordinance or under the California Public Records Act and the Brown Act whenever it concludes that any person has violated any provisions of this ordinance or the Acts.

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. Summary of Proposed Regulations

1. Section I – Preamble

Summary: Section I, the Preamble, states the following: 1) the purpose of these regulations is to promote compliance with the Sunshine Ordinance; 2) these regulations will apply only to complaints alleging a violation of the Sunshine Ordinance and referrals from the Sunshine Ordinance Task Force; and 3) all matters involving allegations of other laws under the Commission's jurisdiction shall be governed by the Commission's Regulations for Investigations and Enforcement Proceedings ("Regulations"). *See Attachment B.*

Decision Point 1: Shall the Commission approve the language of Section I, Preamble, as set forth on page 1 of the proposed regulations?

2. Section II – Definitions

Section II, Definitions, contains terms taken from the Regulations, with the following additional definitions:

1) "Business day" is expanded to exclude a day on which the office of the Ethics Commission is closed, which may include mandatory furlough days to address the current dire budgetary shortfalls;

2) "Complaint" means a written document alleging a violation of the Sunshine Ordinance filed with the Commission;

3) "Order of Determination" means a final recommendation issued by the Task Force concerning a violation of the Sunshine Ordinance;

4) "Referral" means a reference for enforcement and/or penalties from the Task Force to the Commission, after the Task Force has issued an Order of Determination finding a violation of the Sunshine Ordinance;

5) "Sunshine Ordinance" means the San Francisco Administrative Code section 67.1, et seq.;

6) "Task Force" means the Sunshine Ordinance Task Force, established by San Francisco Administrative Code section 67.30; and

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

Decision Point 2: Shall the Commission approve the language of Section II, Definitions, as set forth on pages 1-2 of the proposed regulations?

3. Section III – Complaints Alleging Violations of the Sunshine Ordinance

Summary: Section III specifies the process by which complaints involving alleged violations of the Sunshine Ordinance are handled.

Under Section III.A., any person may file a complaint with the Commission or the Task Force alleging a violation of the Sunshine Ordinance. The Commission staff may also initiate a complaint. If the Commission receives a complaint that the Task Force has not yet considered or is still pending at the Task Force, the Executive Director may commence an investigation, or, at his or her discretion, take no action until after the Task Force has issued an Order of Determination or a final recommendation regarding the complaint.

Decision Point 3(a): Shall the Commission approve the language of Section III.A, as set forth on page 2 of the proposed regulations?

Under Section III.B., if the Task Force, after issuing an Order of Determination, refers a matter to the Ethics Commission for enforcement and/or penalties, the Executive Director must schedule a hearing before the Commission. The Executive Director must provide notice to each Respondent and the original Complainant, who is the real party in interest. The Task Force will be given a courtesy notice.

This provision addresses the Task Force's concern that the Executive Director should not have the ability to administratively dismiss referrals from the Task Force without approval from the Commission. In addition, under Section III.B., all matters referred by the Task Force to the Commission concerning a violation of the Sunshine Ordinance (after issuing an Order of Determination) will bypass the staff investigation process and proceed straight to a hearing before the Commission. However, the Executive Director must provide appropriate notice 15 days prior to the hearing.

Decision Point 3(b): Shall the Commission approve the language of Section III.B., as set forth on page 2 of the proposed regulations?

Section III.C. clarifies the administrative exhaustion requirement of section 67.35(d) of the Sunshine Ordinance. That section permits "any person" to institute proceedings in court or before the Commission "if enforcement action is not taken by a city or state official 40 days after a complaint is filed." The Ordinance does not define what it means to "file" a "complaint" before going to court and it does not define "enforcement action." The Ordinance also does not indicate which "city or state official" has the power to consider complaints under the Sunshine Ordinance.

By regulation, the Commission may adopt a reasonable interpretation that clarifies the 40-day requirement. Section III.C. specifies that if the Task Force or a Complainant has notified the District Attorney or California Attorney General of an alleged violation of the Sunshine Ordinance, the Executive Director may not take action on the complaint regarding the alleged violation until at least 40 days have passed after such notification and the enforcement agency receiving the notification has failed to act.

Decision Point 3(c): Shall the Commission approve the language of Section III.C., as set forth on page 2 of the proposed regulations?

4. Section IV – Investigations; Report and Recommendation

Summary: Section IV outlines the process for investigating alleged violations of the Sunshine Ordinance. Section IV does not apply to referrals from the Task Force; such referrals proceed directly to a hearing before the Commission. The pertinent provisions of Section IV are as follows:

1) Factual Investigation – The Executive Director's investigation may include, but is not limited to, interviewing the Respondent(s) and any witnesses and reviewing documentary and other evidence. Staff proposes using the phrase "may include" instead of "shall include" because cases can vary widely in terms of the complexity of the allegation, the cooperation of the Respondent, Complainant and witnesses. As such, the "may include" language provides staff the flexibility it needs to conduct thorough investigations. The language also tracks the language used in the Commission's current regulations for non-Sunshine complaints.

   Section IV.A also states that the investigation shall be conducted in a confidential manner, pursuant to San Francisco Charter section C3.699-13.

2) Report of Investigation – After completing the investigation, the Executive Director must prepare a written report, which will include a summary of factual and legal findings. The report must also include the Executive Director's disposition recommendation, which will be one of the following: a) a finding of violation of the Sunshine Ordinance and proposed penalties; b) a finding of violation of the Sunshine Ordinance and proposed stipulation, decision and order; or c) a finding of no violation of the Sunshine Ordinance and dismissal. The report must be delivered to the Commission.

   The report is a public document. However, in order to preserve the integrity of the investigation, internal staff notes are not disclosable until the Commission has issued a final decision following the hearing, accepted a stipulation, decision and order, or dismissed the matter. *(See Section VI.B. of proposed Regulations.)*

   a. If the report recommends a finding of violation and penalties, the Executive Director must inform the Commission and schedule a hearing pursuant to Section IV.C.

   b. If the report recommends a finding of violation and stipulation, the Executive Director must so inform the Commission. Thereafter, any two or more Commissioners may cause the matter to be calendared for consideration by the full Commission in open session at the next Commission meeting held no sooner than ten days after the date the Executive Director informs the Commission of the settlement recommendation. During this meeting, Commissioners may ask staff questions and must take one of the following

actions, each of which requires the vote of at least three Commissioners: 1) accept the stipulation; 2) reject the stipulation and instruct staff to seek a different settlement amount; or 3) reject the stipulation and instruct staff to schedule a hearing pursuant to Section IV.C. of the Regulations.

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

If the matter is not calendared by the Commission, the stipulation must be signed by the Executive Director, the Commission Chairperson and the Respondent; and the Executive Director must inform the Complainant of the finding of violation and stipulated order.

c. If the report recommends a finding of no violation and dismissal, the Executive Director must so inform the Commission. Thereafter, two or more Commissioners may cause the matter to be calendared for consideration by the full Commission in open session at the next Commission meeting held no sooner than ten days after the date the Executive Director informs the Commission of the dismissal recommendation. During this meeting, the Commissioners may ask staff questions and must take one of the following actions, each of which requires the votes of at least three Commissioners: 1) accept the dismissal recommendation; 2) reject the dismissal recommendation and instruct staff to seek a settlement; or 3) reject the dismissal recommendation and instruct staff to schedule a hearing pursuant to Section IV.C. of the Regulations.

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

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

3) Delivery of Report and Notice of Hearing – If a hearing is scheduled, the Executive Director must deliver a copy of the written report to each Respondent and the Complainant, along with a written notice of the date, time and location of the hearing, at least 45 days in advance of the hearing date.

   Although the Complainant will not have a formal role in the hearing, providing the Complainant with a copy of the written report serves two important purposes: a) it proactively allows the Complainant to learn what the Commission staff has done with his or her complaint – the report is a public document and providing it to the

Complainant addresses past criticism from the Task Force and members of the public that the Commission's handing of Sunshine complaints is done without public scrutiny; and b) it promotes transparency for Commission handling of complaints related to the Ordinance, a long-standing goal of the Task Force.

4) Response to Report – If a hearing is scheduled, each Respondent may submit a written response to the report.

