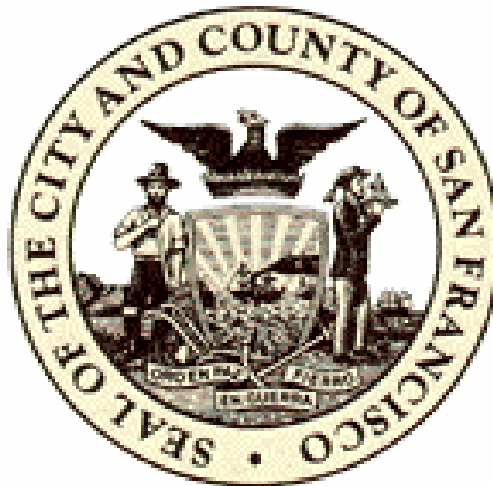


**THE RACIAL PRIVACY INITIATIVE:
ANTICIPATED IMPACTS ON CITY PROGRAMS**



**A Report by the Human Rights Commission
City and County of San Francisco
25 Van Ness Avenue, Suite 800
San Francisco, California 94102-6033
415-252-2500**

Compiled by Ellise Nicholson, HRC Representative

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I. Introduction

The Racial Privacy Initiative is a California ballot initiative that would amend Article I, section 32 of the California Constitution to prohibit state and local governments, public universities and school districts from collecting or using information about race, ethnicity, color or national origin. The Initiative, which is sponsored by The American Civil Rights Coalition and its Chairman Ward Connerly, is certified for the presidential primary election scheduled for March 2004. If passed it will take effect on January 1, 2005.

The *San Francisco Chronicle* posted results of a nationwide survey of registered voters on May 1, 2002. The results indicated that California voters favored this proposed ballot measure. Nearly half of all likely voters initially support Connerly's measure, with 34% opposed and 18% undecided. According to the *Chronicle*, the early support seemed to coincide with attitudes toward Proposition 209, which voters approved in 1996.

The Human Rights Commission, through its Committees, conducted an investigation into the impact the proposed law would have on City programs should it pass in March 2004. This report is a compilation of the results of the Commission's investigation. Each Committee's presentation was organized differently, and that difference in structure is reflected in this report.

II. Summary of the Proposed Law

The Racial Privacy Initiative would prohibit classification on the basis of race by state and other public entities by adding Section 32 to Article I of the California Constitution as follows:

- (a) The state shall not classify any individual by race, ethnicity, color or national origin in the operation of public education, public contracting or public employment.
- (b) Nor may the state classify any individual by race, ethnicity, color, or national origin “in the operation of any other state operations” unless approved by a 2/3 majority of both houses and by the governor.

A. Definitions

“State” is defined as including, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, California State University, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

“Classify” is defined in the initiative as the act of separating, sorting or organizing by race, ethnicity, color or national origin, including but not limited to inquiring, profiling, or collecting such data on government forms.

“Individual” refers to current or prospective students, contractors or employees or, for purposes of subsection (b), any persons subject to state operations.

B. Exemptions

1. *Compelling State Interest*

- As noted in subsection (b) of the proposed law, there is an exception to the prohibition on classifications in state operations other than public education, public contracting, and public employment *if the legislature specifically determines that said classification serves a compelling state interest, approves said classification by 2/3 majority in both houses of the legislature, and the governor agrees.*
- This exception *does not apply* to public education, contracting, and employment.

2. *DFEH (Department of Fair Employment and Housing)*

- *DFEH exempt:* “DFEH shall be exempt from this section with respect to DFEH-conducted classifications in place as of March 5, 2002.”
- *Exemption expires in 10 years:* “However, unless specifically extended by the legislature, this exemption shall expire ten years after date of this measure.”

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- *Not allowed to impute race:* “notwithstanding DFEH’s exemption from this section, DFEH shall not impute race, color, ethnicity or national origin to any individual.”

3. *Law Enforcement*

- *Law enforcement may use racial descriptions:* “Nothing in this section shall prevent law enforcement officers, while carrying out their law enforcement duties, from describing particular persons in otherwise lawful ways.”
- *But no tracking required.* “Neither the governor, the legislature nor any statewide agency shall require law enforcement officers to maintain records that track individuals on the basis of said classifications, nor shall the governor, the legislature or any statewide agency withhold funding to law enforcement agencies on the basis of the failure to maintain such records.”

4. *Medical Research Subjects and Patients*

“Otherwise lawful classification of medical research subjects and patients shall be exempt from this section.”

5. *Prisoners/Undercover Law Enforcement*

“Otherwise lawful assignment of prisoners and undercover law enforcement officers shall be except from this section.”

6. *Complying with Federal Law*

“Nothing in the section shall be interpreted as prohibiting action which must be taken to comply with federal law, or establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.”

7. *Consent Decrees*

“Nothing in this section shall be interpreted as invalidating any valid consent decree or court order which is in force as of the effective date of this section.”

III. Impact of the Proposed Law: Reports from HRC Committees

A. Minority Business Enterprises/Woman Business Enterprises/Local Business Enterprises (MBE/WBE/LBE) Advisory Committee: Impact on the City's MBE Program by Bayard Fong

Bayard Fong, Contract Compliance Officer with the SF Human Rights Commission, reported on the potential impact of the RPI, if passed, on the City's Minority Business Enterprises (MBE) Program.

1. Background of the Program

The City implements Chapter 12D.A of the San Francisco Administrative Code, the Minority, Woman, and Locally Owned Business (MBE/WBE/LBE) Participation Ordinance. Pursuant to Chapter 12D.A, it is the policy of the City and County of San Francisco to ensure full and equitable opportunities for Minority Business Enterprises (MBE), Woman Business Enterprises (WBE), and Local Business Enterprises (LBE) to participate as prime and subcontractors in providing goods and services to the City.

