



# ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

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JOHN ST. CROIX  
EXECUTIVE DIRECTOR

Date: December 11, 2014  
To: Members, Ethics Commission  
From: John St. Croix, Executive Director  
By: Jesse Mainardi, Deputy Executive Director  
Re: Policy Discussion Regarding Sunshine Ordinance Task Force Referrals

## INTRODUCTION

The Ethics Commission has considered twelve referrals from the Sunshine Ordinance Task Force since adopting new procedures for handling such referrals in November 2012. A review of these matters<sup>1</sup> reveals that the Commission has faced certain recurring issues. To develop a more uniform approach, Commissioners have requested a policy discussion regarding some of these issues.

This memorandum is intended to facilitate one such discussion. More specifically, this memorandum addresses the following three issues:

1. How should the Commission handle Task Force referrals that are inconsistent with the original complaint and/or earlier Task Force orders or resolutions in the same matter?
2. What factors bear on whether a department head is responsible for the violations of the Sunshine Ordinance by his or her staff?
3. How does a City officer or employee fulfill the obligation to send an "authorized representative" to a Task Force meeting?

## PURPOSE AND STRUCTURE OF MEMORANDUM

The goal of this memorandum is to facilitate a discussion that will establish clear policies regarding the above issues and will otherwise streamline and simplify future consideration of Task Force referrals. Staff will incorporate any adopted policies into regulations for the Commission's approval at a future meeting. These regulations will provide guidance to staff, the Task Force, and the Commission itself when handling future matters that implicate these issues.

<sup>1</sup> A chart summarizing each of these matters is attached as Appendix A.

However, even if the Commission were to decline to adopt policies with respect to one or more of these issues, staff hopes that, at a minimum, this discussion will provide context and inform the Commission's thinking with respect to future referrals.

This memorandum begins with a summary of the Commission's procedures for handling referrals from the Task Force, as well as the Commission's enforcement powers with respect to any Sunshine Ordinance violations. It continues with a summary of each of the three issues mentioned above. Each issue is accompanied with a list of suggested policy responses.

Staff recognizes that the list of issues and potential policy options is not exhaustive. Staff has attempted to address the more important issues it has identified in the interest of facilitating a focused, efficient and productive conversation. However, Commissioners may have other issues they wish to address during this discussion, or other ideas as to how to address the issues mentioned above. Staff welcomes discussion of such issues and ideas.

A draft copy of this memorandum was distributed to the members of the Task Force as well as to City department heads in October, as staff believes that these parties may wish to provide comment regarding the above issues. In this regard, staff has already received feedback from the Task Force both orally (via attendance at Task Force hearings) and in writing. Staff also understands that a representative of the Task Force will make public comment at the Commission's December 16 meeting when this matter is considered.

A final prefatory comment: the issues discussed in this memorandum "overlap" with each other. More specifically, a Task Force referral that names a department head as a respondent, even though that person was not previously named as such in earlier Task Force proceedings, implicates both referral issues (issue number 1) as well as department head responsibility (issue number 2). In this regard, staff encourages the Commission to consider all issues as they relate to each other, and not discretely.

## **ETHICS COMMISSION PROCEDURES**

In the interest of providing appropriate context, this section reviews the Commission's procedures for handling referrals from the Task Force, as well as the Commission's enforcement powers with respect to Sunshine Ordinance violations.<sup>2</sup>

### ***1. Ethics Commission Referral Procedures Generally.***

The Commission has established two procedures for handling referrals from the Task Force. These procedures are set forth in Chapters Two and Three of the Commission's regulations regarding Sunshine Ordinance enforcement. The appropriate procedures/chapter for

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<sup>2</sup> Importantly, the chart in Appendix B summarizes the *Task Force's* procedures for handling a complaint alleging a violation of the Sunshine Ordinance *before* such a complaint is referred to the Commission.

a matter will depend on: (1) who the respondents are; *and* (2) whether the referral alleges a willful or non-willful violation.<sup>3</sup>

The chart below outlines how the two chapters are applied:

<b>Respondent(s)</b>	<b>Alleged Violation(s)</b>	<b>Applicable Chapter</b>	<b>Violation is Official Misconduct?</b>
City officers and employees <i>other than</i> elected officials or department heads	Non-Willful	Chapter Two	No
City officers and employees <i>other than</i> elected officials or department heads	Willful	Chapter Two	Only “managerial city employees”
Elected officials and department heads	Non-Willful	Chapter Two	No
Elected officials and department heads	Willful	Chapter Three	Yes

## ***2. Chapter Two Hearings.***

The Commission created the Chapter Two procedures pursuant to sections 67.30(c) and 67.35(d) of the Sunshine Ordinance.<sup>4</sup> A respondent in a Chapter Two hearing has the burden of proving, by a preponderance of the evidence, that he or she did *not* violate the Sunshine Ordinance. The Commission thus defers to the Task Force’s determination in these matters absent evidence to the contrary.

## ***3. Chapter Three Hearings.***

Chapter Three effectuates Sunshine Ordinance section 67.34, which provides that “[c]omplaints involving allegations of willful violations of [the Sunshine Ordinance] . . . by elected officials or department heads . . . shall be handled by the Ethics Commission.” The Commission interpreted this language to mean that the Commission must independently adjudicate the underlying matter based on an investigation by Commission staff.<sup>5</sup> Thus, the Commission drafted Chapter Three procedures that in essence contemplate a “trial de novo” of the alleged violations where there is no deference to the Task Force’s prior determination.

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<sup>3</sup> A “willful violation” is “an action or failure to act with the knowledge that such act or failure to act was a violation of the Sunshine Ordinance.” (SFEC Reg. Chap. 1, § II.U.)

<sup>4</sup> Section 67.20(c) provides that “[t]he 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.” Section 67.35(d) provides that “[a]ny person may institute proceedings for enforcement and penalties under this act in any court of competent jurisdiction or before the Ethics Commission if enforcement action is not taken by a city or state official 40 days after a complaint is filed.”