5) Rebuttal to Response – The Executive Director may submit a written rebuttal to any response.

Decision Point 4: Shall the Commission approve the language of Section IV, as set forth on pages 3-5 of the proposed regulations?

5. Section V.A., V.B. and V.D. – Hearing Rules and Procedures

Summary: Sections V.A., V.B. and V.D. outline the hearing process for alleged violations of the Sunshine Ordinance and referrals from the Task Force. Although patterned after the regulations which govern the hearing process for non-Sunshine complaints, there are several key differences:

1) Any hearing for a Sunshine complaint or referral is a public hearing.

2) Unlike non-Sunshine complaints where there is a probable cause hearing followed by a hearing on the merits, for complaints involving Sunshine allegations, there is only one hearing.

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

4) If the hearing concerns a Task Force referral, the Respondent bears the burden of proof to show that he or she did not violate the Ordinance. In such cases, the assumption is that the Respondent violated the Ordinance. Respondent must refute or rebut the evidence relied on by the Task Force to show that he or she did not violate the Ordinance.

5) If the hearing is not a Task Force referral but relates to a Sunshine complaint, the Respondent will be given an opportunity to speak before the Commission, and staff will present the case. No other live testimony will be permitted.

6) Section V.D adds language that if the Commission finds that if any of the confidentiality provisions of the San Francisco Charter is applicable, including but not limited to sections Appendix C, section C3.699-13, and Appendix F, sections F1.107, F1.110, and F1.111, unless such provision conflicts with an express non-confidentiality provision in California Government Code section 6250 et seq. (California Public Records Act) or section 54950 et seq. (Ralph M. Brown Act), such

provision will serve as an absolute defense against an alleged violation of the Ordinance.

As with the standard of proof in non-Sunshine complaints, the Commission may determine that the Respondent violated the Ordinance only if a person of ordinary caution and prudence would conclude, based on a preponderance of the evidence, that the Respondent committed the violation.

These provisions serve not only to expedite the resolution of the complaint, but they also provide transparency in the handling and resolution of the matter, which aids both the Commission in its public outreach efforts and the Task Force's stated desire to be involved in the Commission's investigations and enforcement process.

The draft regulations also provide that a respondent who fails to appear at the hearing may be deemed to have admitted the violation(s) bought against him or her.

Decision Point 5(a): Shall the Commission approve the language of Sections V.A., V.B. and V.D. as set forth on pages 5-8 of the proposed regulations?

6. Section V.C. – Administrative Orders and Penalties; Warning Letters

Summary: Section V.C. sets forth the procedures by which the Commission determines: 1) whether a violation of the Sunshine Ordinance was willful in nature; and 2) what orders and penalties to issue. These proposals are modeled after the Commission's Regulations for non-Sunshine complaints. As currently drafted, the regulations provide the following:

1) If the Commission determines that a violation of the Sunshine Ordinance was willful, it may issue orders and monetary penalties of up to $5,000 per violation. To determine whether a violation is willful, the Commission must consider all the relevant circumstances regarding the case, including but not limited to: a) whether the Respondent complied with all aspects of the Ordinance, but failed to comply within the appropriate timeframe for good cause; b) the volume of records requested, and the extent to which the records were practically accessible; and 3) whether the Respondent consulted with counsel prior to committing the alleged violation. The Respondent may not use City monies to pay such penalties.

2) If the Commission determines that the violation was not willful, it may issue warning letters urging the Respondent to cease and desist the violation and/or disclose any records required by law.

Staff recommends that the Commission discuss the issuance of monetary penalties for willful violations of the Ordinance. The possibility of actual monetary penalties is not a guarantee of ensuring a higher level of compliance with the Ordinance by City officials and employees.

Monetary penalties raise two issues that are worth considering. First, unlike non-Sunshine complaints, any Respondent will necessarily be, by virtue of the alleged Sunshine violation, a City employee. As such, the employee may have rights under the City's various Memoranda of Understanding ("MOU") with labor unions to grieve any disciplinary action. There is a

possibility that the imposition of a monetary penalty by the Commission could be deemed as a disciplinary action and could thus be subject to the grievance procedure.

Second, the imposition of monetary penalties for willful violations of the Ordinance may, in effect, be levied against the City itself, not the employee. Most MOUs contain language which provides that a City employee will not incur personal liability for actions performed within the scope of the employee's employment.[1]

Currently, the Commission, after making a finding of a willful violation of the Ordinance, can only inform the Respondent's appointing authority of its findings. The Commission may wish to consider other penalties for willful violations of the Ordinance, non-monetary in nature, such as making public the nature of the violation, including the Respondent's name and a summary of the violation. However, please note that whatever penalty the Commission imposes may be subject to the grievance procedure under the employee's MOU.

Also, Section V.C.3. provides that if the Commission finds an elected official or a department head committed a willful violation of the Ordinance, the Commission may issue a finding of official misconduct and so inform the Mayor or appointing authority.

Decision Point 5(b): Shall the Commission approve the language of Section V.C, as set forth on pages 7-8 of the proposed regulations?

7. Section VI – Miscellaneous Provisions

Summary: Modeled after the regulations for non-Sunshine complaints, Section VI contains provisions which address issues such as ex parte communications, access to complaints and deliberations, and continuance requests.

Section VI.B. provides that no records related to complaints may be disclosed except as necessary to the conduct of the investigation or as required by the California Public Records Act or the Sunshine Ordinance. In order to provide for the integrity of the investigation, internal staff notes may not be disclosed until one of the following has occurred:

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

Decision Point 6: Shall the Commission approve the language of Section VI, as set forth on pages 8-10 of the proposed regulations?

[1] For example, IFPTE Local 21's current MOU states the following: "The City shall defend and indemnify an employee against any claim or action against the employee or account of any act or omission in the scope of the employee's employment with the City, in accord with, and subject to, the provisions of California Government Code Sections 825 et seq. Nothing herein is deemed to supersede state law." Other union MOUs contain similar language.

8. Section VII – Stipulated Orders

Summary: Modeled after the regulations for non-Sunshine complaints, Section VII sets forth the procedure by which a settlement agreement between the Respondent and the Executive Director may be approved by the Commission.

Decision Point 7: Shall the Commission approve the language of Section VII, as set forth on page 11 of the proposed regulations?

III. Clean-up Language for Existing Regulations

Summary: The following are three clean-up proposals to the existing Regulations which: a) state that all complaints alleging a violation of the Sunshine Ordinance shall be governed by the Ethics Commission Regulations for Complaints Alleging Violations of the Sunshine Ordinance; b) delete references to violations of the Sunshine Ordinance; and c) amend the definition of "business day" by adding the language "or a day on which the Commission office is closed for business" to conform with the definition in the proposed Sunshine regulations.

Decision Point 8(a): Shall the Commission approve the addition of Section III.D. as set forth on page 3 of the current Regulations?

III.D. Complaints Alleging a Violation of the Sunshine Ordinance. Any complaint that alleges a violation of the San Francisco Sunshine Ordinance or a referral to the Ethics Commission by the Sunshine Ordinance Task Force following an Order of Determination shall be governed by the Ethics Commission Regulations for Complaints Alleging Violations of Sunshine Ordinance.

Decision Point 8(b): If the answer to Decision Point 8(a) is yes, shall the Commission approve the deletion of other references to the Sunshine Ordinance in the current Regulations? *(See strikethrough language in Attachment B, pages 2, 7, 15, and 16.)*

Decision Point 8(c): Shall the Commission approve the amended definition of "business day" of Section II.A. on page 1 of the current Regulations?

ATTACHMENT A

San Francisco
Ethics Commission

25 Van Ness Ave., Suite 220
San Francisco, CA 94102
Phone 252-3100 Fax 252-3112

ETHICS COMMISSION REGULATIONS FOR COMPLAINTS ALLEGING VIOLATIONS OF THE SUNSHINE ORDINANCE

Effective Date: _____, 2010

Table of Contents

I. PREAMBLE

Pursuant to San Francisco Charter section 15.102, the San Francisco Ethics Commission promulgates these Regulations in order to ensure compliance with the San Francisco Sunshine Ordinance, S.F. Admin. Code §§ 67.1, et seq. These Regulations shall apply only to complaints alleging violations of the Sunshine Ordinance and referrals from the Sunshine Ordinance Task Force. All matters involving alleged violations of conflict of interest, campaign finance, lobbyist, campaign consultant or other ethics laws shall be handled under the Ethics Commission's Regulations for Investigations and Enforcement Proceedings.

