

Date: October 27, 2009

Item No. 27

File No. _____

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- EC's proposed rules on handling SOTF complaints**
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Completed by: Chris Rustom

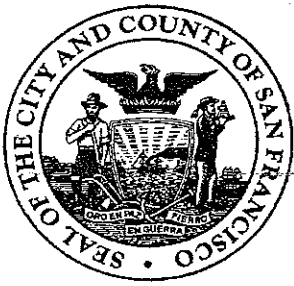
Date: Oct. 21, 2009

***This list reflects the explanatory documents provided**

~ Late Agenda Items (documents received too late for distribution to the Task Force Members)

** The document this form replaces exceeds 25 pages and will therefore not be copied for the packet. The original document is in the file kept by the Administrator, and may be viewed in its entirety by the Task Force, or any member of the public upon request at City Hall, Room 244.

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ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

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JOHN ST. CROIX
EXECUTIVE DIRECTOR

Date: October 13, 2009

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

From: John St. Croix, Executive Director

Re: Regulations regarding Ethics Commission enforcement of the Sunshine Ordinance

On April 24, 2009, the Ethics Commission ("Commission") and the Sunshine Ordinance Task Force ("Task Force") held a joint meeting to address matters within the jurisdiction of both bodies. At that meeting, Task Force members described how the Task Force evaluates complaints, issues findings and refers some matters to the Commission for further adjudication. The Commission's staff described the enforcement process set forth in the City's Charter and the Commission's enforcement regulations and discussed how the Commission has applied that process to Task Force referrals.

Under the Charter, the Commission has the authority to adopt regulations related to carrying out the purposes of the Sunshine Ordinance. Following the discussion at the joint meeting, Commission staff reviewed the Sunshine Ordinance and now proposes five regulations to clarify the Commission's handling of complaints alleging Sunshine Ordinance violations. The last of these proposals will be considered by the Ethics Commission at its meeting on October 19, 2009; the remainder will be crafted and considered once the Commission receives comments from the Task Force.

1. Sunshine Task Force Referrals Will Be Formal Complaints.

The Commission's Regulations for Investigations and Enforcement Proceedings ("Enforcement Regulations") distinguish between formal complaints, which are submitted in writing on a form prescribed by the Commission, and informal complaints, which are not submitted using the Commission's formal complaint form. Under the Enforcement Regulations, the Executive Director has discretion – but no obligation – to process and review informal complaints. The Executive Director must process formal complaints and may only dismiss them in limited circumstances.

Staff proposes amending the Commission's Enforcement Regulations to provide that any complaint referred to the Commission by the Task Force would be processed as a formal complaint. Under this proposal, the Executive Director would be required to

process and review all Task Force referrals and could only dismiss those matters in certain circumstances as set forth in the Enforcement Regulations.

When it accepts such complaints, the Commission would consider the Task Force's conclusions and findings, but would also conduct its own investigation. The Commission would not be bound by the Task Force's conclusion that the respondent had willfully violated the Sunshine Ordinance. The Commission is not the enforcement arm of the Task Force; the Commission will continue to conduct its own investigations and exercise its own judgment with respect to all of the complaints it handles.

2. The Ethics Commission Will Only Consider Intentional Violations Of the Sunshine Ordinance.

Section 67.34 of the Sunshine Ordinance describes the Commission's jurisdiction to handle enforcement of the Sunshine Ordinance. That section states, in relevant part, "[c]omplaints 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." (emphasis added). The Commission has long concluded that the Ordinance only gives it the authority to enforce "willful" violations and that "willful" in this context means *intentionally and with knowledge that the act is a violation of the law*. To codify this longstanding understanding and interpretation of the Ordinance, staff proposes that the Commission adopt a regulation defining "willful." Under this definition, as it has been applied in practice by the Commission, a City employee or officer who withholds records in good faith reliance on the advice of the City Attorney's Office has not "willfully" violated the Sunshine Ordinance. Staff proposes that the Commission's regulatory definition of "willful violation" should address this common scenario by clarifying that an action taken in good faith reliance on the advice of the City Attorney cannot be a willful violation of the Sunshine Ordinance.