<sup>5</sup> In this regard, the procedures in Chapter Three are more similar to the Commission’s usual enforcement procedures for non-Sunshine Ordinance matters than the procedures in Chapter Two.

In a Chapter Three hearing, a preponderance of the evidence must prove that the Respondent violated the Sunshine Ordinance. Unlike in Chapter Two proceedings, Commission staff conducts an independent investigation and makes a recommendation regarding resolution.<sup>6</sup> The Commission required these procedures both because the Sunshine Ordinance specifies that willful violations by elected officials or department heads “shall be handled by the Ethics Commission” and because such violations constitute official misconduct.

#### ***4. Ethics Commission Enforcement Powers.***

Once the Commission has determined that a respondent has violated the Sunshine Ordinance, the Commission’s enforcement powers are essentially *the same* under both Chapters Two and Three. These powers include issuing orders requiring:

- a. the respondent to cease and desist the violation and/or produce the public record(s); and/or
- b. the Executive Director to post on the Ethics Commission’s website the Commission’s finding that the Respondent violated the Sunshine Ordinance; and/or
- c. the Executive Director to issue a warning letter to the respondent and inform the Respondent’s appointing authority, or the Mayor if the respondent is an elected official, of the violation.

Notably, the Ethics Commission has no apparent authority to enforce any order it issues by (for example) imposing a fine, seeking injunctive relief, etc.

There is one important distinction between potential penalties under Chapters Two and Three: *section 67.34 of the Sunshine Ordinance states that a willful violation handled pursuant to Chapter Three constitutes official misconduct and an elected official may be suspended and removed from office for official misconduct.* (See also Charter § 15.105.) Department heads are not subject to such suspension or removal.<sup>7</sup>

## **ISSUES AND PROPOSED OPTIONS**

### ***1. First Issue: How should the Commission handle Task Force referrals that are inconsistent with earlier Task Force orders or resolutions in the same matter?***

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<sup>6</sup> Staff’s recommendations may be one of the following: (a) that Respondent(s) willfully violated the Sunshine Ordinance; (b) that Respondent(s) violated the Sunshine Ordinance but the violation was not willful; or (c) that Respondent(s) did not violate the Sunshine Ordinance. (SFEC Reg. Chap. 3, § II.C.2.)

<sup>7</sup> Sunshine Ordinance section 67.34 also indicates that, in addition to department heads and elected officials, a “managerial city employee” may be found to have committed willful violations of the Sunshine Ordinance which constitute official misconduct. The definition of “managerial city employee” is unclear. Moreover, section 67.34 does not indicate that Commission should handle such allegations.

The first issue is procedural in nature. In particular, the Task Force’s referral letters sometimes include violations and/or respondents that do not match those that were discussed during the Task Force’s hearing on the merits or at a committee meeting, or that were identified in the original complaint, the Order of Determination, or the motion to refer the matter to the Commission (collectively, the “Task Force proceedings”). Some discrepancies include:

- *Different violations*: the Task Force’s referral letter to the Commission might include violations which were not addressed in the Task Force proceedings, or omit violations that were addressed in those proceedings.
  - Commissioner Studley alluded to a similar issue in considering *Ethics Complaint No. 03-120402 (Herrera)*, where the Commission found that placing brief written summaries at the end of an agenda was not a violation of the Ordinance. Additional violations were mentioned as undisputed facts in a Task Force memorandum and were raised at a subsequent Commission hearing, but were never referenced in the Task Force’s official findings or referral. Commissioner Studley stated that “our job is to look at the complaint before us and the findings of the Task Force.”
- *Different respondents*: the Task Force’s referral letter to the Commission might include respondents who were not named as such in the Task Force’s proceedings.
  - For example, in *Ethics Complaint No. 04-140303 (Herrera)*, an Order of Determination concluded that the Library Commission violated the Sunshine Ordinance by failing to provide audio-visual equipment for public comment, but the referral instead identified the Department head as the proper respondent.
- *Non-willful violations become willful*: the Task Force’s referral letter to the Commission might indicate that a violation is willful when no such allegation or finding was made in the Task Force proceedings.
  - For example, in *Ethics Complaint No. 02-140228 (Rahaim)*, the Task Force’s Order of Determination concluded that Planning Department staff had non-willfully violated the Sunshine Ordinance by failing to turn over certain requested records. However, the referral alleged that Department head John Rahaim willfully violated the ordinance. The Commission heard the referral as a Chapter 3 matter (i.e., an allegation of a willful violation).

These discrepancies can present challenges for staff and the Commission in handling Task Force referrals and raise the following question:

How should the Commission handle Task Force referrals that are inconsistent with the original complaint and/or earlier Task Force orders or resolutions in the same matter?<sup>8</sup>

On the one hand, staff and the Commission wish to give effect to the complainant’s and Task Force’s intent with respect to each given matter. On the other hand, these discrepancies raise questions about what the true intent actually is, particularly if the referral letter (as drafted by the Chair) is different from the motion to refer the matter to the Commission. (See Appendix B for a summary of the Task Force’s complaint procedures.)

Moreover, it would appear to offend generally accepted notions of fairness to accept referrals for violations that may not have been previously addressed in full or for respondents who were not properly noticed.<sup>9</sup> This issue may be particularly problematic in *Chapter Two proceedings* where, unlike the “trial de novo” contemplated in Chapter Three, the Commission defers to the Task Force’s prior determination.<sup>10</sup>

In light of the above, staff proposes the following policy options for handling Task Force referral letters that include violations and/or respondents that do not match those that are named or discussed during the Task Force proceedings or in the original complaint:

<b>Potential Options for Handling Inconsistent Referrals</b>	
<i>Option 1:</i>	Adopt a policy that the Commission should send the matter back to the Task Force for clarification and/or potential re-hearing.
<i>Option 2:</i>	Adopt a policy that the Commission should consider only those violations that the Commission determines to represent the intent of the Task Force, which shall be informed by the staff’s communications with the Task Force and/or a review of the Task Force’s referral motion, and those respondents who were properly noticed during Task Force proceedings.