II. DEFINITIONS

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

A. "Business day" means any day other than a Saturday, Sunday, City holiday, or a day on which the Commission office is closed for business.

B. "City" means the City and County of San Francisco.

C. "Commission" means the Ethics Commission.

D. "Complaint" means a written document alleging a violation of the Sunshine Ordinance filed with the Commission.

E. "Complainant" means a person or entity that files a complaint.

F. "Day" means calendar day unless otherwise specifically indicated. If a deadline falls on a weekend or City holiday, the deadline shall be extended to the next business day.

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

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

I. "Exculpatory information" means information tending to show that the respondent is not guilty of the alleged violations.

J. "Mitigating information" means information tending to excuse or reduce the culpability of the Respondent's conduct.

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

L. "Referral" means a reference for enforcement and/or penalties from the Task Force to the Commission, after the Task Force has issued an Order of Determination finding a violation of the Sunshine Ordinance.

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

N. "Stipulated order" means an order regarding a complaint, the terms of which have been agreed to by both the Executive Director and the Respondent.

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

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

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

III. COMPLAINTS ALLEGING VIOLATIONS OF THE SUNSHINE ORDINANCE.

A. Any person, including Commission staff, may file a complaint with the Commission or the Task Force alleging a violation of the Sunshine Ordinance. When the Executive Director receives a complaint that the Task Force has not yet considered or that is still pending at the Task Force, the Executive Director may handle the complaint pursuant to Section IV of these Regulations or may, in his or her discretion, take no action until after the Task Force has issued an Order of Determination or a final recommendation regarding the complaint.

B. When the Executive Director receives a referral from the Task Force, the Executive Director shall schedule a hearing at the next regular meeting of the Commission, provided that: 1) the Executive Director issue a written notice to each Respondent and the original Complainant (real party in interest) of the date, time and location of the hearing, at least 15 days in advance of the hearing date. The Executive Director shall also provide a courtesy notice to the Task Force. Such hearings shall otherwise be governed by the provisions of Section V of these Regulations.

C. If the Task Force or a Complainant notifies the District Attorney or California Attorney General of a violation or alleged violation of the Sunshine Ordinance, the Executive Director shall not take action on the referral or complaint regarding that violation or alleged violation until at least 40 days after the notification date.

IV. INVESTIGATIONS; REPORT AND RECOMMENDATION

A. Factual Investigation. The Executive Director's investigation may include, but shall not be limited to, the interview of the Respondent(s) and any witnesses, and the review of documentary and other evidence. The investigation shall be conducted in a confidential manner, pursuant to San Francisco Charter, Appendix C, section C3.699-13.

B. Report of Investigation.

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

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

a. **Finding of Violation of Sunshine Ordinance and Penalties.** If the report recommends a finding of violation and penalties, the Executive Director shall schedule a hearing pursuant to Section IV.C. of these Regulations.

b. **Finding of Violation of Sunshine Ordinance and Proposed Stipulation, Decision and Order.** If the report recommends a finding of violation and settlement, the Executive Director shall so inform the Commission. Thereafter, any two or more Commissioners may cause the matter to be calendared for consideration by the full Commission in open session at the next Commission meeting held no sooner than ten days after the date the Executive Director informs the Commission of the proposed stipulation, decision and order. During the meeting at which the Commission considers the proposed stipulation, Commissioners may ask staff questions and shall take one of the following actions, each of which requires the vote of three Commissioners: 1) accept the proposed stipulation; 2) reject the proposed stipulation and instruct staff to seek a different settlement amount; or 3)

reject the proposed stipulation and instruct staff to schedule a hearing pursuant to Section IV.C. of these Regulations.

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

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

c. **Finding of No Violation of Sunshine Ordinance and Dismissal.** If the report recommends a finding of no violation and dismissal, the Executive Director shall so inform the Commission. Thereafter, any two or more Commissioners may cause the matter to be calendared for consideration by the full Commission in open session at the next Commission meeting held no sooner than ten days after the date the Executive Director informs the Commission of the dismissal recommendation. During the meeting at which the Commission considers the dismissal recommendation, Commissioners may ask staff questions and shall take one of the following actions, each of which requires the vote of three Commissioners: 1) accept the dismissal recommendation; 2) reject the dismissal recommendation and instruct staff to seek a settlement; or 3) reject the dismissal recommendation and instruct staff to schedule a hearing pursuant to Section IV.C. of these Regulations.

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

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

C. Delivery of Report and Notice of Hearing. If a hearing is scheduled pursuant to section IV.B., the Executive Director shall deliver to each Respondent and the Complainant a copy of the report summarizing the Ethics Commission's investigation, with written notice of the date, time and location of the hearing, at least 45 days in advance of the hearing date. The notice shall inform each Respondent that he or she has the right to be present and represented by counsel at the hearing.

D. Response to the Report.

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

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

E. Rebuttal.

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

V. HEARING

A. General Rules and Procedures.

1. Public Hearing

The hearing shall be open to the public. The Commission may hold the hearing, or the Commission may assign one of its members or a hearing officer to hold the hearing and submit a report and recommendation to the Commission. If the Commission holds the hearing, the Commission may assign an outside hearing officer as the presiding officer at the hearing, as set forth in section VI.E.3.

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

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

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

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

2. Standard of Proof

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

3. Burden of Proof

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

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

4. Rules of Evidence

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

5. Exhibits

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

6. Oral Argument

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

7. Failure to Appear

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

B. Finding of Violation.

If the Commission conducts the hearing, the Commission shall determine, no later than 45 days after the date the hearing is concluded, whether the Respondent has committed a violation of the Sunshine Ordinance. If the Commission assigns one of its members or an outside hearing officer to conduct the hearing, the assigned member or hearing officer shall submit a report and recommendation to the Commission no later than 30 days after the date the hearing is concluded, as described in section VI.E of these Regulations. Thereafter, the Commission shall determine, no later than 45 days after the date the report and recommendation is delivered, whether the Respondent has committed a violation of the Sunshine Ordinance.

The votes of at least three Commissioners are required to find that a Respondent has committed a violation of the Sunshine Ordinance. The finding of a violation of the Sunshine Ordinance shall be supported by findings of fact and conclusions of law and shall be based on the entire record of the proceedings. Each Commissioner who participates in the decision shall certify on the record that he or she personally heard the testimony (either in person or by listening to a tape or recording of the proceeding) and reviewed the evidence, or otherwise reviewed the entire record of the proceedings.

C. Administrative Orders and Penalties; Warning Letters.

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

2. To determine whether a violation of the Sunshine Ordinance is willful, the Commission shall consider all the relevant circumstances surrounding the case, including but not limited to:

(a) whether the Respondent complied with all aspects of the Sunshine Ordinance, but failed to comply within the appropriate time-frame for good cause;

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

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

3. If the Commission finds that Respondent committed a willful violation of the Sunshine Ordinance, the Commission may issue orders and penalties requiring the Respondent to:

(a) cease and desist the violation;

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

(c) pay a monetary penalty to the general fund of the City in an amount up to five thousand dollars ($5,000) for each violation. The Respondent may not use City monies to pay such penalties.

4. If the Commission finds that an elected official or a department head committed a willful violation of the Sunshine Ordinance, the Commission may also issue a finding of official misconduct and so inform the Mayor or appointing authority.

5. When deciding penalties, the Commission shall consider all the relevant circumstances surrounding the case, including but not limited to:

(a) the severity of the violation;

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

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

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

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

6. If the Commission finds that Respondent has violated the Sunshine Ordinance but has not committed any willful violation, the Commission may issue warning letters urging the Respondent to:

(a) cease and desist the violation; and/or

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

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

D. Finding of No Violation.

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

The application of any of the confidentiality provisions of the San Francisco Charter, including but not limited to sections Appendix C, section C3.699-13, and Appendix F, sections F1.107, F1.110, and F1.111, unless such provision conflicts with an express non-

confidentiality provision in California Government Code section 6250 et seq. (California Public Records Act) or section 54950 et seq. (Ralph M. Brown Act), is a defense against an alleged violation of the Sunshine Ordinance.