3. The Ethics Commission Will Have The Authority To Impose Penalties For Willful Sunshine Ordinance Violations.

While section 67.34 of the Sunshine Ordinance provides that the Ethics Commission must handle allegations of willful Sunshine Ordinance violations and section 67.35 mentions "proceedings for enforcement and penalties," the Sunshine Ordinance does not enumerate the potential penalties. Staff proposes that the Commission should adopt regulations setting penalties for willful violations. Specifically, staff proposes regulations that allow the Commission to impose monetary penalties after finding a willful violation. Staff also proposes that the regulations should allow the Commission to recommend discipline or removal – but not to impose discipline or removal – for department heads or managerial employees who have willfully violated the Sunshine Ordinance.

4. Under The Ordinance's Administrative Exhaustion Requirements, The Ethics Commission Will Not Initiate Complaints That Have Been Referred To The District Attorney Or Attorney General Unless The Law Enforcement Agency Takes No Action For 40 Days.

Finally, staff also proposes that the Commission adopt a regulation clarifying the administrative exhaustion requirement in section 67.35(d) of the Sunshine Ordinance. That section permits "any person" to institute proceedings in court or before the Ethics Commission "if enforcement action is not taken by a city or state official 40 days after a complaint is filed." The Sunshine Ordinance does not describe what it means to "file" a "complaint" before going to court and does not define "enforcement action" or indicate which "city or state officials" have the power to take such action. By regulation, the Commission can adopt a reasonable interpretation that clarifies this 40-day requirement.

Staff concludes that the most reasonable interpretation of section 67.35(d) is that "filing" a "complaint" with a "city or state official" means referring an alleged violation to the District Attorney or Attorney General. The Sunshine Ordinance allows the Task Force or the Supervisor of Records to refer City officials to the District Attorney or Attorney General. *See* S.F. Admin. Code § 67.21(d) (if custodian of records refuses to make a record public, "the supervisor of records shall notify the district attorney or the attorney general who shall take whatever measures she or he deems necessary and appropriate to insure compliance with the provisions of this ordinance"); § 67.21(e) (if custodian of records refuses to make a record public after a Task Force order, "the Sunshine Task Force shall notify the district attorney or the attorney general who may take whatever measures she or he deems necessary to insure compliance with the provisions of this ordinance"). Additionally, the District Attorney has civil and criminal enforcement authority under the Brown Act. *See* Cal. Gov't Code §§ 54960, 54960.1, 54959.

Thus, staff proposes that the Commission adopt regulations to provide that whenever the Task Force, the Supervisor of Records or a complainant makes such a referral, section 67.35(d) requires the complainant to give the agency 40 days to act before initiating a proceeding with the Commission or in court. The Sunshine Ordinance does not require a referral to the District Attorney or Attorney General in every case, but in those circumstances where someone already has referred the matter, the regulation would prohibit the commencement of a Commission or court action unless the law enforcement agency receiving the referral has failed to act for 40 days.

5. Sunshine Enforcement Matters Will Be Public.

In advance of the Commission's May 11 and October 19, 2009 meetings, staff proposed amendments to the Enforcement Regulations. One of the proposed amendments provides that enforcement proceedings involving alleged violations of the Sunshine Ordinance should not be subject to the same confidentiality rules as other types of complaints handled by the Commission.

Under that proposal, deliberations by the Commission regarding Sunshine enforcement matters would take place in open session at public meetings, not in closed session like other enforcement matters. Additionally, complaints, investigative files and other documents containing information about Sunshine enforcement matters will be public documents, if the Sunshine Ordinance requires disclosure. Finally, to protect the integrity of staff investigations, internal staff e-mails, memoranda, and notes regarding any particular Sunshine Ordinance matter will not be disclosed until after the dismissal of the complaint or the Commission has issued a final decision following the hearing on the merits on the Sunshine enforcement matter.

~~Staff believes that these changes are consistent with the purposes of the Sunshine Ordinance.~~
The purpose of the Sunshine Ordinance is to promote transparency in government. Ensuring the transparency of the Commission's decision-making process regarding Sunshine Ordinance violations is consonant with that goal. Additionally, because most Sunshine Ordinance matters already have been discussed at public Task Force meetings before staff initiates an investigation, these matters have already become public.

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