<sup>8</sup> As mentioned, this issue overlaps with the issue of whether a department head is responsible for Sunshine Ordinance violations by his or her staff, which is discussed later in this memorandum. I.e., if a department head is responsible for his or her staff’s violations, a referral naming him or her as a respondent may be appropriate regardless of whether the department head was named in a prior Task Force Order of Determination or resolution.

<sup>9</sup> The City Attorney has advised that a respondent’s due process rights are *not* implicated by the Task Force hearings given that the respondent is only subject to reputational harm. (See *Paul v. Davis*, 424 U.S. 693, 712 (1976) [injury to reputation does not implicate liberty or property interest protected by due process].)

<sup>10</sup> Members of the Task Force have pointed out that, in some instances, the actual individuals or alleged violations implicated in the matter do not become apparent until later in the complaint process and it is thus difficult, for example, for the Task Force to always notice all parties on all potential allegations prior to the hearing on the merits. Staff understands the dilemma posed by this situation under current Task Force procedures, but this consideration does not necessarily impact the fairness considerations described above. Indeed, instead of ruling on issues that were not adequately noticed, the Task Force (and the parties to a Task Force complaint) might be better served by instituting a procedure for an initial review of all complaints in order to identify the appropriate issues and parties.

<p><i>Option 3:</i> Adopt a policy that the Commission should consider the violations and respondents indicated in the referral letter without reference to the Task Force proceedings.<sup>11</sup></p> <p><i>Option 4:</i> Adopt a policy that the Commission should consider the violations and respondents indicated in the referral letter without reference to the Task Force proceedings <i>only in Chapter Three matters</i>. In Chapter Two matters, the Commission should shift the burden back to the complainant for any <i>additional</i> violations and respondents in the referral letter.<sup>12</sup></p>
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Staff recommends that the Commission adopt Option 4. This option provides an easily applied bright-line rule that gives effect to the Task Force’s referral letter, but treats a new respondent or a respondent facing new allegations fairly by shifting the evidentiary burden.

In this regard, staff also notes that a Task Force Order of Determination will typically not contain detailed findings of fact or conclusions of law. With the approval of the Commission, staff intends to transmit a general request to the Task Force that future referrals contain, to the extent possible, more detailed findings of fact or conclusions of law so as to facilitate Commission decision-making, particularly with respect to Chapter Two proceedings.

***2. Second Issue: the Task Force’s referral to the Commission alleges that a department head violated the Sunshine Ordinance based on acts by his or her subordinate(s).***

The Commission has occasionally wrestled with the issue of whether the head of a City department is the proper respondent in a referral where another department employee responds to a records request or otherwise is responsible for complying with the Sunshine Ordinance. In essence, the question is the following:

What factors will indicate that a department head is responsible for the failure of his or her staff to comply with the Sunshine Ordinance?

This issue of department head responsibility has arisen on a few occasions. For example, in *Ethics Complaint No. 03-140303 (Ginsburg)*, Recreation and Parks Director Phil Ginsburg was named as a respondent in a referral regarding the redaction of certain City applications. In that instance, the Commission referred the matter back to the Task Force because Mr. Ginsburg had not been named in its Order of Determination.

However, the Commission found a Department head responsible for actions of his staff in *Ethics Complaint No. 02-140228 (Rahaim)*. In that matter, the Commission concluded that John

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<sup>11</sup> The Commission took this step in *Ethics Complaint No. 02-140228 (Rahaim)*.

<sup>12</sup> This option would likely require bifurcating the matter into two successive hearings – one under Chapter Two (with no staff report) and one under Chapter Three (with a staff report).

Rahaim, the Director of the Planning Department, committed a non-willful violation of failing to timely produce public records. Although Mr. Rahaim was not responsible for responding to the request at issue, the Commission found that he was responsible for his staff's response to the records request by virtue of the nature of his supervisory role for those staff members.<sup>13</sup>

This issue is also implicated each time a referral names a *department* as a respondent. In these instances, the complainant presumably wishes to name the department head as the respondent – even if he or she was not involved in the matter – as only a City officer or employee may be a respondent under current Commission regulations. (See SFEC Reg. Chap. 1, §II.R.) For example, in *Ethics Complaint No. 02-130307 (Patterson)*, the referral named the Arts Commission as the respondent in a complaint involving the redaction of speaker cards. Commissioner Studley wondered whether the Commission's Executive Director should have been named as a respondent (in lieu of its Director of Communications whom staff also included as a respondent in the matter).

In any case, holding a department head responsible for *all* failures to comply with the Sunshine Ordinance could unfairly penalize the department head for actions beyond his or her personal involvement or for instances where certain employees simply do not comply with otherwise robust departmental policies. As an alternative, the Commission might consider certain factors to determine if a department head in fact violated the Sunshine Ordinance, and whether he or she did so willfully or non-willfully.

For example, the Commission might determine that a department head committed a *non-willful* violation of the Sunshine Ordinance based on certain factors, including: (1) whether the department head knew about the records request; (2) whether the responding staff member was a direct report or otherwise close in the chain of command to the department head; and (3) whether the department head had instituted sufficient Sunshine Ordinance compliance policies.

Additionally, the Commission might determine that a department head committed a *willful* violation of the Sunshine Ordinance only in those instances where he or she was actually *involved* in a records request or other Sunshine Ordinance matter; doing so would be consistent with Commission regulations and would avoid a categorical rule that did not account for, say, the size of a City agency. (See SFEC Reg. Chap. 1, § II.U [“willful violation” is acting “with the knowledge that such act or failure to act was a violation”].)