VI. MISCELLANEOUS PROVISIONS

A. Ex Parte Communications.

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

B. Access to Complaints and Related Documents and Deliberations.

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

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

C. Oaths and Affirmations.

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

D. Selection of Designee by the Executive Director.

Whenever the Executive Director designates an individual other than a member of the Commission staff to perform a duty arising from the Charter or these Regulations, the Executive Director shall notify the Commission of the designation no later than the next business day.

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

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

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

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

F. Extensions of Time and Continuances.

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

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

G. Recordings.

Every hearing shall be electronically recorded.

H. Place of Delivery.

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

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

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

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

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

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

I. Page Limitations and Format Requirements.

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

J. Conclusion of Hearing.

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

VII. STIPULATED ORDERS

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

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

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

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

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

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

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

C. Once the Executive Director enters into a stipulation with a Respondent, the Executive Director shall inform the Commission of this stipulation and shall place the matter on the agenda at the next Commission meeting occurring no sooner than ten days from the date the Executive Director informs the Commission of the stipulated agreement.

D. Stipulations must be approved by the Commission and, upon approval, must be announced publicly. The stipulated order shall have the full force of an order of the Commission.

IX. SEVERABILITY

If any provision of these Regulations, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Regulations and the applicability of such provisions to other persons and circumstances shall not be affected thereby.

ATTACHMENT B

San Francisco
Ethics Commission

25 Van Ness Ave., Suite 220
San Francisco, CA 94102
Phone 252-3100 Fax 252-3112

ETHICS COMMISSION

REGULATIONS FOR INVESTIGATIONS

AND ENFORCEMENT PROCEEDINGS

Effective Date: July 5, 1997
Includes technical amendments effective April 13, 2002;
Streamlined Process for Complaints Alleging a Failure to File Campaign Finance Disclosure Reports effective August 15, 2004; amendments effective October 10, 2005; amendments effective March 10, 2006; amendments effective November 10, 2006; amendments effective December 18, 2009; ~~and~~ amendments effective January 8, 2010; and amendments effective November/December , 2010

Table of Contents

I. PREAMBLE

These Regulations of the San Francisco Ethics Commission are promulgated in order to ensure the fair, just, and timely resolution of complaints presented to the Commission that allege violations of laws within the Commission's jurisdiction by:

1. Setting and maintaining objective standards for the investigation and prosecution of matters brought before the Commission;

2. Eliminating any political or improper influence in the investigation and prosecution of persons accused of ethics violations;

3. Protecting the privacy rights of those accused of ethics violations by maintaining the confidentiality of complaints filed with, and investigations conducted by, the Commission;

4. Setting and enforcing reasonable time limits within which enforcement proceedings should be completed;

5. Coordinating and sharing with other governmental agencies the responsibility for investigations and prosecutions of complaints, whenever consistent with the interests of justice;

6. Delegating to the Commission staff maximum discretion in the handling and resolution of complaints at staff level, while retaining oversight of those staff activities.

II. DEFINITIONS

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

A. "Business day" means any day other than a Saturday, Sunday, City holiday**, or a day on which the Commission office is closed for business**.

B. "City" means the City and County of San Francisco

C. "Commission" means the Ethics Commission.

D. "Complainant" means a person or entity that makes a complaint.

E. "Credible" means offering reasonable grounds for being believed.

F. "Day" means calendar day unless otherwise specifically indicated. If a deadline falls on a weekend or City holiday, the deadline shall be extended to the next working day.

G. "Deliver" means transmit by U.S. mail or personal delivery to a person or entity or to an agent authorized to accept delivery on behalf of the person or entity. For purposes of these Regulations, delivery may be made by leaving copies of the material with a responsible person at either the residence or place of business of the person or entity to whom the material is directed. The Commission, the Executive Director or a respondent receiving material may consent to any other means of delivery, including delivery by e-mail or fax. In any proceeding, following a determination of probable cause, the Commission Chair or designated Commissioner or hearing officer may order that delivery of briefs or other materials be accomplished by e-mail.

H. "Enforcement action" means an action pursuant to San Francisco Charter section C3.699-13.

I. "Exculpatory information" means information tending to show that the respondent is not guilty of the alleged violations.

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

K. "Mitigating information" means information tending to excuse or reduce the significance of the respondent's conduct.

L. "Probable cause" means that based on the evidence presented there is reason to believe that the respondent committed a violation of law.

M. "Respondent" means a person or entity that is alleged in a complaint to have committed a violation of law.

N. "Stipulated order" means an order regarding a complaint the terms of which have been agreed to by both the Executive Director and the respondent.

O. "Violation of law" means a violation of City laws relating to campaign finance, lobbying, campaign consulting, conflicts of interest, or governmental ethics, and State laws relating to campaign finance, conflicts of interest, or governmental ethics, including, but not limited to: San Francisco Charter section 15.100 et seq. and Appendix C (ethics); the San Francisco Campaign and Governmental Conduct Code; ~~the San Francisco Sunshine Ordinance, S.F. Administrative Code Ch. 67;~~ the Political Reform Act of 1974, Government Code section 81000 et seq.; Government Code section 1090 et seq.; and Government Code section 3201, et seq.

III. COMPLAINTS

A. Formal Complaints.

1. Any person or entity may file a formal complaint alleging a violation of law. Formal complaints must be made in writing on a form specifically provided by the

Commission staff. Formal complaints must include the following information, upon the complainant's information and belief:

(a) the name and address of the respondent;

(b) the provision(s) of law allegedly violated;

(c) the facts constituting the alleged violation(s);

(d) the names and addresses of witnesses, if any; and

(e) identification of documents or other evidence which may prove the facts constituting the alleged violation(s), if any.

2. Formal complaints may be filed anonymously. Any formal complaint not filed anonymously must be verified and signed by the complainant under penalty of perjury. If the complainant is an entity, the complaint must be verified and signed under penalty of perjury by an authorized officer or agent of the entity.

3. The Executive Director shall process and review all formal complaints, following the process described in Section IV.

B. Informal Complaints. Any person or entity may file an informal complaint alleging a violation of law by submitting a complaint by telephone, in person, or in writing other than on the form prescribed by the Commission. The Executive Director shall have no obligation but has the discretion to process and review informal complaints.

C. Complaints Initiated by the Executive Director. The Executive Director may initiate complaints. These complaints need not conform to the requirements for formal complaints specified in subsection A of this Section.

D. Complaints Alleging a Violation of the Sunshine Ordinance. Any complaint that alleges a violation of the San Francisco Sunshine Ordinance or a referral to the Ethics Commission by the Sunshine Ordinance Task Force following an Order of Determination shall be governed by the Ethics Commission Regulations for Complaints Alleging Violations of Sunshine Ordinance.

IV. REVIEW OF COMPLAINTS

A. Preliminary Review. The Executive Director must conduct a preliminary review of each formal complaint. This inquiry may include reviewing relevant documents, communicating with the complainant, communicating with the respondent, and any other inquiry to determine whether a full investigation is warranted.

B. Dismissal of Complaint. Based on the allegations and information contained in a complaint, and the Executive Director's preliminary review, the Executive Director may

dismiss the complaint if the allegations do not warrant further action for reasons that may include, but are not limited to:

1. Credible evidence clearly refutes the allegations.

2. The allegations, if true, do not constitute a violation of law within the Commission's jurisdiction.

3. The complaint contains an expression of opinions, rather than specific allegations.

4. The allegations contained in the complaint are already under investigation, or already have been resolved, by the Commission or another law enforcement agency.

If the Executive Director dismisses a complaint under this section, the Executive Director shall take no further action on the complaint, except that he or she may: 1) inform the complainant of the Executive Director's decision; 2) at his or her discretion, issue a warning letter to the respondent; or 3) at his or her discretion, refer the complaint to another agency for its appropriate action.