Under the ordinance, "minority," "minorities," or "minority person" means members of one or more of the following ethnic groups:

- Asian Americans (defined as Chinese, Japanese, Koreans, Pacific Islanders, Samoans, Filipinos, Asian Indians, and Southeast Asians);
- African Americans;
- Latino Americans (defined as Mexicans, Puerto Ricans, Cubans, Central or South Americans);
- Iranian Americans;
- Arab Americans (defined as all individuals whose ancestry is from an Arabic speaking country that is a member of the League of Arab States as well as all individuals whose ancestry is from a country bordering an Arabic speaking country that is a member of the League of Arab States and who are regarded as having ancestry from an Arab speaking country that is a member of the League of Arab States);
- Native Americans.

"Minority Business Enterprise" (MBE) is defined as an economically disadvantaged local business operating in San Francisco that is an independent and continuing business for profit, performs a commercially useful function, is owned and controlled by one or more minority persons residing in the United States or its territories. The Director of the San Francisco Human Rights Commission (HRC) shall certify businesses as bona fide MBEs/WBEs/LBEs.

"Owned" means that minorities or women:
Possess an ownership interest of at least 51 percent of the business;

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Possess incidents of ownership, such as an interest in profit and loss, equal to at least the required ownership interest percentage;
Contribute capital, equipment and expertise to the business.

In order to be certified as an MBE, firms must submit a completed application to HRC, with all requested documentation. HRC also conducts an on-site inspection. Once certified, the firm is eligible for benefits provided by the Ordinance.

San Francisco spends almost a billion dollars a year contracting for outside goods and services. The SF City and County Board of Supervisors initially passed Ordinance No. 139-84, Minority/Women/Local Business Utilization Ordinance” on April 2, 1984 to combat the City and County of San Francisco’s own active and passive participation in discrimination against minority and woman owned businesses in its contracting for goods and services. Since 1984, the HRC has implemented an MBE/WBE/LBE Program to remedy discrimination in the award of public contracts.

The statistics collected for City funded projects in 1983-1984 illustrated that less than 2% of the prime contract awards went to minority owned businesses and/or women owned businesses. The Ordinance was renewed in 1989, and again in 1998. Over this period of time MBE/WBE representation has gradually increased. The Annual Report for 2001/2002 shows that 17% of the prime contract awards went to MBE/WBEs.

2. Scope of the Program

Chapter 12D.A.4. provides a five- percent (5%) bid/rating discount for economically disadvantaged local businesses (LBE) bidding on City contracts, and an additional five percent (5%) for local Minority or Women owned firms (MBE/WBE). To help departments ensure that local minority and women owned businesses are provided opportunities to participate in City procurement, Chapter 12D.A.5. directs City departments to conduct “good-faith efforts” to obtain Minority Business Enterprise (MBE) or Women Owned Business Enterprise (WBE) participation when procuring goods and services. “Good-faith efforts” include:

- Encouraging MBE/WBEs to attend pre-bid meetings;
- Advertising in general circulation media, trade association publications and minority/woman business focused media;
- Notifying MBE/WBEs and soliciting their interest;
- Dividing contract work into economically feasible units to facilitate MBE/WBE participation in the contract;
- Pursuing solicitations of interest by contacting MBEs/WBEs to determine whether these businesses are interested;
- Providing MBE/WBEs with adequate information about the plan, specifications, and requirements of the contract;
- Negotiating (where applicable) with MBEs/WBEs in good faith and demonstrating that MBEs/WBEs were not rejected as unqualified without sound reasons based on a thorough investigation of their capabilities;

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- Using the services of available community and contractors' groups, and local, state or federal minority and woman business assistance offices that provide assistance in the recruitment of MBE/WBEs for public sector contracts.

The Ordinance (12D.A.17.) further requires prime contractors to demonstrate good faith efforts to use MBEs and WBEs as subcontractors on the City's public works/construction and professional services contracts. Departments work with HRC to establish subcontracting participation goals depending on the extent of subcontract opportunities presented by the contract and the availability of MBE/WBE subcontractors capable of providing goods and services to the contract.

The program also extends a bonding assistance program and a prompt payment program to certified MBE/WBEs.

3. Tracking

The HRC gathers contract award data by department for prime and subcontract awards by ethnicity, gender, and city/non-city-based firms. This is collected through the HRC's diversity tracking system. The HRC also compiles availability data of MBEs/WBEs that are in the City's potential contracting pool. The data are used to measure dollars that are being awarded to City contractors. The data are also used to determine whether City monies are being equitably awarded among the diverse San Francisco business population.

4. Impact of the Racial Privacy Initiative (RPI) on the Program

If the RPI is passed:

- The City would not be allowed to ask firms to designate the ethnicity/race of the owners on the Schedule A certification application.
- The City would no longer be able to determine the availability of minority owned firms.
- The City would no longer be able to collect race/ethnicity data on contracts. It would not be possible to determine if certain ethnic minority businesses were receiving or not receiving a representative share of the contracts.
- The City would not be able to identify discrimination.
- The City would not be able to remedy discrimination through the programs now available under Chapter 12D.A.

B. Lesbian Gay Bisexual Transgender (LGBT) Advisory Committee: Impact on the City's Health Programs by James Loyce

Mr. James Loyce, Director of the San Francisco Department of Public Health (DPH) AIDS Office, explained that without accurate data on race and ethnicity, DPH would not be able to identify and respond adequately to health disparities nor would it be able to fulfill its mission to protect and promote the health of all San Franciscans. Mr. Loyce stated that there are five bases on which DPH collects and reports on racial and ethnic information: 1) to appropriately evaluate the health needs of San Francisco's diverse communities; 2) to access funding through competitive grants; 3) to conduct effective program planning; 4) to help evaluate contractors' cultural competency; and 5) to collect and report race, ethnicity and national origin information through its hiring process.

1. Evaluating the Health Needs of San Francisco's Diverse Communities

Mr. Loyce stated that DPH must be able to conduct its own community evaluations in order to obtain timely, accurate and specific data. He explained that DPH needs to know how disease impacts communities. This requires that contractors demonstrate cultural competency in order to represent a certain community, and that staff and board members reflect that community. One of the first things that the proposed law would do, said Mr. Loyce, is to disallow check-off boxes. The exemption for "medical research subjects" and "patients" would not apply to community surveys. DPH sometimes goes out into communities to inquire about who lives in those areas and what their health indicators are based on race and national origin.