As a further alternative, the Commission might also consider changing its regulations to allow a *department* to be held responsible for *non-willful* violations of the Ordinance.<sup>14</sup> Such an

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<sup>13</sup> A similar “the-buck-stops-at-the-top” policy is applied in tort law to hold an employer vicariously liable for torts committed by an employee within the scope of employment. The *respondeat superior* doctrine has three policy justifications — prevention, compensation, and risk allocation. (See *Patterson v. Domino's Pizza, LLC*, 2014 Cal. LEXIS 6251, \*35.) In the present context, the doctrine could be justified by the “prevention” justification. That is, a department head who knows that he or she may be a respondent in a Sunshine Ordinance referral might be more likely to institute sufficient Sunshine Ordinance compliance procedures. Such incentive might, however, be mitigated by the fact that the Ethics Commission may lack significant enforcement power with respect to department heads, even if they are found to have willfully violated the Sunshine Ordinance.

<sup>14</sup> The Ordinance provides that *willful* violations of the Sunshine Ordinance by “an elected official, department head, or other managerial city employee” are official misconduct, suggesting that only individuals can commit willful



approach would allow the Commission to declare that a document was not properly produced, a meeting was not properly noticed, etc., even when it is unclear who in particular was responsible for the violation. It may also spare certain named respondents from reputational harm for technical violations or violations that what are in fact the result of a collaborative effort.<sup>15</sup>

In light of the above, staff proposes the following policy options for holding a department head responsible for his or her staff’s failure to comply with the Sunshine Ordinance:

<b>Potential Options for Department Head Responsibility</b>	
<i>Option 1:</i>	Adopt a policy of treating a complaint against a department, not a named employee, as a complaint against its department head.
<i>Option 2:</i>	Adopt a policy that a department head can be found to have committed a <i>non-willful</i> violation of the Sunshine Ordinance based on consideration of the following factors: (1) whether the department head knew about the records request; (2) whether the responding staff member was a direct report or otherwise close in the chain of command to the department head; and (3) whether the department head had instituted sufficient Sunshine Ordinance compliance policies.
<i>Option 3:</i>	Adopt a policy that a department head can be found to have committed a <i>willful</i> violation of the Sunshine Ordinance based on consideration of the department head’s actual involvement in the records request or other matter.
<i>Option 4:</i>	Adopt a policy that City departments may be found to have committed <i>non-willful</i> violations of the Sunshine Ordinance. <sup>16</sup>

Staff recommends that the Commission adopt Options 3 *and* 4. Option 3 will hold department heads responsible when they are involved the Sunshine Ordinance matters, but will not unfairly penalize department heads who diligently work to ensure compliance. Option 4 will allow the Commission to decide whether a non-willful violation has occurred even when responsibility for such violation is not evident.

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violations. However, the Sunshine Ordinance also states that the Task Force may make referrals whenever it concludes that any *person* (a term generally construed broadly) violated the Sunshine Ordinance, which suggests that a department can be deemed to commit a non-willful violation. (See S.F. Admin. Code §§ 67.30(c), 67.34.)

<sup>15</sup> If it proceeds in this fashion, the Commission will also likely wish to decide if it will be able to find such non-willful departmental violations in instances when the department is not named as a respondent (i.e., essentially add the department as a respondent).

<sup>16</sup> Option 4 was developed *after* distribution of a draft of this memorandum to the Commission and the Task Force.

**3. Third Issue: How does a City officer or employee fulfill the obligation to send an “authorized representative” to a Task Force meeting?**

This issue concerns section 67.21(e) of the Sunshine Ordinance, which provides:

“Where requested by the petition [for a determination whether the record requested is public], the Sunshine Task Force may conduct a public hearing concerning the records request denial. An *authorized representative* of the custodian of the public records requested shall attend any hearing and explain the basis for its decision to withhold the records requested.” (Emphasis added.)

In the past, the Task Force has interpreted this provision to mean that a custodian of records must send a *knowledgeable* representative to the hearing. The rationale for interpreting section 67.21(e) in this manner may well be sound: the Task Force wishes to have access to someone who can answer its questions regarding the matter, particularly given that the full Task Force generally does not meet more than once or twice a month. Further, the Task Force has argued that only a knowledgeable representative can “explain the basis for its decision to withhold the records requested,” as required by section 67.21(e). In this regard, the Task Force has stated that it is sometimes frustrated by department representatives who may, for instance, read a prepared statement but are otherwise unable to address certain issues deemed central to the matter at hand.

Notwithstanding these reasonable contentions, it does not appear that the plain language of section 67.21(e) requires a *knowledgeable* representative. Indeed, one may fairly be understood to “explain a departmental decision” simply by reading a relevant and accurately prepared statement.<sup>17</sup> In this regard, the respondent in *Ethics Complaint No. 09-120703 (Lazar)* understood (based on DCA advice) that a City department may send any authorized representative so long as that person is able to accurately state the response of that officer or employee to the Task Force. The Commission did not find a violation of section 67.21(e) in that matter, even though the Task Force did not believe that the respondent’s representative at a hearing was adequately informed about the matter at issue.

More broadly, certain policy considerations militate against imposing a “knowledgeable” requirement. As an initial matter, it is unclear what exactly constitutes a “knowledgeable” representative. Should the representative have been involved in the records request? Should the respondent have “briefed” the representative on the matter and, if so, to what extent? Is a representative who answers seven out of ten Task Force questions “knowledgeable?” Drawing appropriate lines in this regard – and providing meaningful guidance to City departments – could be difficult and relatively arbitrary, particularly if the Task Force continues to address issues at certain hearings that were not noticed to the parties.

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<sup>17</sup> See <http://www.merriam-webster.com/dictionary/explain>; visited November 13, 2014 (defining “explain” to mean “to make known; to make plain or understandable; to give the reason for or cause of”).

Moreover, as a practical matter, one may assume that each City department has an incentive to send a representative who can adequately defend and/or explain the department's actions and that, if it does not, the Task Force will find for the complainant. In other words, the solution to this problem may simply be for the Task Force to rule on the evidence before it, which will likely be *against* any department that sends a representative who is unable to address the concerns of the Task Force.