The Executive Director shall provide a monthly summary to the Commission of each complaint dismissed, including the reasons for dismissal, provided that such information shall comply with the confidentiality requirements of the Charter.

If a monthly summary of complaints dismissed under this section includes a matter that was referred to the Commission by the Sunshine Ordinance Task Force, the portion of the summary regarding the referred matter shall be made part of the public record.

C. There is Reason to Believe a Violation May Have Occurred. If, based on the allegations and information contained in a complaint, and the Executive Director's preliminary review, the Executive Director determines that there is reason to believe that a violation of law may have occurred, the Executive Director shall immediately forward the complaint to the District Attorney and the City Attorney.

Within ten business days after receipt of the complaint, the District Attorney and City Attorney shall inform the Commission whether the District Attorney or City Attorney has initiated or intends to pursue an investigation of the complaint.

If neither the District Attorney nor City Attorney intends to pursue an investigation, the Executive Director shall, within 14 days of such notification, inform the complainant in writing of the action, if any, that he or she has taken or plans to take on the complaint, together with the reasons for such action or non-action. If the Executive Director has not informed the complainant of the action that he or she has taken or plans to take on the

complaint within 14 days, the complainant shall be notified of the reasons for the delay and shall subsequently receive notification as provided above.

V. CONDUCT OF INVESTIGATIONS

A. Factual Investigation. The Executive Director's investigation may include, but shall not be limited to, the interview of the respondent(s) and any witnesses, the deposition of respondent(s) and/or witnesses, and the review of documentary and other evidence.

B. Subpoenas. During an investigation, the Executive Director may compel by subpoena the testimony of witnesses and the production of documents relevant to the investigation.

VI. DETERMINATION THAT THERE IS NOT PROBABLE CAUSE TO BELIEVE A VIOLATION OF LAW HAS OCCURRED

A. Executive Director Determination and Calendaring. If the Executive Director determines that there is not probable cause to believe that a violation of law has occurred, the Executive Director shall inform the Commission of that determination and provide clear and concise reasons supporting that determination. Thereafter any two or more members of the Commission may cause the item to be calendared for consideration by the full Commission in a closed session at the next Commission meeting held no sooner than ten days after the date the Executive Director informs the Commission of the Executive Director's determination. Commissioner's requests that a complaint be calendared for consideration by the full Commission must be received by the Executive Director not less than five days prior to the date of the meeting, so that the Executive Director may comply with the applicable notice and agenda requirements.

B. Commission Decision Not to Dismiss. If the matter is calendared for consideration by the Commission, and if the Commission decides that there is reason to believe that a violation of law may have occurred, the Commission shall direct the Executive Director either to investigate the matter further or to prepare a probable cause report and schedule a probable cause hearing.

C. Commission Decision to Dismiss. If the matter is calendared for consideration by the Commission, and if the Commission decides that there is not reason to believe that a violation of law may have occurred, the Commission shall take no further action on the complaint other than: 1) inform the complainant and respondent of the Commission's decision; 2) at the Commission's discretion, issue a warning letter to the respondent; or 3) at the Commission's discretion, refer the complaint to another agency for its appropriate action.

D. Commission Decision Not to Calendar. If the Executive Director determines that there is not probable cause to believe that a violation of law has occurred, and if after the Executive Director informs the Commission of the determination the Commission does not calendar the matter for consideration pursuant to section VI(A), the Executive

Director shall take no further action except that he or she may: 1) inform the complainant and respondent of the Executive Director's decision; 2) at his or her discretion, issue a warning letter to the respondent; or 3) at his or her discretion, refer the complaint to another agency for its appropriate action.

VII. RECOMMENDATION THAT THERE IS PROBABLE CAUSE TO BELIEVE A VIOLATION OF LAW HAS OCCURRED

A. Probable Cause Report. When the Executive Director determines there is probable cause to believe a violation of law has occurred, the Executive Director shall prepare a written "probable cause report" and schedule a probable cause hearing. The probable cause report shall contain a summary of the laws that the Executive Director believes the respondent(s) violated and evidence gathered through the investigation, including any exculpatory and mitigating information. In the probable cause report, the Executive Director may present statements including hearsay, declarations of investigators or others relating to the statements of witnesses, or the examination of physical evidence. Unless otherwise permitted by the Commission Chair or the Commission Chair's designee for good cause shown, the probable cause report shall not exceed 25 pages excluding attachments.

B. Delivery of Probable Cause Report and Notice of Probable Cause Hearing. The Executive Director shall deliver to each respondent a copy of the probable cause report, with written notice of the date, time and location of the probable cause hearing, at least 45 days in advance of the hearing date. The notice shall inform each respondent that he or she has the right to be present and represented by counsel at the probable cause hearing.

C. Response to the Probable Cause Report.

1. Each respondent may submit a written response to the probable cause report. The response may contain legal arguments, a summary of evidence, and any mitigating or exculpatory information. Unless otherwise permitted by the Commission Chair or the Commission Chair's designee for good cause shown, the response shall not exceed 25 pages excluding attachments.

2. Each respondent who submits a response must deliver the response no later than 20 days prior to the date of the probable cause hearing. Unless the parties agree to deliver materials by email, the respondent must deliver a total of eight copies of the response to the Executive Director. The Executive Director must then immediately distribute copies of the response to the Commission. The respondent must also deliver one copy of the response to every other respondent named in the probable cause report.

D. Rebuttal . The Executive Director may submit evidence or argument in rebuttal to a response. If the Executive Director chooses to do so the Executive Director must deliver the rebuttal to the Commission and each respondent named in the probable cause report no later than seven days prior to the date of the probable cause hearing. Unless

otherwise permitted by the Commission Chair or the Commission Chair's designee for good cause shown, the rebuttal shall not exceed ten pages excluding attachments.

VIII. PROBABLE CAUSE HEARING; DETERMINATION OF WHETHER AND HOW TO PROCEED WITH A HEARING ON THE MERITS

A. General Rules and Procedures.

1. Unless otherwise decided by the Commission, the Commission shall sit as a hearing panel to conduct the probable cause hearing. The Commission may assign one of its members to conduct the probable cause hearing and submit a report and recommendation to the Commission.

2. ~~Except for hearings regarding alleged willful violations of the Sunshine Ordinance, the~~ **The** hearing shall be closed to the public to the extent permitted by state law, unless the respondent requests that the probable cause hearing be held in public. ~~Probable cause hearings regarding alleged willful violations of the Sunshine Ordinance shall be held at a public meeting unless otherwise provided in state or local law.~~

3. Unless otherwise decided by the Commission, formal rules of evidence shall not apply to the probable cause hearing. Neither the Executive Director nor the respondent(s) may present live witness testimony at the probable cause hearing.

4. The Commission may find that there is probable cause to believe a violation of law has occurred only if a person of ordinary caution and prudence would conclude, based on the evidence, that there is a reasonable ground to suspect that the respondent has committed the violation.

B. Probable Cause Determination.

1. If the Commission as a whole conducts the probable cause hearing, the Commission shall make the probable cause determination no later than 45 days after the date the hearing is concluded. If the Commission assigns one of its members to conduct the probable cause hearing, the assigned member shall submit a report and recommendation to the Commission no later than 30 days after the date the hearing concludes, and the Commission shall make the probable cause determination no later than 45 days after the assigned member delivers his or her report and recommendation.

2. A determination that there is probable cause to believe that a violation of law has occurred shall be based on the entire record of the proceedings. Each Commissioner who participates in the decision shall certify on the record that he or she personally heard or read the testimony (either in person or by listening to a tape or reading the transcript prepared by a court reporter) and reviewed the evidence, or otherwise reviewed the entire record.

3. The Commission shall not make a finding of probable cause if it is presented with clear and convincing evidence that, prior to the alleged violation:

(a) the respondent had requested and obtained a written opinion from the Commission;

(b) the respondent, in requesting the opinion, disclosed truthfully all the material facts pertinent to the case;

(c) the Commission or its staff issued a formal, written opinion with which both the District Attorney and City Attorney concurred; and

(d) the respondent committed the acts or violations alleged in the complaint in good-faith reliance upon the formal, written opinion of the Commission.