One example of this community surveying is the Bayview community. DPH helped conduct a survey as a participant on the Bayview Hunter's Point (BVHP) Health and Environmental Task Force. One important finding broken down by race was that the overall percentage of those diagnosed with asthma in BVHP was 10%. African-Americans had the highest (11%) while Asian/Pacific Islanders had the lowest (6%). Moreover, BVHP is often perceived as being an exclusively African-American area. However, in collecting data on race and ethnicity, DPH now knows that a significant number of Asians and Latinos also live there. DPH would not be able to evaluate the health care needs of this community had it not been able to find out who lives there and what their respective health care needs are.

Mr. Loyce also explained that Healthy People 2010 (the set of federal health objectives) has as its goal the elimination of health disparities. This goal cannot be met if DPH is not allowed to conduct community surveys. For example, African-Americans and Latinos are over-represented in rates of HIV. The proposed law would make it impossible for DPH to identify risk populations within racial and ethnic groups and to work to achieve the goals of Healthy People 2010.

2. Accessing Funding Through Competitive Grants

Mr. Loyce stated that grants accounted for 8% of DPH's revenue last year, but that some areas of DPH rely much more heavily on grants. 87% of the AIDS Office's 73 million-

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dollar budget comes from grant monies. While the Racial Privacy Initiative allows data collection for information required by federal grants, obtaining information for federal, State, and local grant applications would be made more difficult if State and local agencies cannot collect information based on race and ethnicity. For example, Ryan White CARE funding requires documentation of severe need in San Francisco, including information about co-morbidities including substance abuse, mental health, tuberculosis, and access to services. The AIDS Office is asked to describe racial disparities and access to services. RPI would make it difficult to accurately establish need and access to services. This not only will affect communities of color but white communities as well. In San Francisco, primarily, large numbers of white men are contracting HIV. We would not know this if we could not collect the data on race, said Mr. Loyce.

3. *Effective Program Planning*

RPI would prohibit DPH from conducting effective program planning. Race may be associated with increased exposure, different susceptibility to disease, and unequal access to care. DPH strives to create programs that respond to the needs of the City's diverse communities and to improve health outcomes within target populations. Under RPI, DPH would be greatly challenged in its ability to target programs to specific racial and ethnic groups impacted by health disparities.

For example, DPH implements the Chinatown Outreach & Prevention Services program (CHOPS) and the Breast Cancer & Cervical Cancer Services program (BCCS). The CHOPS program was developed because tuberculosis rates in San Francisco are highest among Asians, and three quarters of new cases occur among foreign-born people. The CHOPS program aims at increasing adult screening and improving compliance and participation. With respect to the BCCS program, African Americans have the highest mortality rate for breast cancer. Its prevalence is also elevated for Latino and Chinese women. BCCS was developed to educate communities in the City most impacted by these cancers (Bayview Hunter's Point, Potrero Hill, Visitacion Valley/Sunnydale), and actively helps women get screened for these cancers. These programs would not exist without the racial data showing which communities are most impacted by which illnesses.

Another example concerns the environmental impact relating to race and region. Residents of BVHP face proximity to the City's most environmentally unfriendly industries, hazardous waste sites, and have the highest hospitalization rates for corresponding illnesses (asthma, hypertension, and congestive heart failure). Many of the houses in BVHP have mold, which causes cancer and respiratory problems. Such environmental hazards as sewage, shipyards, and fire on the nearby naval base release unhealthy toxins into the area. DPH has worked with community groups to create the Health & Environmental Resource Center, to educate and train residents on issues such as housing habitability, and to negotiate with the transit agency to allocate the lowest emissions buses.

4. *Evaluating Contractors' Cultural Competency*

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DPH relies on community based organizations (CBOs) to carry out many of its programs. Effective treatment and interventions must take place in the context of the consumer's culture. The goal is that all contractors provide culturally competent, language appropriate services. In order to achieve this goal, DPH seeks to hire people from the communities being served. Under RPI, DPH would be unable to determine whether appropriate, effective services are being provided to clients. Additionally, the City and County of San Francisco focuses on minority, women and locally owned businesses for contracting. It would be impossible for DPH, as well as other local governmental agencies, to ascertain the ownership information as it relates to race/ethnicity for the businesses with which we contract, or with which we consider contracting.

In many cases, federal, state and local funds are mixed together in one contract. It is not yet clear how RPI would affect this practice. For example, it is possible that agencies would need to separate federal funding into a new contract and continue to collect data on that portion of the contractual services while not on the portion using other funds. If this is the case, the contract will be artificially bifurcated for the contractor and the agency, and will increase the administrative cost and burden. This could require that even a small community based organization track race/ethnicity for clients in one part of a program, yet not in a different part of the same program. Worse, it could become so cumbersome as to have the effect of bringing these services to a standstill.

5. *Collecting and Reporting Race and Ethnicity Data in Hiring*

DPH currently collects race and ethnicity data with respect to applicants for employment, individuals taking the civil service examination, new hires, termination, and workforce data by classification and work site. DPH is an equal opportunity provider and is committed to an active nondiscrimination program. A policy of nondiscrimination is not sufficient to erase the effects of past discrimination. What is important is the ability to access services and to have those services reflect the community. Data are also used to respond to complaints of employment discrimination and are frequently requested by federal or State civil rights agencies. DPH's ability to respond to complaints and requests for information would be greatly limited if the information were not available.

6. *Additional Concerns*

Mr. Loyce stated that RPI would have profound effects on the ability of DPH to collect and disseminate information integral to understanding and responding to disparities in a number of areas. Research today shows that there are disparities within almost all health indicators, with many racial and ethnic groups suffering far below the norm in health care access, likelihood of early diagnosis and adequate treatment and rates of specific diseases. With this knowledge, it is more important than ever to collect the very information this initiative would ban. Clearly, this initiative would interfere with the ability to fulfill DPH's mission to protect and promote the health of all San Franciscans.