In light of the above, staff proposes the following policy options:

<b>Potential Options for Authorized Representatives</b>	
<i>Option 1:</i>	Adopt a policy that requires an authorized representative who was actually involved in the records request to attend a Task Force hearing, when requested pursuant to section 67.21(e).
<i>Option 2:</i>	Adopt a policy that requires any authorized representative of the respondent/custodian of the public records to attend a Task Force hearing, when requested pursuant to section 67.21(e), so long as that person is briefed on the matter by that officer or employee.
<i>Option 3:</i>	Adopt a policy that requires any authorized representative of the respondent/custodian of the public records to attend a Task Force hearing, when requested pursuant to section 67.21(e), so long as that person is able to accurately state the response of that officer or employee to the Task Force.

Staff recommends that the Commission adopt Option 3 as it gives effect to the plain language of the Sunshine Ordinance, is consistent with advice from the City Attorney's office, and ensures that the respondent's message to the Task Force is adequately conveyed.

## CONCLUSION

Staff hopes that the Commission finds both this memorandum and the related policy discussion helpful. As mentioned, staff's intent was both to respond to the will of the Commission and to establish clear policies regarding the issues discussed above, which could form the basis for future regulations that provide guidance to staff, the Task Force, the public, and the Commission. Importantly, to the extent that the Commission does adopt specific policies, they will be conveyed directly and immediately to the Task Force.

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## APPENDIX A

Complaint	Date	Chapter	Summary of Disposition	Further Description/Other Issues
03-120402	2/25/13	3	<p>The Commission found that Luis Herrera, City Librarian did <u>not willfully violate</u> section 67.16 of the Sunshine Ordinance.</p> <p>The matter involved the failure to include a “brief written summary” of comments provided by a speaker in the body of the minutes.</p> <p>In a later matter heard on June 24, 2013 (<i>FPPC Complt No. 01-130307 (Herrera)</i>), the Commission concluded that placing the summary in an addendum that is part of the minutes satisfies section 67.16.</p>	<ul style="list-style-type: none"> <li>• Commissioners Hur and Liu indicated that a violation is not willful if there are conflicting interpretations from the City Attorney’s office and the Sunshine Ordinance Task Force.</li> <li>• Commissioner Studley indicated other allegations would not be considered because they were not in the referral or part of the record.</li> </ul>
15-111205 (1st of 2)	2/25/13	3	<p>The Commission found that that Phil Ginsburg and other members of the Recreation and Parks Department did <u>not willfully violate</u> sections 67.21(c), 67.25, 67.26, or 67.27 of the Sunshine Ordinance, although the Commission suggested that there was a non-willful violation.</p> <p>The matter involved the alleged failure to: (1) provide emails properly deleted pursuant to the department’s record retention policy; (2) request a search of such emails by the Department of Technology; and (3) direct requesters to the third-party recipient of such emails (the Commonwealth Club).</p>	<ul style="list-style-type: none"> <li>• The Commission did not adjudicate whether the records retention policy is acceptable under the Administrative Code, although the City Attorney’s office generally ensures that such policies comply with local and state laws.</li> <li>• City Attorney generally advises that the Sunshine Ordinance does not require an agency to look at backup tapes for properly deleted emails.</li> </ul>
15-111205 (2nd of 2)	2/25/13	2	<p>The Commission found that Respondent Olive Gong, Custodian of Records for the Recreation and Parks Department, <u>violated</u> section 67.25 of the Sunshine Ordinance by failing to respond in</p>	<ul style="list-style-type: none"> <li>• There was some discrepancy between the Order of Determination (which mentioned three respondents) and the referral (which mentioned only two, including the Chair of the Recreation and Parks Commission).</li> </ul>

**APPENDIX A**

Complaint	Date	Chapter	Summary of Disposition	Further Description/Other Issues
			<p>a timely manner to an immediate disclosure request, despite reasonable efforts to timely comply (i.e., documents were provided).</p> <p>The Commission also found that Respondent Gong did <u>not violate</u> sections 67.21(c), 67.25, 67.26, or 67.27 of the Sunshine Ordinance (provisions referenced in the related matter handled per Chapter 3).</p>	<ul style="list-style-type: none"> <li>• The Commission did not find that the Recreation and Parks Commission Chair violated the Sunshine Ordinance, even though the records request involved his emails.</li> <li>• A department representative indicated that archived e-mails previously maintained by the Department of Technology are now kept in the department. In this regard, a commissioner requested that staff address the issue of searching backup files in response to Sunshine Ordinance requests in the future.</li> <li>• DCA advised that his office has interpreted the section 67.29-7 of the Sunshine Ordinance, which requires department heads to retain records in a professional manner, to require a department head to ensure that records are maintained in a manner consistent with the department's records retention policy. I.e., an employee who follows his or her own retention policy cannot be found in violation of the Sunshine Ordinance.</li> </ul>
04-120507	2/25/13	2	<p>The Commission found that Respondent Caroline Celaya, Custodian of Records for the Municipal Transportation Authority, <u>violated</u> section 67.25 of the Sunshine Ordinance by failing to respond in a timely manner to an immediate disclosure request, despite reasonable efforts to timely comply (i.e., certain documents were provided).</p> <p>The Commission also found that Respondent Celaya did <u>not violate</u> sections 67.21(c) or 67.21(e) of the Sunshine Ordinance.</p>	<ul style="list-style-type: none"> <li>• This matter involved the production of the requester’s personnel records and thus it was questionable as to whether this matter was properly brought as a Sunshine matter.</li> <li>• The Commission did not find that the respondent violated section 67.21(e) (failing to send a knowledgeable representative).</li> <li>• The Commission did not find that the respondent violated section 67.21(c) (failing to identify other appropriate contact).</li> </ul>
07-120621	2/25/13	2	<p>The Commission found that Respondents Mohammed Nuru did <u>not violate</u> sections 67.21(c) or 67.21(e) of the Sunshine Ordinance.</p>	<ul style="list-style-type: none"> <li>• The Order of Determination found “DPW” in violation of the Sunshine Ordinance. Acting department head Mohammed Nuru and Frank Lee were listed as respondents in the Commission matter.</li> </ul>

