

Date: Feb. 23, 2010

Item No. 11  
File No. \_\_\_\_\_

## SUNSHINE ORDINANCE TASK FORCE

### AGENDA PACKET CONTENTS LIST\*

- Ethics Commission proposed rules on Sunshine complaints**
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

Completed by: Chris Rustom

Date: Feb. 18, 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

JAMIENNE S. STUDLEY  
CHAIRPERSON

SUSAN J. HARRIMAN  
VICE-CHAIRPERSON

EMI GUSUKUMA  
COMMISSIONER

EILEEN HANSEN  
COMMISSIONER

CHARLES L. WARD  
COMMISSIONER

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.

S:\Enforcement\SunshineOrdinance\memo to EC&SOTF 10.09.doc

MEMORANDUM RE PROPOSED AMENDED/REVISED ETHICS COMMISSION  
REGULATIONS FOR INVESTIGATION AND ENFORCEMENT PROCEEDINGS.

(Prepared by Allen Grossman for Ethics Commission Meeting 05/11/09)

1. The most obvious problem with these proposed amended regulations is the failure to distinguish between the three ways in which Ethics is presented with matters involving open government laws:

- A complaint filed directly with the Commission, which requires investigation and some determination whether a violation may have occurred --- willful or not.

*The Regulations could reasonably track those for "violations of law" as spelled out in the proposed amended regulations, except, as noted below, the Commission itself should ultimately decide whether to pursue a complaint (as the SOTF does) and the process and all records would have to be totally open in the way that the SOTF conducts its complaint process.*

*The need for separate rules is found in the text of charter Section 15.102:*

**"The Commission may adopt, amend and rescind rules and regulations consistent with and related to carrying out the purposes and provisions of this Charter and ordinances related to campaign finances, conflicts of interest, lobbying, campaign consultants and governmental ethics and to govern procedures of the Commission. In addition, the Commission may adopt rules and regulations relating to carrying out the purposes and provisions of ordinances regarding open meetings and public records."**

*and in Appendix Section C3.699-13 INVESTIGATIONS AND ENFORCEMENT PROCEEDINGS, which limits investigations to certain ordinances, expressly omitting those dealing with open government laws.*

**"The commission shall conduct investigations in accordance with this subdivision of alleged violations of this charter and City ordinances relating to campaign finance, lobbying, conflicts of interest and governmental ethics."**

- A referral from the SOTF for enforcement of an Order that has not been complied with, whether or not willful, where the issue as to what the respondent is required to do has already been determined.

*Here a completely separate set of Enforcement Regulations would be needed, as there has to be, at a minimum, an automatic finding that a non-complied Order constitutes "probable" cause and the burden is on the respondent, in a public hearing before the Commission, to establish factually or, perhaps, on some legal basis, that the Order was in error. Both the original complainant and the SOTF lawyer should "represent" the SOTF. There would be no willful versus non-willful issue here. If the Commission finds that the respondent was required to comply with the SOTF Order and did not within a*

given period, then that “willful failure” would be “official misconduct” under Section 15.105(e) of the charter.

- A finding by the SOTF of official misconduct by an official that is referred to the Commission for adjudication, as required by Article XV, Section 15.105.

*Here because the official misconduct findings or charges referred to the Commission for adjudication could emanate, under the charter, from at least five other bodies, a generic set of Regulations is needed. They should be as comprehensive as those agreed on in the Ed Jew case because of the due process implications.*

2. In the case of an SOTF referral for enforcement, the procedure must ensure that the Commission does not delegate any authority to the Executive Director. The SOTF has already done all the heavy lifting and both the complainant and respondent had full opportunities in their submittals to and in the hearings before the SOTF and its C&A Committee to make their cases. As a result, the SOTF heard all the evidence, thoroughly addressed the legal issues and entered an Order of Determination. Thus, the Commission’s Executive Director should not have the power to dismiss the referred Order for “insufficient evidence” or “lack of probable cause” or based on some legal principle that the SOTF had considered and rejected. Those aspects of the investigation and sorting of issues, with a documented Order have already been completed. The enforcement then goes to the full Commission for a hearing.