Regarding the ability of DPH to collect data on patients not connected to research projects, Mr. Loyce stated that in hospitals linked to the University of California system, such as San Francisco General, DPH could collect data on those patients who could be

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linked to a research project. But once they are out of the hospital and back into the community, DPH would not be able to track them.

Regarding grant funding from combined sources, Mr. Loyce explained the complicated nature of the RPI in that often times federal money is given to the State and then passed on to the City. It is unclear which rules apply in that case. Regarding whether data collected for federal grants could be used for other purposes, Mr. Loyce stated that under the proposed law, the data collected would be limited and narrowly defined as only for the purposes of the federal grant.

Mr. Loyce commented on whether the RPI could benefit DPH or communities of color (e.g. grants might be easier to obtain because they would not be slated for people of color). Perhaps with respect to increasing private giving, Mr. Loyce said, but not with regard to public monies. Moreover, said Mr. Loyce, race neutral policies will not benefit people of color agencies until those agencies have the skills and staff to compete.

Mr. Loyce stated that he believes that the law would be challenged in court. Whether or not it would be implemented while pending the court's decision is unclear, but he stated that it could be argued that, like Propositions 187 and 209, it would have a chilling effect on access to health care even while litigation was pending over its legality.

Mr. Loyce submitted a written report. (See attached Appendix A).

C. Employment Committee: Impact on the City's Employment Non-Discrimination Programs

Representatives from San Francisco's Department of Human Resources' Equal Employment Opportunity (EEO) Unit and the Human Rights Commission's Employment Division spoke about the impact that RPI would have on their work in the event that voters approve it in 2004.

1. Dorothy Yee, Manager of EEO Unit, SF Department of Human Resources

Ms. Yee conducts recruitment and outreach for City hiring, investigates complaints of discrimination, and writes applications for Federal funding that require Equal Employment plans. These plans include racial data that could not be collected under RPI. It is critical that the City employ a workforce that reflects the diversity of San Francisco residents, including employees with representative cultural and ethnic backgrounds and bilingual abilities. Ms. Yee stated that if the City were unable to collect racial data, it would be impossible to target recruitment to underrepresented populations.

2. Mary Gin Starkweather, Contract Compliance Officer, SF Human Rights Commission

Mary Gin Starkweather discussed her work mediating, investigating, and issuing recommendations for findings of discrimination in employment discrimination cases. Ms. Starkweather stated that the utilization of comparative data is a critical component in making determinations as to whether discrimination has occurred. She further stated that without reference to race or racial data, it would be more difficult for complainants to support their claims of discrimination, and it would deprive the investigator of critical information in making their findings or in conducting mediations and investigations.

3. Ed Campos, Discrimination Investigator, SF Human Rights Commission

Ed Campos collects and analyzes workforce tracking data for the Department of Public Works and investigates cases of employment discrimination. He discussed workforce tracking with respect to City contracts. Without data on race and gender, stated Mr. Campos, it would not be possible to identify contractors who do not employ diverse workforces. If the City could not identify these contractors, it would be unable to assist them, as it does now, in hiring a workforce representative of San Francisco.

4. Frank Anderson, Senior Contract Compliance Officer, SF Human Rights Commission

Frank Anderson discussed the history of the Commission's founding in 1964. The Human Rights Commission was successful in the implementation of hallmark non-discrimination in employment legislation because the agency was able to show the facts and figures of racial discrimination in the car dealers association and hotel industries. Mr. Anderson said that in 1968, the hallmark legislation passed prohibiting discrimination in employment in City contracts. This legislation has stood up to all legal

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challenges. Had it not been for the City's ability to collect the data that showed the racial discrimination in these industries, this critical legislation may not have come into existence. Without the data exposing inequities, the City will be unable to develop legislation and programs to remedy discrimination.

D. Issues Committee: Impact on San Francisco's Law Enforcement

Representatives from the San Francisco Police Department, Sheriff's Department, Public Defender's Office, District Attorney's Office, and Office of Citizen Complaints each spoke about the impact that RPI would have on their offices should it pass.

1. Earl Sanders, Chief of Police, San Francisco Police Department

Earl Sanders, Chief of Police for the San Francisco Police Department (SFPD), has worked as a San Francisco law enforcement officer for 38 years. Chief Sanders stated that the SFPD uses racial descriptions in its work, and that racial data are documented in the SFPD arrest records and/or contact records. To the extent that these data are used as an investigative tool, their use and collection will not be affected by the proposed initiative.

However, the SFPD also collects racial data beyond that used in conducting criminal investigations. For example, San Francisco's citizens requested that the SFPD collect racial data relating to traffic stops because of allegations of racial discrimination (profiling) by police in conducting these stops. These data are being used to assist the department in offering better training, education, supervision, and management of officers, as well as to impose possible sanctions against those who use an individual's race in a negative way.

The purpose of collecting racial data is to determine whether individuals are being treated differently or being discriminated against because of their racial group. The SFPD strives to serve a diverse community, and an essential part of how this is accomplished is by employing a diverse staff. RPI would affect recruitment efforts in the department. When personnel are chosen with diversity in mind, the department is able to get the best of the best officers. Chief Sanders expressed that historically, the SFPD has led the way in diversity. At the time that Chief Sanders (then Assistant Chief) issued this report to the Committee, the SFPD had an Asian (Chinese American) Chief, an African American Assistant Chief, an Irish American female as a Deputy Chief, and an African American female as a Commander. Chief Sanders stated that recording racial data assists the department in keeping balance and representation of the people it serves. This diverse representation in the department would be affected negatively should RPI pass.

2. Michael Hennessey, Sheriff, San Francisco Sheriff's Department

Sheriff Michael Hennessey stated that RPI would place the government in a position of being uninformed about its citizenry and/or the impact of its programs for its citizenry. He explained that the initiative provides certain exemptions for some law enforcement functions. However, his department maintains data and classifies people by ethnicity or race in ways that would be prohibited by the law, but that benefit the department and community, and maintain the safety of the city's jails. RPI provides an exception for the classification of prisoners, but this exception has some limitations.