## APPENDIX A

Complaint	Date	Chapter	Summary of Disposition	Further Description/Other Issues
			<p>The matter involved a voluminous records request.</p>	<ul style="list-style-type: none"> <li>The referral included a violation by Frank Lee, Executive Assistant to the Director of DPW, for failing to attend a Task Force meeting.</li> </ul>
09-120703	2/25/13	2	<p>The Commission found that respondent Howard Lazar, Program Director of the Street Artists Program at the Arts Commission, <u>violated</u> section 67.22 of the Sunshine Ordinance by failing to respond to a request for public information (i.e., failing to provide information found in public records).</p> <p>The Commission also found that Respondent Lazar did <u>not violate</u> section 67.21(e) of the Sunshine Ordinance.</p>	<ul style="list-style-type: none"> <li>After an asthma attack at a prior meeting, the respondent sent a representative to a Task Force meeting based on City Attorney's Office advice that any representative may attend the Task Force meeting(s), as long as the person could accurately provide the Arts Commission's response. The Task Force disagreed.</li> <li>The Commission rejected contentions that the violation was willful based on the respondent's alleged history of responding to records requests.</li> </ul>
02-130307	6/24/13	2	<p>The Commission found that Respondent "Kate Patterson/San Francisco Arts Commission" <u>violated</u> section 67.25 of the Sunshine Ordinance by failing to respond in a timely manner to an immediate disclosure request and, by not providing appropriate notice and justification, failed to comply with section 67.26 of the Sunshine Ordinance in making their redactions on the speaker cards requested by Complainant.</p> <p>The Commission also found that that the Respondent met the burden of establishing that the records need not be publicly disclosed in an unredacted fashion based on privacy case law cited by the City Attorney's office.</p>	<ul style="list-style-type: none"> <li>The complainant wanted the Department head to be held responsible.</li> <li>Ms. Patterson stated that personal addresses and email addresses were redacted from the speaker cards due to privacy concerns. She consulted with the City Attorney's office to determine what to redact.</li> </ul>
01-130307	6/24/13	3	<p>The Commission found that Luis Herrera, City Librarian did <u>not violate</u> section 67.16 of the Sunshine Ordinance.</p>	<ul style="list-style-type: none"> <li>The Commission concluded that there was no violation at all because the written summaries appeared in the minutes and that placing the summaries in an addendum that is part of the same document satisfies the requirements of section 67.16.</li> </ul>

## APPENDIX A

Complaint	Date	Chapter	Summary of Disposition	Further Description/Other Issues
			<p>The matter involved the failure to include a “brief written summary” of comments provided by a speaker in the body of the minutes.</p>	
02-120402	9/23/13	3	<p>The Commission found that Supervisors David Chiu, Malia Cohen, Eric Mar, and Scott Wiener did <u>not violate</u> sections 67.7(b) or 67.15(a),(b) of the Sunshine Ordinance.</p> <p>The matter concerned 14 pages of amendments to a proposed Parkmerced Development Agreement introduced at a Land Use Committee.</p>	<ul style="list-style-type: none"> <li>• The primary issue was whether the amendments were within the scope of the noticed agenda item at the hearing (i.e., whether the committee adequately noticed the matter). The Commission found that they were.</li> <li>• The committee members asked for advice from the Deputy City Attorney present during the meeting, who stated that the committee could consider the amendments (which were distributed at the meeting).</li> </ul>
04-140303	3/24/14	2	<p>The Commission found that Luis Herrera, City Librarian did <u>not violate</u> section 67.15(a),(d) of the Sunshine Ordinance.</p> <p>The matter concerned whether the failure to purchase and/or install requested audio-visual equipment for public comment constituted an abridgement of public comment or criticism.</p>	<ul style="list-style-type: none"> <li>• The Order in this matter indicated that the Library Commission violated the Sunshine Ordinance, while the referral indicated that Mr. Herrera committed the violation. Commissioner Hur expressed concern that the appropriate party was not before the Commission.</li> </ul>
03-140303	4/28/14	3	<p>The Commission did not reach a conclusion as to whether Phil Ginsburg, Director of the Recreation and Parks Department, violated section 67.26 of the Sunshine Ordinance by allowing the redaction of private home address and phone information on otherwise produced applications with the City.</p> <p>Ultimately, the Ethics Commission referred the matter back to the Sunshine Ordinance Task Force for more factual information.</p>	<ul style="list-style-type: none"> <li>• The department redacted the address and phone information per the advice of its Deputy City Attorney based on constitutional privacy protections.</li> <li>• The other main issue was whether Mr. Ginsburg was properly named as the respondent in the manner given that he was not named in the Order of Determination and the department’s custodian of records indicated that she was responsible for the response in this matter.</li> <li>• Commissioner Keane made a motion (seconded by Commissioner Renne) to find that the Sunshine Ordinance was violated by Mr. Ginsburg as the head of the Recreation and Park Department and that the violation was non-willful, and that the information</li> </ul>

**APPENDIX A**

Complaint	Date	Chapter	Summary of Disposition	Further Description/Other Issues
				withheld in this matter should be disclosed. The motion failed by a 2-3 vote.
02-140228	7/28/14	3	<p>The Commission found that John Rahaim, the Director of the Planning Department, <u>violated</u> section 67.21(a) of the Sunshine Ordinance because Department staff who were supervised by Mr. Rahaim’s own direct report failed to timely produce the public records.</p> <p>However, the violation was <u>non-willful</u>.</p>	<ul style="list-style-type: none"> <li>The complaint alleged that John Rahaim committed a willful violation of the Sunshine Ordinance. Although Mr. Rahaim was not responsible for responding to the request at issue, the Commission found that Mr. Rahaim was responsible for the Planning Department’s response to the records request by virtue of the nature of his supervisory role over Department staff.</li> </ul>