3. With respect to findings or charges of official misconduct, the problem is obvious. The procedure must ensure that the Commission cannot delegate to the Executive Director the power to dismiss any such finding or charge. The Commission can issue rules for those findings of official misconduct from the SOTF, if it wants to, but it would still leave open what its procedure should be when the finding or charge comes from some other governmental body under the charter.

4. Part XIII, Section B.3, page 15, deals with the public records contained in files “for complaints alleging willful violations of the San Francisco Sunshine Ordinance.” It prohibits disclosure of the “complaint, investigative file or information contained therein or Commissioner or staff deliberations, except as necessary to the conduct of an investigation or as required by the [CPRA] or the [Sunshine Ordinance.]” The longstanding claim that the charter allows the Commission to keep its “investigative files” secret to the extent permitted by state law is simply wrong. By its terms, the charter provision relied on by the Commission does not apply to open government law investigations and, in any case, the Commission’s investigations are not covered by the CPRA §6254(f) exemption because the Commission is not a “law enforcement” agency. Moreover, the proposed provision reverses the rule in both the CPRA and the Sunshine Ordinance that public records are disclosable unless specifically exempt under either of those laws. Under those circumstances it violates Proposition 59, unless the Commission make findings, after a hearing, that satisfy this requirement:

“A statute, court rule, or other authority adopted after the effective date of this subdivision 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.”

NOTES ON ST. CROIX 10/13/09 MEMO TO ETHICS COMM.

Pg 1, intro pgh, St. Croix wrote, *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 SOTF refers matters to the EC for *enforcement*, not for *further adjudication*.

Pgs 3-4, proposed Item #5 of regulations, St. Croix wrote, *[T]o 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.*

How does disclosure of staff investigations and internal communications compromise their integrity, regardless of when during the process it takes place? This non-disclosure policy seems to belie the statements in the ensuing pgh.

Also St. Croix restates here the misassumption that the SOTF, in referring matters to the EC, wants the Comm. to weigh the merits of those complaints. Again, we do not believe that is the EC's role; we believe the EC's role is to hold city officials' and employees' feet to the fire when we have found they have willfully violated the SFSO.



ATTN:

Chair Richard Knee

I have reviewed the Ethic Commission's proposed rules on handling SOTF complaints and after careful consideration I would like to address a matter that needs further investigation. The interpretation and EC's views on Section 67.34, what constitutes a "willful violation", quote: "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." End quote. All policy bodies must be familiar with the Sunshine Ordinance and Ethics training, therefore not knowing the law does not excuse one from the consequences. Upon further review of this matter I looked up the EC's complaint procedures online. If a policy body refuses to provide public information it does so with intent. The matter is then referred to the Complaint Committee and if jurisdiction is found a full SOTF meeting will be held and an order of determination shall be made. When an order of determination is made then it is referred to CAC to determine compliance. According to the EC's public postings of these procedures are as follows:

**F. Department to Comply with Determination of the SOTF**

1. The Administrator shall send the Order of Determination to the complainant and respondent and request a written response within 5 days, which shall be monitored by the SOTF Compliance and Amendments Committee. If a public records violation is found, the custodian of records shall be ordered to provide the record to the complainant within 5 days after the issuance of the Order of Determination. The Compliance and Amendments Committee shall review whether there has been compliance with the Order of Determination.

2. If there is a failure to comply, the Compliance and Amendments Committee may recommend that the SOTF notify the District Attorney, the California Attorney General, the Board of Supervisors and/or the **Ethics Commission**, who may take measures they deem necessary to ensure compliance with the Ordinance.

Therefore it is my humble belief that any referral made by CAC to the Ethics Commission proves willful failure; on the basis that intent has been proven and the policy body has been made full aware of the law.

Respectfully,

Member Doyle Johnson

This page purposely left blank