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In San Francisco, for example, according to the US census, the African American population is approximately 8%. Because the Sheriff's Office is able to keep and gather statistics on San Francisco's jail population, it is known that the jail population is 54% African American. Having this data raises the question of whether San Francisco's criminal justice system has a disparate impact on a particular community, in this case, the African American community. This begs the question of whether our laws are being enforced fairly and evenly. We can ask whether or not the OR system (wherein inmates are released on their own recognizance, without bail) operates fairly and evenly. Is the bail system being enforced in an evenhanded manner? Having statistics that raise those questions makes for a fairer justice system.

Second, the Sheriff's Department operates a number of programs in the jails that are designed to help people better themselves. These include educational programs, drug treatment programs, job development programs, and psychiatric programs. Mr. Hennessey stated that it is important that these opportunities be available on a non-discriminatory basis. Keeping statistic enables the department to monitor, for example, whether or not Black inmates are able to get into educational programs as frequently or at a similar percentage as White inmates or Asian inmates. Mr. Hennessey believes that under RPI, the department would be unable to gather and use such data.

A third way that RPI would limit the department's efforts to eliminate discrimination relates to employment practices. The department conducts outreach to all the different ethnic communities in San Francisco in an attempt to recruit a diverse work force. Having African-American officers in proportion to the large percentage of African-American inmates helps make the jails safer, said Sheriff Hennessey. Similarly, it's important to have gay officers since we have gay inmates, and to have Asian officers not only because of some Asian deputies' bilingual abilities but because prisoners in custody are frightened, don't know whom to turn to with a complaint, don't know whom to trust. There is often a visual and cultural bonding that occurs between prisoners and staff when there is an ethnic similarity. If the department is able to adjust its hiring practices to reflect its prisoner population, it is better able to gather complaints and information from inmates, and helps reduce tensions between inmates and staff. Mr. Hennessey explained that when a Black defendant walks into a courtroom that has a White judge, a White prosecutor, White lawyers and jurors, and all White guards, that defendant may feel like it's an "us versus them" situation. The Sheriff's department does not want to see that happen in San Francisco. RPI would limit the department's ability to recruit and maintain a diverse staff.

Fourth, prohibiting the government from gathering this data is going to make the government more vulnerable to attack in cases of allegations of racial discrimination. For example, Mr. Hennessey explained, if there is a job opening and he has the authority on a promotional examination list to pick from the first three candidates, if he skips over a Black person to select someone else whom he considers more highly qualified, that person might claim racial discrimination. If he can show his past practices, such as that in 27 other cases he promoted the Black person who was most eligible, he's able to

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defend his practices. If the department is unable to collect or keep such data, he cannot defend his choice.

3. *Kevin Allen, Deputy Public Defender, Office of the Public Defender*

The Public Defender's office is a representative agency for all indigent people in San Francisco. It often relies on statistical information to do its work. While the department does not have a staff member designated to gather statistical racial information regarding the jails, the office relies on Sheriff Hennessey's statistics on the racial makeup of the jail population. Based on these statistics, the office can question whether or not disproportionate numbers of inmates of a certain race are imprisoned based on some invidious type of prosecution and selective enforcement of the law. The department relies on this statistical data when defending a person under the laws of the State of California and the Federal Constitution (particularly the Equal Protection Clause and the 14th Amendment), which provide equal rights for every person.

The Public Defender's Office also collects racial data in its intake process. For example, the office documents the nationality of many of its clients because there may be immigration consequences for criminal defendants. In order to provide reliable and responsible representation, it's important that the office gather this information from clients so that it can fully inform them of the consequences of a conviction or plea. In fact, if attorneys don't inform their clients of the immigration consequences, case law makes clear that they can be found to have provided ineffective assistance, and can be brought before the Bar. Often it is important not only to know whether or not a person is a United States citizen, but more specifically, at times it is critical to know where a person is from. For example, if someone is from Cuba or Afghanistan, they can be informed that the U.S. is unlikely to deport them. That may affect what happens in every day practice in the courtroom. In some cases, attorneys confer with the Immigration Legal Resource Center here in the City for such information.

Mr. Allen agreed with Sheriff Hennessey concerning the importance of employing a diverse staff. When a defendant walks into a courtroom and sees only people of one race, it is disconcerting. People need to feel comfortable. To have a criminal case pending against you is not fun; it's not enjoyable; it's nerve-racking. At times, the Public Defender may be the last friend these people have. For them to see diversity, at least somebody else sitting across from them whether it is a Black defendant seeing a Black attorney or an Asian attorney, then they feel that it isn't us against them. If you have one race of people that is prosecuting, defending, and judging—and another that is coming through the doors dressed in orange, defendants are going to feel that they are not getting a fair and proper defense.

Mr. Allen explained that having a diverse staff also helps in providing clients with the best possible defense. For example, he stated that recently he was reviewing a tape that was interpreted from Tagalog. His office mate, who happened to be Filipino, noticed that the interpreter was making mistakes. Because the office staff is so diverse – 80 attorneys representing 20 nationalities, gay, lesbian, male, female, tall, and short, they can share

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information about cultural practices and background that may help them better defend their clients. For example, people from the south may view police differently than people who were raised in San Francisco. A southern Black individual being pulled over at night in San Francisco might react differently than somebody who was raised in California.

The office gets a great deal of assistance from racial data gathered by the Office of Citizen Complaints (OCC). Often times defense motions are based on evidence gathered by the OCC. Part of the job of the Public Defender is to ensure that the law is upheld, and that police act within the Constitution. If somebody is pulled over in a rich, largely White neighborhood because they look like they don't belong, that is not constitutional. Each person is to be free from unreasonable searches, seizures, and arrests. If the Office of Citizen Complaints doesn't gather the information on allegations of racial bias by officers, the Public Defender cannot provide an adequate defense.