4. If the Commission determines that there is not probable cause to believe a violation has occurred, the Commission shall dismiss the complaint and take no further action on the complaint, except: 1) inform the complainant and each respondent of the Commission's decision; 2) at the Commission's discretion, issue a warning letter to the respondent; or 3) at the Commission's discretion, refer the complaint to another agency for its appropriate action.

5. If the Commission determines that there is probable cause to believe a violation of law has occurred, the Commission shall announce its determination in open session. The announcement shall contain a summary of the allegations for which the Commission determines there is probable cause to believe a violation of law has occurred and a cautionary statement that each respondent is presumed to be innocent unless and until such time that the allegations are proved in a subsequent hearing on the merits.

C. Determination How to Proceed with Hearing on Merits.

1. Following a determination of probable cause by the Commission, the Commission shall proceed with a hearing on the merits of the complaint. Unless otherwise decided by the Commission, the Commission shall sit as the hearing panel to hear the merits of the case. The Commission may also sit as the hearing panel to hear the case, with an outside hearing officer presiding, or designate an individual Commissioner or an outside hearing officer to hear the case and file a report and recommendation for decision by the Commission.

2. The Commission shall provide for resolution of preliminary matters in advance of the hearing on the merits. Unless otherwise decided by the Commission, the Commission Chair shall hear and decide preliminary matters pursuant to Section X, subsection B. The Commission alternatively may designate an individual Commissioner or an outside hearing officer to hear and decide preliminary matters.

3. The Commissioner or hearing officer assigned to decide preliminary matters shall also be authorized to provide for the issuance of subpoenas.

D. Amending Probable Cause Determination.

Before the Executive Director has scheduled the hearing on the merits, or no later than 60 days prior to the date the hearing on the merits is scheduled to commence, the Executive Director may request that the Commission amend the probable cause determination to add or amend allegations or charges against the respondent. If the Executive Director seeks to amend the probable cause determination, the Executive Director, the respondent(s) and the Commission shall follow the procedures set forth in Sections VII and VIII, and the Executive Director shall issue an amended accusation and notice of the hearing on the merits following the procedures set forth in Section IX.

IX. ISSUANCE OF ACCUSATION; SCHEDULING AND NOTICE OF HEARING ON MERITS

A. Issuance of Accusation.

Except as provided in Section XI, following a determination of probable cause by the Commission, the Executive Director shall issue an accusation. The accusation shall clearly specify the provisions of the laws that each respondent allegedly violated and shall set forth the acts or omissions with which each respondent is charged. The accusation shall list only those charges for which the Commission made a determination of probable cause. The Executive Director shall deliver a copy of the accusation to each respondent ten days after the Commission's probable cause determination. The accusation is a public document.

The Executive Director shall present the case in support of the accusation at the hearing on the merits. The accusation shall be the charging document for the purpose of the hearing on the merits. The commission shall not find that any respondent has committed a violation of law if the accusation does not allege such a violation and provide the respondent notice of the basis for the allegation.

B. Scheduling and Notice of Hearing on Merits.

The Executive Director shall schedule the hearing on the merits, and deliver written notice of the date, time and location of the commencement of the hearing to each respondent at least 45 days prior to the commencement of the hearing. The notice shall be in substantially the following form:

> "You are hereby notified that a hearing will be held before the Ethics Commission (or name of hearing officer or assigned Commissioner) at ___ on the __ day of ___, 20__, at the hour of ___, at (location of _____), upon the charges made in the accusation. You may be present

at the hearing, may, but need not, be represented by counsel, may present any relevant evidence, and will be given an opportunity to cross-examine all witnesses testifying against you. You may request the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Commission on or before (date)."

X. DISCOVERY; HEARING BRIEFS; PRELIMINARY MATTERS.

A. Discovery. The Executive Director and each respondent shall be entitled to pre-hearing discovery in accordance with the provisions of California Administrative Procedure Act, Government Code, Title 2, Division 3, Part 1, Chapter 5, section 11500 et seq.

B. Resolution of Preliminary and Procedural Matters.

1. The Executive Director and any respondent may present preliminary matters, unrelated to the merits of the accusation, to the assigned Commissioner or hearing officer designated to hear such matters pursuant to Section VIII, subsection C(2). Preliminary matters may include, but are not limited to, the following:

(a) procedural matters;

(b) disqualification of any member of the Commission from participation in the hearing on the merits;

(c) requests for dismissal of any charges in the accusation because, even if the allegations set forth in the accusation are true, those charges do not state a violation of law as alleged;

(d) discovery motions; and

(e) any other matters not related to the truth or falsity of the factual allegations in the accusation.

2. A request for resolution of preliminary matters must be delivered to the assigned Commissioner or hearing officer no later than 25 days prior to the commencement of a hearing on the merits. At the same time that the request is delivered to the assigned Commissioner or hearing officer, the requester must deliver copies of the request to the Executive Director and every other respondent named in the accusation.

3. The request for resolution of preliminary matters may contain legal arguments and a summary of the facts underlying the request. Unless otherwise permitted by the assigned Commissioner or hearing officer for good cause shown, the request shall not exceed 15 pages excluding attachments.

4. The Executive Director or each respondent may submit a written opposition to a request for resolution of preliminary matters. The opposition must be delivered to the assigned Commissioner or hearing officer no later than ten days after the date of delivery of the request. At the same time that the opposition is delivered to the assigned Commissioner or hearing officer, the party submitting the opposition must deliver copies of the opposition to the Executive Director and every other respondent named in the accusation. Unless otherwise permitted by the assigned Commissioner or hearing officer for good cause shown, the opposition shall not exceed ten pages excluding attachments.

5. The requestor may submit a written reply to an opposition. The reply must be delivered to the assigned Commissioner or hearing officer no later than five days after the date of delivery of the opposition. At the same time that the reply is delivered to the assigned Commissioner or hearing officer, the party submitting the reply must deliver copies of the reply to the Executive Director and every other respondent named in the accusation. Unless otherwise permitted by the assigned Commissioner or hearing officer for good cause shown, the reply shall not exceed five pages excluding attachments.

6. The assigned Commissioner or hearing officer shall issue a written decision on each request for resolution of preliminary matters no later than five days prior to the commencement of the hearing on the merits.

7. The Executive Director or any respondent may submit a written request for reconsideration, by the Commission, assigned Commissioner or hearing officer who will conduct the hearing on the merits, of any decision made on preliminary matters. A party requesting reconsideration shall deliver the request on the Commission, assigned Commissioner or hearing officer, and the Executive Director and any other respondent, no less than three days prior to the hearing on the merits.

8. Before or during the hearing on the merits, the Executive Director and any respondent may file a request for resolution of a procedural matter affecting the conduct of the hearing. This request shall be directed to the Commissioner or hearing officer designated to hear preliminary matters pursuant to Section VIII, subsection C(2). The request shall follow the process outlined by paragraphs 2 through 5 of this section, except that the request may be submitted later than 25 days prior to the commencement of the hearing on the merits but may not be submitted after the conclusion of the hearing on the merits. If either party requests a written decision, the assigned Commissioner or hearing officer shall issue a written decision no later than 20 days after the date of the request.

C. Hearing Briefs.

The Executive Director shall, and any respondent may, submit a hearing brief. The brief shall outline significant legal arguments and list evidence and witnesses to be presented at the hearing. The brief is not required to list anticipated rebuttal evidence or rebuttal witnesses. Unless the Commission or outside hearing officer agrees to accept briefs by email, six copies of the brief shall be delivered to the Commission, assigned Commissioner, or outside hearing officer no later than 20 days prior to the date the

hearing on the merits commences. The Executive Director shall deliver a copy of the Executive Director's brief to each respondent named in the accusation. Each respondent who chooses to submit a brief shall deliver copies of the respondent's brief to the Executive Director and to every other respondent named in the accusation.