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## Appendix B

### General Summary of Task Force Procedures for Handling a Complaint

1. *Filing of complaint.* A complaint is filed with the Task Force and a hearing on the merits is scheduled. Complainants and respondents are notified and required to appear. They may submit documentation.
2. *Hearing on the merits.* The Task Force holds a hearing on the merits and determines whether the respondent has violated the Sunshine Ordinance.
3. *Order of Determination.* Working with the Task Force Administrator, the Chair issues an Order of Determination reflecting the Task Force's conclusions that the respondent has violated the Sunshine Ordinance.<sup>1</sup> The Order is sent to all parties and may occasionally be sent to department heads who are not themselves respondents.
4. *Referral to Committee.* If the Order indicates that the respondent violated the Sunshine Ordinance, the matter is referred to a Task Force committee, usually the Compliance & Amendments Committee. Complainants and respondents are required to appear at the committee meeting to discuss whether the respondent is complying with the Task Force's Order.
5. *Referral back to Task Force.* The Task Force committee determines whether the respondent has complied with the Task Force's Order. If the respondent has not, the matter may be referred back to the full Task Force.
6. *Referral to Commission.* The Task Force holds a meeting to determine whether the respondent has complied with the Task Force's Order. Complainants and respondents are notified and required to appear. If Task Force determines that the respondent has not complied with the Task Force's Order, the Task Force may vote to refer the matter to the Ethics Commission.
7. *Referral letter drafted.* Working with the Task Force Administrator, the Chair issues a referral letter to the Ethics Commission stating the respondents in the matter and their specific violations of the Sunshine Ordinance. Complainants and respondents are sent the letter.

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<sup>1</sup> Although an Order will identify which sections of the Sunshine Ordinance the respondent has violated, it will typically not contain detailed findings of fact or conclusions of law.

SUNSHINE ORDINANCE  
TASK FORCE



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**MEMORANDUM**

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**Date:** December 11, 2014  
**To:** San Francisco Ethics Commission  
**From:** Allyson Washburn, Chair, Sunshine Ordinance Task Force (SOTF)  
Lee Hepner, Chair, SOTF - Compliance and Amendments Committee  
**Subject:** Policy Discussion Regarding Sunshine Ordinance Task Force Referrals

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**INTRODUCTION**

As a preliminary matter, the Sunshine Ordinance Task Force thanks the Ethics Commission for its efforts to seek clarification on proper handling of referrals from the Task Force to the Commission. In particular, we extend our gratitude to Deputy Executive Director Jesse Mainardi, who has appeared at our meetings and discussed with us the issues presented in the Commission's memorandum, and has consequently assisted in tailoring this response to the Commission's specific concerns. The Task Force is grateful for the opportunity to reach a mutual understanding with respect to the three issues set forth in the Commission's memorandum, which are repeated here for reference:

1. How should the Commission handle Task Force referrals that are inconsistent with the original complaint and/or earlier Task Force orders or resolutions in the same manner?
2. What factors bear on whether a department head is responsible for the violations of the Sunshine Ordinance by his or her staff?
3. How does a City officer or employee fulfill the obligation to send an "authorized representative" to a Task Force meeting?

This response memorandum considers each of the above three issues in turn, and is the product of our institutional knowledge and the discussions we have had on these matters at both our regular Task Force meetings and at our Compliance and Amendments Committee meeting. Where appropriate, this memorandum refers to specific sections of the Sunshine Ordinance (Administrative Code, Chapter 67). We intend to keep the responses brief with the further intent of appearing at the December 16, 2014, Ethics Commission meeting to field any additional questions.

## ISSUES AND ANALYSIS

### **1. First Issue: How should the Commission handle Task Force referrals that are inconsistent with the original complaint and/or earlier Task Force orders or resolutions in the same manner?**

The Commission notes that its first issue is procedural in nature, and the Task Force acknowledges in particular potential concerns arising out of perceived inconsistencies over the lifespan of the Task Force's consideration of Sunshine Complaints. Indeed, discrepancies between the original complaint, the Order of Determination, and the referral letter to the Commission are inherent in the Task Force's processing of citizen complaints. It is commonplace, for example, for the Task Force to find violations of the Sunshine Ordinance after conducting a more thorough investigation of the facts underlying a complaint that were not readily apparent from the complaint itself or from the Memorandum prepared by the City Attorney in advance of that fact-finding mission.

Regarding these inconsistencies, it is the Task Force's preference that Option 3 be implemented - i.e., adopt a policy that the Commission should consider the violations and respondents indicated in the referral letter without reference to the Task Force proceedings. The Commission notes that this was the approach taken with respect to *Ethics Complaint No. 02-140228 (Rahaim)*. But because this was a Chapter Three proceeding against a department head, the Commission conducted its own independent investigation of the matter to determine whether a preponderance of the evidence supported a finding that Mr. Rahaim had violated the Sunshine Ordinance. In this case, the Task Force agrees that it was proper for the Commission to both (1) consider the violations as set forth in the Task Force's referral letter without reference to the underlying Task Force proceedings, and (2) conduct an independent Chapter 3 investigation.

With respect to non-willful violations "becoming" willful violations, again, the Commission should defer to the Task Force referral letter without reference to the underlying Task Force proceedings. In the *Rahaim* matter, *supra*, the referral letter to the Commission alleged that the Department head willfully violated the Sunshine Ordinance, even though the Order of Determination indicated a non-willful violation. In this instance, the Commission was correct in hearing the matter pursuant to Chapter Three. Because the Order of Determination precedes further notification to respondents, referral to committee, and potential referral back to the Task Force, ongoing non-compliance with an Order of Determination may cause the Task Force to deem the alleged violation to be willful in nature. Ultimately, this is not an inconsistency between the Order of Determination and the referral letter to the Commission, but rather reflects the evolution of the matter throughout the Task Force's multi-step consideration of the facts and evidence.