In short, if the Public Defender is unable to use or gather information on race, ethnicity, and national origin, either on its own or by conferring with OCC or the Sheriff's Department, it will be unable to do its job effectively.

4. Reginald Smith, District Attorney's Office

Mr. Smith stated that the District Attorney, Terence Hallinan, believes that RPI may promote discrimination in the City. Mr. Smith stated that The District Attorney's Office is concerned about whether or not Article I, Section 32(g) of the RPI, which is the exception allowing law enforcement officers to carry out their duties, will apply to the D.A.'s Office. Mr. Smith would argue that this exception applies to the D.A.'s Office in very substantial ways.

The District Attorney's Office does collect racial data. This data are collected in the form of an Equal Employment Opportunity Voluntary Self Identification Form that all new employees are given as they enter the District Attorney's Office. These data are collected in order to obtain grant funding from the Office of Criminal Justice Planning (OCJP). OCJP requires that the agencies that receive this federal assistance prepare an Equal Employment Opportunity Plan denoting the racial composition of attorneys, support staff, investigators, and peace officers.

The District Attorney's Office also receives federal funds from the US Dept. of Justice and must submit an Equal Employment Opportunity Plan to that office as well. If the office cannot obtain these data, it will lose funding.

Mr. Smith stated that according to the 2000 census, California's racial composition is 47% White, 32% Hispanic, 11% Asian, 7% African American, and 1% Native American. Of all of the state court judges in California in 1997, 89% of all the state judges were White, only 4.3% were Hispanic, 4% African American, and 2% Asian. Members of the California Bar are 83% White, 6% Asian, 3.7% Hispanic, and 2.4% African American. As the other members of law enforcement community noted, it is important that

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defendants do not feel that the criminal process is stacked against them. In the District Attorney's Office, Mr. Hallinan has tried to make sure that there is diversity not only in the attorney ranks, but in management ranks as well. Mr. Smith stated that this diversity has been very helpful in terms of the District Attorney's Office solving problems and making and maintaining connections to San Francisco's varied communities.

5. *Mary Dunlap, Director, Office of Citizen Complaints*

Ms. Dunlap stated that most certainly the Office of Citizen Complaints (OCC) collects racial data. It is their business to help prevent racial discrimination. In that business, one cannot help but gather information concerning people's race. She explained that the OCC is an unusual agency in that it is a civilian agency that serves the purpose that is typically served by internal affairs departments. It investigates citizen, meaning civilian, complaints about alleged officer misconduct. These complaints necessarily include complaints about racial slurs, race discrimination, selective enforcement, and, in the colloquial, "driving while brown and black," and "jaywalking while transgender." It would be impossible to investigate such claims without fact-finding, which includes identifying the parties and the nature of the complaint. If one cannot note race as the RPI dictates, one cannot note racism. This would cut about 110 cases a year out of OCC's 1000 plus caseload.

OCC asks people to voluntarily identify their ethnicity so the office is aware of whom it serves. About 80% or more of complainants provide an ethnicity designation that enables OCC to make this determination. Of all complaints made to OCC, somewhere between 25% and 32% are brought by African American complainants. The office would not have this significant statistic if it could not ask people voluntarily indicate their ethnicity on the complaint form.

OCC also needs to ask about an individual's race when they make a complaint of race discrimination (slurs, etc.), and where the OCC is investigating a possible discriminatory pattern within the police department. At the same time, the OCC exonerates officers who have properly used race as a law enforcement function. Moreover, OCC, under City Charter, is required to make recommendations to the SFPD regarding non-discrimination. Ms. Dunlap has worked side by side with Chief Sanders implementing some of those recommendations. The recommendations that relate to race could not be made or generated if the OCC could not collect data about race.

The RPI exemption for law enforcement, Section (g), is insufficient and confusing. For example, even though Ms. Dunlap is an experienced lawyer, she is unsure whether provision (g) allows or precludes San Francisco from gathering data about racial profiling by its police department. This is data that the SFPD, at the behest of the Commission and on its own initiative, began to gather in the last year. Inability to collect this data would preclude the OCC from taking the initial step of determining whether the facts in a given case give rise to an inference or an allegation or a concern that racial discrimination is involved.

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In short, RPI would actively interfere with the OCC's ability to do its job, particularly insofar as that job requires it to investigate racial discrimination.

Ms. Dunlap submitted a written report. (See attached Appendix B).

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E. Youth and Education Committee: Impact on San Francisco's Public Schools

Eric Mar, member of the San Francisco Board of Education, issued a report to the SF Human Rights Commission at their regularly scheduled Commissioners' Meeting on September 26, 2002. That report is attached as Appendix C.

IV. Summary of Findings

In Conclusion, this report establishes that should California voters approve the Racial Privacy Initiative in March 2004, it would have a severe impact on San Francisco government's ability to redress discrimination in contracting, health, employment, law enforcement, and education.

V. APPENDIX

- A. Report of the San Francisco Department of Public Health**
- B. Report of the San Francisco Police Commission's Office of Citizen Complaints**
- C. Report of the SF Board of Education**

APPENDIX A

San Francisco Department of Public Health
The Impact of the Classification by Race, Ethnicity, Color or National Origin State Ballot Initiative

CLASSIFICATION BY RACE, ETHNICITY, COLOR OR NATIONAL ORIGIN INITIATIVE

University of California Regent Ward Connerly's American Civil Rights Coalition is sponsoring a new ballot initiative entitled Classification by Race, Ethnicity, Color or National Origin (CRENO). (This initiative was previously called the Racial Privacy Initiative or RPI.) CRENO would prohibit the collection, analysis or use of information pertaining to race, ethnicity, color or national origin by state and local governments. Actions taken to maintain federal funding are exempted, though classification of public health data is not. It is expected to appear on California's March 2004 ballot, as qualification is pending a full count of all signatures.