D. Issuance of Hearing Subpoenas.

The Executive Director and any respondent named in the accusation may request the issuance of subpoenas for the attendance of witnesses and for the production of documents at the hearing on the merits. Requests for the issuance of subpoenas should be delivered no later than 20 days prior to the commencement of the hearing on the merits. The request shall be accompanied by a declaration specifying the name and address of the witnesses and setting forth the materiality of their testimony. If the request is for a document subpoena, it shall be accompanied by a declaration which includes the following information: a specific description of the documents sought; an explanation of why the documents are necessary for the resolution of the complaint; and the name and address of the witness who has possession or control of the documents. Subpoenas may be issued upon approval of the Commission or the Commissioner or hearing officer designated by Section VIII, subsection C(2).

XI. DISCOVERY OF EXCULPATORY INFORMATION AND DISMISSAL OF COMPLAINT PRIOR TO HEARING ON THE MERITS

A. Discovery of Exculpatory Information. Following the delivery of the probable cause report, if the Executive Director is aware of or discovers any exculpatory information with respect to any charge listed in the accusation, the Executive Director shall notify the Commission and the respondent(s) of this information.

B. Dismissal Recommendation. After a determination of probable cause and before a hearing on the merits, the Executive Director may recommend that the Commission dismiss the complaint. The Executive Director may make such a recommendation based on the Executive Director's discovery of exculpatory information or other good cause. In such situations, if he or she has not done so already, the Executive Director is not required to issue an accusation and the Commission need not hold a hearing on the merits, unless the Commission overrides the Executive Director's dismissal recommendation.

C. Commission Consideration of Dismissal Recommendation. The Executive Director shall present the dismissal recommendation and the reasons for the recommendation to the Commission in a public memorandum. Thereafter, any two or more members of the Commission may cause the complaint to be calendared for consideration by the full Commission in open session at the next Commission meeting occurring no sooner than ten days from the date the Executive Director informs the Commission of the Executive Director's recommendation. A Commissioner's request that a complaint be calendared must be received by the Executive Director no fewer than

five days prior to the date of the meeting, so that the Executive Director may comply with the applicable notice and agenda requirements. If two or more members of the Commission do not cause the complaint to be calendared, or if in open session a majority of the Commission does not vote to override the dismissal recommendation, the Commission shall take no further action on the complaint except: 1) inform the complainant and each respondent of the Commission's decision; 2) at the Commission's discretion, issue a warning letter to the respondent; or 3) at the Commission's discretion, refer the complaint to another agency for it appropriate action.

D. Dismissal or Removal of Specific Charges. After a determination of probable cause and before a hearing on the merits, the Executive Director may decide not to proceed with a specific charge listed in the accusation. If the Executive Director makes such a determination, the Executive Director shall immediately notify in writing the respondent(s) and the Commission or hearing officer. If the Executive Director provides such notice, the Commission shall not find a violation based on the specific charge or violation after a hearing on the merits.

XII. HEARING ON THE MERITS

A. General Rules and Procedures.

1. Public Hearing

The hearing on the merits shall be open to the public, provided that either the Executive Director or the respondent(s) may request that the Commission, assigned Commissioner or hearing officer exclude any witnesses.

2. Standard of Proof

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

3. Rules of Evidence

All evidence admissible in an administrative proceeding governed by the California Administrative Procedure Act shall be admissible in a hearing on the merits. The Executive Director and each respondent shall have the right to call and examine witnesses under oath or affirmation, to introduce exhibits, to cross-examine and impeach witnesses, and to rebut any evidence presented.

4. Exhibits

Where both parties stipulate to the admissibility of an exhibit, the parties shall so advise the Commission in advance of the hearing. For all other exhibits, each party may move

to admit a particular exhibit at the hearing, and the other party shall have an opportunity to object prior to the ruling on the admission.

5. Witnesses

Witnesses shall be examined by the parties as follows: direct examination, cross-examination, re-direct. After the parties have concluded their examination of a witness, Commissioners shall have an opportunity to pose questions to the witness.

6. Oral Argument

At the hearing, the Executive Director and each respondent shall be allowed oral argument. The Commission, assigned Commissioner, or hearing officer shall determine the appropriate length for the arguments.

B. Finding of Violation.

If the Commission as a whole conducts the hearing on the merits, the Commission shall determine, no later than 45 days after the date the hearing is concluded, whether the respondent has committed a violation of law. If the Commission assigns one of its members or an outside hearing officer to conduct the hearing on the merits, the assigned member or hearing officer shall submit a report and recommendation to the Commission no later than 30 days after the date the hearing is concluded. Thereafter, the Commission shall determine, no later than 45 days after the date the report and recommendation is delivered, whether the respondent has committed a violation of law.

The votes of at least three Commissioners are required to find a violation of law. The finding of a violation shall be supported by findings of fact and conclusions of law and shall be based on the entire record of the proceedings. Each Commissioner who participates in the decision shall certify on the record that he or she personally heard the testimony (either in person or by listening to a tape or recording of the proceeding) and reviewed the evidence, or otherwise reviewed the entire record of the proceedings.

C. Administrative Orders and Penalties.

1. The votes of at least three Commissioners are required to impose orders and penalties for a violation. The Commission may issue orders and penalties requiring the respondent(s) to:

(a) cease and desist the violation;

(b) file any reports, statements or other documents or information required by law; and/or

(c) pay a monetary penalty to the general fund of the City in an amount permitted under the law that the Commission finds the respondent has violated, or, if the law

does not specify the amount of the monetary penalty, in an amount up to five thousand dollars ($5,000) for each violation, or three times the amount which the respondent failed to report properly or unlawfully contributed, expended, gave or received, whichever is greater.

2. When deciding on an order and penalties, the Commission shall consider all the relevant circumstances surrounding the case, including but not limited to:

(a) the severity of the violation;

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

(c) whether the violation was deliberate, negligent or inadvertent;

(d) whether the violation was an isolated incident or part of a pattern;
(e) whether the respondent has a prior record of violations of law; and

(f) the degree to which the respondent cooperated with the investigation and demonstrated a willingness to remedy any violations.

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

D. Finding of No Violation.

If the Commission determines that there is insufficient evidence to establish that the respondent has committed a violation, or if the Commission determines that there is sufficient evidence to establish that the respondent has not committed a violation, the Commission shall publicly announce this fact. Thereafter, the Commission shall take no further action on the complaint. The Executive Director shall inform each respondent and complainant of the Commission's determination.

XIII. MISCELLANEOUS PROVISIONS

A. Ex Parte Communications.

Once a complaint is filed, no Commissioner or staff member shall engage in oral or written communications outside of a Commission meeting, interview or settlement conference regarding the merits of an enforcement action with the respondent or complainant or any person communicating on behalf of the respondent or complainant unless the communication is necessary for the conduct of the investigation or enforcement action.

B. Access to Complaints and Related Documents and Deliberations.

1. ~~Except as described in subsection 3 for complaints alleging violations of the San Francisco Sunshine Ordinance, no~~ **No** complaint, response thereto, investigative file or information contained therein, or Commissioner and staff deliberations about complaints shall be disclosed except as necessary to the conduct of an investigation, prior to a probable cause determination.

2. After a determination of probable cause, the probable report, the response, and the rebuttal shall be confidential, unless the respondent requested that the probable cause hearing be public. All investigative documents, including notes and memoranda, created prior to the probable cause determination, such as the complaint, shall remain confidential, except that the Executive Director may provide a copy of the complaint to the respondent(s) if the Executive Director determines that disclosure is necessary to the conduct of the investigation. All investigative documents, including notes and memoranda, created by the Executive Director and his or her staff after the probable cause determination shall be confidential, except for the accusation, until any such documents are either delivered to the Commission or respondent(s), introduced as evidence or an exhibit, or distributed for public consumption, such as an agenda or press release.

~~3. For complaints alleging willful violations of the San Francisco Sunshine Ordinance (S.F. Administrative Code Ch. 67), no complaint, investigative file or information contained therein, or Commissioner or staff deliberations shall be disclosed except as necessary to the conduct of an investigation or as required by the California Public Records Act (Government Code section 6250, et seq.) or the San Francisco Sunshine Ordinance. Deliberations by the Commission regarding such a complaint shall be conducted at a public meeting. In order to guarantee the integrity of the investigation, internal notes taken by the Executive Director or his or her staff shall not be disclosed until after the dismissal of a complaint or the Commission has issued its final decision following the hearing on the merits.~~

4. In addition to the prohibition on ex parte communications stated in Section XIII, subsection A, except at a public meeting of the Commission, Commissioners are prohibited, prior to a final determination on the merits of a complaint, from engaging in oral or written communications regarding the merits of a complaint or enforcement action with any person or entity unless the communication is necessary for the conduct of the investigation or enforcement action. After a final determination on the merits of a complaint, Commissioners may discuss matters in the public record.