The Commission's proposed Option 4 suggests that in Chapter Two matters, the Commission should shift the burden back to the complainant for any additional violations and respondents in the referral letter, e.g. in addition to those set forth in earlier stages of the Task

Force proceedings. The Task Force notes that in Chapter Two proceedings, unlike in Chapter Three proceedings, the burden rests with the *respondent* to prove that he or she did not violate the Sunshine Ordinance. But even in light of this difference, the Task Force reiterates its preference for Option 3. The Commission should defer to the Task Force's determinations as reflected in the referral letter, with the understanding that it is not unusual for additional violations and respondents to arise throughout the course of the Task Force's consideration of any given matter.<sup>1</sup>

## **2. Second Issue: What factors bear on whether a department head is responsible for the violations of the Sunshine Ordinance by his or her staff?**

With respect to the second issue raised in the Commission's memorandum to the Task Force, the Task Force is sympathetic to certain aspects of each of the three potential options for department head responsibility. The Task Force is also mindful that ambiguity with regard to *who* should be held responsible for an alleged violation against a department may be cured in part by clearer communication from the Task Force to the Commission, e.g. in the referral letter, regarding (1) which respondents it found to be responsible for the violation or violations in question, and (2) the basis for the Task Force's determination of each individual respondent's involvement in the violation.

Option 1 suggests adopting a policy of treating a complaint against a department, not a named employee, as a complaint against its department head. Absent any contrary indication in the Task Force's referral letter, the Commission in most instances should adhere to this policy. But the Task Force also recognizes that in some instances, in particular, those instances where a violation arises out of a department's failure to comply with a public records request (i.e., a violation of Section 67.21 of the Sunshine Ordinance), a department's designated custodian of records may be ultimately responsible and properly implicated in the Commission's determination of whether a violation occurred. Absent an aberration in the Task Force's policy moving forward, the Task Force's referral letter to the Commission will reflect additional information regarding which individual employee(s) should be deemed responsible for violating the Sunshine Ordinance.

The Task Force also agrees that both Options 2 and 3 are appropriate procedure for proceeding on a complaint that names only a department, and no individuals, as a respondent.

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<sup>1</sup> Concerning additional respondents, the Task Force is mindful of the due process considerations arising out of naming a respondent who may not have received notice of the initial Complaint. For this reason, the Task Force has endeavored to provide additional notice to new respondents at various stages between the initial complaint and referral to the Commission. Additionally, the City Attorney has similarly advised the Task Force that a respondent's due process rights are *not* implicated by the Task Force hearings given that the respondent is only subject to reputational harm. *Paul v. Davis*, 424 U.S. 693, 712 (1976). Absent compelling evidence to the contrary, the Commission should assume that any respondent named in a referral letter to the Commission has been provided notice and an opportunity to correct an alleged violation prior to the matter's referral to the Commission.

Option 2 allows for the finding of a non-willful violation of the Sunshine Ordinance based on a theory of liability rooted in *respondent superior* doctrine (as the Commission found in *Rahaim, supra*). Option 3 allows for the finding of a willful violation of the Sunshine Ordinance only if the department head was directly involved in the records request.

The Commission may choose to proceed differently based on the nature of the violation set forth in the Task Force's referral letter. For example, the Task Force could find that a department is in violation of Section 67.29-7 of the Sunshine Ordinance, which mandates the maintenance of documents and correspondence in a professional and businesslike manner. In this and similar circumstances, where the violation may impugn a department's *policies* – as opposed for an isolated failure to properly respond to a records request, for instance – the Task Force may recommend, and the Commission may more easily find, a willful violation of the Sunshine Ordinance by the department head when only the department is named as a respondent. The Task Force is receptive to further discussion with the Commission on this type of scenario.

### **3. How does a City officer or employee fulfill the obligation to send an “authorized representative” to a Task Force meeting?**

The issue of what constitutes an “authorized representative” is narrower in scope, but is less conducive to a steadfast response. The reason for this is that the Task Force's determination of 67.21(e) violations is more subjective in nature, or at least arises out of circumstances that are removed from the facts underlying a complaint to the Task Force. While it may be easier to determine from the undisputed facts of a case whether a public records request was properly responded to, the determination of “authorized representative” is more discretionary.

Of the three options set forth in the Commission's memorandum, the Task Force is most sympathetic to the first option, and each successive option is less preferred. From the Task Force's perspective, we have a limited opportunity to investigate the facts of any particular complaint, and Section 67.21(e) is the Task Force's only leverage to compel a knowledgeable individual to a Task Force meeting to assist in our fact-finding endeavor. Violations are infrequently apparent from the face of the complaint and it is imperative to the Task Force's effectiveness to be able to ask myriad questions of attending parties and expect thorough and informed responses to those questions. For example, in determining whether a department has adequately responded to a public records request, the Task Force often needs to know what efforts were made to search for the records, what efforts were made to provide additional information to the complainant regarding where or from whom those records might be obtained, and whether the department is complying with mandatory records retention policies. While the Task Force can exercise a modicum of leniency if an individual cannot answer *every* question posited to them, the Task Force's job is severely impaired by a respondent who can only state that all records have been produced, without elaboration.

In light of the crippling effect of an uninformed representative, the Task Force suggests adherence to Option 1. But the Task Force is also mindful that a respondent will receive at least one if not two opportunities to correct a violation of 67.21(e) prior to that violation's referral to the Commission.

### **CONCLUSION**

The Task Force reiterates its appreciation for the opportunity to work together with the Commission to resolve the issues set forth in the Commission's memorandum to the Task Force. We share the goal of establishing clear policies regarding these issues and in maintaining an open dialogue that could result in future guidance to City staff, the Commission, the Task Force, and the public.