USING RACE AND ETHNICITY INFORMATION

Because there are often disparities in health outcomes and incidence of disease across different racial and ethnic groups, it is essential to monitor and report health-related conditions using these categories. Healthy People 2010, the set of national health objectives, has two overarching goals: to eliminate health disparities and to increase quality and years of healthy life. Reaching both of these goals, and the specific objectives within them, necessitates collection and use of race and ethnicity data on a local level to identify risk populations and monitor the effectiveness of health interventions targeting specific groups.

The San Francisco Department of Public Health (DPH) collects and reports race and ethnicity information in the following major areas:

1. to appropriately evaluate the health needs of San Francisco's diverse communities;
2. to access funding through competitive grants;
3. to conduct effective program planning;
4. to help evaluate contractors' cultural competency; and
5. to collect and report race, ethnicity and national origin information through its hiring process.

EVALUATING THE HEALTH NEEDS OF SAN FRANCISCO'S DIVERSE COMMUNITIES

DPH engages in its own evaluations and utilizes the evaluations done through other mechanisms to illuminate issues of race and ethnicity as it relates to health issues and outcomes. In order to obtain timely, accurate and specific data it is important that DPH be able to, when necessary, conduct its own community evaluations. For example, the Bayview Hunters Point Health and Environmental Assessment Task Force (a group in which DPH participates), recently released the results of the Bayview Hunters Point Community Survey.

This Community Survey established the demographics of the group surveyed, which included age, race/ethnicity, household income, marital status, type of housing, etc. Many of the findings were then broken down from the aggregate, often by age group and race/ethnicity. One finding was that the overall percentage of those diagnosed with Asthma in Bayview-Hunters Point was 10%, while African Americans had the highest percent (11%) and Asian/Pacific Islanders had the lowest (6%).

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The American Civil Rights Coalition, the sponsoring committee for CRENO considers “racial check-off boxes” irrelevant and proposes they be phased out. On a practical level, this means that surveys and many research projects involving government agencies could not legally inquire about participants’ race, ethnicity or national origin. Though CRENO exempts medical research subjects and patients, community surveys would presumably not fall under this exemption.

ACCESSING FUNDING THROUGH GRANTS

DPH increasingly relies on grant funding to pay for its services. Grants accounted for 8% of DPH’s overall revenue in FY 2000-2001, with certain divisions depending on federal, State and foundation grants to a much greater degree. For example, DPH’s AIDS Office depends on grants for 87% of their revenue. If California’s State and local governments were unable to request information by race, ethnicity and national origin DPH would have great difficulty remaining competitive when applying for grants.

Funders expect that grant applicants clearly define the relevant issues related to the population being addressed. Funders also require that applicants give an overall view of health issues within the region. In grant applications, DPH must accurately show when severe need and disparities exist. For example, Ryan White CARE funds require documentation of severe need in San Francisco, including information about co-morbidities including substance abuse, mental health, tuberculosis and sexually transmitted diseases. The AIDS Office is asked to describe racial disparities, and access to services. If community surveys and needs assessments are not collecting this information and DPH’s clinics are not able to ask a patient’s race, ethnicity or national origin, there would be no way to accurately establish need and how services are accessed. Many grants are available for services for specific racial groups, and grant applicants must show different aspects of need within that group to obtain funds.

CONDUCTING EFFECTIVE PROGRAM PLANNING

The following programs represent just a few examples of programs that were developed by DPH and its community partners. Each program was created to respond to the needs of the City’s diverse communities and to improve health outcomes within target populations.

1. Public health research in the United State shows that race may be associated with increased exposure, different susceptibility to disease, and unequal access to care. Understanding these issues requires an examination of race as a factor in the relationship between the environment and health. The Bayview Hunters Point (BVHP) neighborhood has been burdened with an unhealthful environment, poverty, and racial discrimination. BVHP has a majority African American population with substantial minorities of Asian and Latino residents. For several years, DPH has worked with this community to understand the causes and consequences of poor health in the neighborhood. Some of the documented issues include the following:

- The community has hosted San Francisco’s most environmentally unfriendly

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industries, including sewage processing, auto wrecking and junkyards, power generation, and ship building and repair.

- The neighborhood has several major contaminated hazardous waste sites located in proximity to residential homes.
- A survey of households in Bayview Hunters Point found that almost twice as many adults rated their own health as fair or poor (17%) compared to similar national surveys (10%).
- Residents have among the highest hospitalization rates for conditions such as asthma, hypertension, congestive heart failure, and diabetes mellitus.

Though these issues relate most directly to a geographic region where any race or ethnicity may live, creating effective programs depends on understanding the racial demographics and ensuring cultural and linguistic competency. Collaborative dialogue, research and analysis have been incredibly productive in terms of actions and policies to make improvements in BVHP. DPH has participated with community groups to provide **education and training on issues such as housing habitability**, created a **Health and Environmental Resource Center**, and negotiated with the city transit agency to allocate the lowest emissions buses to the neighborhood.

2. The **YES WE CAN Urban Asthma Partnership (YWC)** is the umbrella for 14 organizations, and is working to improve the standard of care for asthma in low-income communities. DPH participates in this collaborative effort, which resulted from the work of service providers and community activists in Bayview Hunters Point concerned about the impact of asthma in their community. African Americans have two to three times the hospitalization rate for asthma as white San Franciscans. The work of this group helped institute a medical-social model at the San Francisco General Hospital Pediatric Asthma Clinic and at Mission Neighborhood Health Center, which utilizes a health team consisting of a doctor, nurse care coordinator and community health worker to address the problems associated with asthma management. An assessment of this program found that African American families refused home visits for education at a much higher rate than Latino and Asian families, allowing for the program planners to determine a different approach to successfully reach these families. Continuation of such evaluations is vital to the creation of optimal asthma management programs among diverse ethnic clients.
3. The **Tuberculosis CHOPS (Chinatown Outreach Prevention Services) program** is a satellite clinic of DPH's Chinatown Public Health Center. Tuberculosis (TB) rates are highest among Asians and three-quarters of new cases occur among the foreign-born (90% of which have immigrated from China, the Philippines, and Southeast Asia). CHOPS targets Chinese clients in order to:
 - increase adult screening;
 - improve treatment compliance; and
 - enable better participation for those assigned to the daily observed treatment (DOT) program.