C. Oaths and Affirmations.

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

D. Selection of Designee by the Executive Director.

Whenever the Executive Director designates an individual other than a member of the Commission staff to perform a duty arising from the Charter or these Regulations, the Executive Director shall notify the Commission of the designation no later than the next business day.

E. Powers and Duties of Hearing Officers.

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

2. When an individual Commissioner or a hearing officer is assigned to hear and decide preliminary matters in advance of a hearing on the merits, he or she shall make an actual determination. This determination may be reviewed by the Commission upon request by the Executive Director or a respondent, pursuant to the procedures specified in Section X, subsection B(7).

3. When an individual Commissioner or a hearing officer is assigned to conduct a probable cause hearing or hearing on the merits, he or she shall submit a report and recommendation for decision by the Commission. The report and recommendation shall contain proposed findings of fact and conclusions of law. Copies of the report and recommendation shall be delivered to the Commission, Executive Director, and each respondent no later than 30 days after the date the hearing is concluded. Thereafter, the Executive Director shall calendar the matter for consideration at the next Commission meeting not less than 15 days after the date the report and recommendation is delivered to the Commission.

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

F. Statute of Limitations.

1. Unless otherwise stated in local or State law, for statute of limitations purposes, an action or proceeding for administrative penalties is brought or commenced by the Executive Director on the date the Executive Director delivers the probable cause report.

2. If there is no statute of limitations for violations of the law allegedly violated, the probable cause report must be delivered within four years of the date of events which form the basis of the complaint, or the date that the events constituting the basis of the complaint were discovered by the Ethics Commission, whichever is later.

G. Extensions of Time and Continuances.

Whenever the Executive Director, a respondent, or a witness is required to complete an act or produce materials pursuant to these Regulations, that party may request an extension of time. Requests for extensions of time may be made to the Commission Chair or the Commission Chair's designee. The requester must deliver the request to the Commission Chair or designee and provide a copy of the request to all other parties no later than ten business days before the deadline to complete an act or produce materials. The Commission Chair or designee shall have the discretion to consider untimely requests. The Commission Chair or designee shall approve or deny the request within five business days of the submission of the request. The Commission Chair or designee may grant the request only upon a showing of good cause.

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

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

H. Referrals to Other Enforcement Agencies.

At any time after the filing of a complaint, the Commission or Executive Director may refer the matter to another government agency or official if the Commission or Executive Director determines that the agency or official may more appropriately resolve the allegations in the complaint or enforce the applicable provisions of law. A copy of all information gathered by the Commission staff shall be sent to the agency or official together with the referral.

A determination by the Executive Director or the Commission that no further action should be taken on a matter shall not prevent any other government agency from initiating its own enforcement action, including disciplinary action, based on the same allegations and facts.

I. Recordings and Transcripts.

Every probable cause hearing and hearing on the merits shall be tape-recorded. Where the Commission assigns a Commissioner to conduct a probable cause hearing, and where the Commission assigns a Commissioner or hearing officer to conduct a hearing on the merits, the hearing shall also be recorded stenographically. The Commission shall retain

the tapes until the opportunity for legal challenge has been exhausted. Copies of a tape shall be available to the respondent upon request.

J. Place of Delivery.

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

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

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

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

c. If the respondent is a current or former candidate or committee registered with the Ethics Commission, to the address provided to the Ethics Commission by that candidate or committee.

d. If subsections (a) through (c) are not applicable, to an address reasonably calculated to give notice to and reach the respondent.

It is the responsibility of City employees, or candidates or committees who file reports with the Ethics Commission, to maintain accurate addresses with relevant City Departments. The Executive Director therefore may rely on those addresses in carrying out the objectives of the Commission.

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

K. Page Limitations and Format Requirements.

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

L. Public Summary of Dismissed Complaints.

Notwithstanding any other provision of these regulations, the Executive Director may provide a public summary of dismissed complaints. Such summary may include, but need not be limited to, a generic description of each dismissed complaint and a summary

of the reasons for dismissal, provided that such information shall comply with the confidentiality requirements of the Charter.

M. Conclusion of Hearing on the Merits.

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

XIV. STIPULATED ORDERS

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

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

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

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

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

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

B. The stipulated order shall set forth the pertinent facts and may include an agreement as to anything that could be ordered by the Commission under its authority pursuant to Charter section C3.699-13.

C. Once the Executive Director enters into a stipulated agreement with a respondent, the Executive Director shall inform the Commission of this stipulation. Thereafter, any two or more members of the Commission may cause the stipulation to be calendared for consideration by the full Commission in a closed session at the next Commission meeting occurring no sooner than ten days from the date the Executive Director informs the Commission of the stipulated agreement. If there is a vacancy on the Commission or if a member must recuse himself or herself from consideration of the stipulated order, one member of the Commission may cause the stipulation to be calendared. Commissioners' requests that a stipulated agreement be calendared for consideration by the full

Commission must be received by the Executive Director no fewer than five days prior to the date of the meeting, so that the Executive Director may comply with the applicable notice and agenda requirements.

D. Stipulated orders must be approved by the Commission and, upon approval, must be announced publicly. The stipulated order shall have the full force of an order of the Commission.

XV. SEVERABILITY

If any provision of these Regulations, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Regulations and the applicability of such provisions to other persons and circumstances shall not be affected thereby.

MEMORANDUM #1 TO SOTF MEMBERS:

August 29, 2010

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

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

What the Regulations Cannot Include:

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

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

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

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

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

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

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

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

What the Regulations Should Include.

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

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

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

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

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

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

Other Comments.

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

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

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

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

MEMORANDUM #2 TO SOTF MEMBERS:

August 29, 2010

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

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

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

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

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

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

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

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

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

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

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

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

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

Add to that:

> "All evidence admissible in an administrative proceeding governed by the California Administrative Procedure Act shall be admissible in the hearing. The Executive Director or the original Complainant (for Task Force referrals) and each Respondent and shall have the right to introduce exhibits and to rebut any evidence presented." (§V.A.4.)
>
> "Where the Executive Director or the original Complainant (for Task Force referrals) and the Respondent stipulate to the admissibility of an exhibit, they shall so advise the

Commission in advance of the hearing. For all other exhibits, either the Executive Director or the original Complainant (for Task Force referrals) or the Respondent may move to admit a particular exhibit at the hearing, and the non-moving party shall have an opportunity to object prior to the Commission ruling on the admission." (§V.A.5.)

"At the hearing, the Executive Director or original Complainant (for Task Force referrals) and each Respondent shall be allowed oral argument. The Commission, assigned Commissioner, or hearing officer shall determine the appropriate length for the arguments." (V.A.6.)

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

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

Finally, the Commission's bylaws require it to "... comply with all applicable laws, including, but not limited to, the San Francisco Charter, San Francisco Sunshine Ordinance (Administrative Code sections 67.01 et seq.), ..." That compliance would certainly include all its proceedings dealing with violations of the Ordinance.

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

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

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

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

> One similar to a penalty phase hearing, at which the respondent tries to make a case why there should be no or only a limited penalty imposed, as, for example, the respondent has since turned over the records and offered to reimburse the requestor for the time spent and any costs incurred, including lawyers' fees, in obtaining the records; or
>
> One, a "limited show cause" hearing in which the respondent will be penalized for failure to comply with the Order, unless the respondent can show it has a legally supportable basis for non-compliance not presented to the SOTF. The failure to comply was willful - intentional - so the assertion that it was not willful/intentional as a ground for dismissal is unsupportable; nor would reliance on the City Attorney's advice not to comply, whether oral or written, is not a basis for dismissal as the City Attorney cannot "trump" the SOTF's determination nor may the CA assist a respondent in denying the pubic access to a public recorder, per §67.21(i).

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

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