The CHOPS program was implemented in 2000, and since this time all objectives were met. Referrals for TB testing have dramatically increased, jumping from 187 referrals in 2000 to 340 in 2001. From September 2000 to September 2001, 664 patients received treatment for latent or active TB. This number exceeds prior annual numbers of patients referred from Chinatown Public Health Center and placed on treatment (196 in 1997).

4. **Healthy Kids** is a new health coverage program that offers full-scope medical, dental and vision care to children in San Francisco not eligible for or able to afford other health insurance programs. This program was designed especially to capture children in low-income families who have no access to health insurance because they do not qualify for other public health insurance programs. Latinos are most likely to be uninsured and now make up 60% of the enrollees in the new program. Outreach for this program has specifically targeted the Mission District, Bayview Hunters Point and Chinatown neighborhoods. Large enrollment events/health fairs were held in each of these neighborhoods marking the launch of the program in January 2002.
5. The **Breast Cancer and Cervical Cancer Services (BCCS)** office was created to decrease morbidity and mortality from breast and cervical cancer for women in San Francisco. The mission is accomplished through the enhancement of breast and cervical cancer screening, diagnostic, treatment and support services within the public health care system. African Americans in San Francisco have the highest mortality rate for breast cancer, while a somewhat higher prevalence was found in Latino and Chinese women. BCCS has a team of four Women's Care Navigators who are able to speak Cantonese and Spanish, and work to educate women on the need for preventive care and cancer screening. Without understanding the demographics of the communities impacted by cancer, it would be impossible to know where and how to conduct effective outreach in these communities.

BCCS partners with other community groups to conduct Town Hall meetings to educate impacted communities. In 2001 there were three Town Hall meetings. A total of 333 participants attended these meetings held in Visitacion Valley/Sunnydale, Potrero Hill and Bayview Hunters Point. The Town Hall meetings support local communities in "getting the word out" about breast cancer while getting local information from residents about what they need.

EVALUATING CONTRACTORS' CULTURAL COMPETENCY

Effective treatment and interventions must take place in the context of the consumer's culture. DPH relies on community-based organizations (CBOs) to carry out many of its programs, as they are known and trusted institutions. However, DPH must track and evaluate the success and effectiveness of all programs, external and internal. The goal is that all contractors provide culturally competent, language-appropriate services and one measure of cultural competency is how closely the agencies are staffed with individuals that reflect the population they serve. Under CRENO, DPH would be unable to determine whether culturally competent, language-appropriate services are being provided to the clients who need the services.

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Additionally, the City and County of San Francisco focuses on minority, women and locally owned businesses for contracting. It would be impossible for DPH, as well as other local governmental agencies, to ascertain the ownership information as it relates to race/ethnicity for the businesses with which we contract, or consider contracting.

Currently, DPH maintains approximately 550 contracts. In many cases, federal, State and local funds are mixed together in one contract. It is not yet clear how CRENO would affect this practice. For example, it is possible that agencies would need to separate federal funding into a new contract and continue to collect data on that portion of the contractual services while not on the portion using other funds. If this is the case, the contract will be artificially bifurcated for the contractor and the agency, and will increase the administrative cost and burden. This could require that even a small community based organization track race/ethnicity for clients in one part of a program, yet not in a different part of the same program.

COLLECTING AND REPORTING RACE/ETHNICITY INFORMATION THROUGH HIRING

DPH is an equal opportunity provider and is committed to an active nondiscrimination program. It is the policy of DPH that harassment is prohibited and that all employees and applicants shall receive equal consideration and treatment. However, a policy of non-discrimination by itself is not sufficient to erase the effects of past discrimination imposed on women, people of color, individuals with disabilities and others who have historically suffered from systematic discrimination. DPH takes steps to:

- Increase the number of women, employees of color and employees with disabilities in classifications by implementing, wherever applicable, the outreach activities necessary.
- Recruit, hire and promote in all job classifications without regard to sex, race, color, ancestry, religious creed, national origin, physical disability (including HIV and AIDS), mental disability, pregnancy, disability leave, medical condition (cancer-related), age (over 40), marital status, sexual orientation, height or weight.
- Ensure that DPH is free of any bias in the delivery of health care services and the services are culturally and linguistically proficient.

DPH currently collects and tracks race and ethnicity in the following areas:

- applicants for employment;
- individuals taking Civil Service examinations;
- new hires;
- terminations; and
- workforce data (by classification and work site).

All of the data listed above is used to respond to complaints of employment discrimination and is frequently requested by federal or State civil rights agencies. Our ability to respond to these complaints and requests in a timely and accurate manner would be limited if the

San Francisco Department of Public Health**The Impact of the Classification by Race, Ethnicity, Color or National Origin State Ballot Initiative**

data was not readily available. In some cases, the data is required by the federal government and would not be impacted by CRENO. For example, DPH is required by the federal Equal Employment Opportunity Commission to collect workforce data every two years. In other situations, however, the State or City requires data. When the information DPH collects is not directly federally mandated, this initiative would not allow State or local government agencies to request it. Banning this data collection could negatively impact civil rights and the ability of DPH to fulfill and monitor its own equal opportunity and non-harassment policy.

CONCLUSION

CRENO will have profound effects on the ability of DPH to collect and disseminate information integral to understanding and responding to disparities in a number of areas. Research today shows us that there are disparities within almost all health indicators, with many racial and ethnic groups suffering far below the norm in health care access, likelihood of early diagnosis and adequate treatment and rates of specific diseases. With this knowledge, it is more important than ever to collect the very information this initiative would ban. Clearly, this initiative would interfere with the ability to fulfill DPH's mission to protect and promote the health of all San Franciscans.

APPENDIX B

THE POLICE COMMISSION .
OFFICE OF CITIZEN COMPLAINTS

CITY AND COUNTY OF SAN FRANCISCO



Mary C. Dunlap
Director

June 12, 2002

TO: Honorable Haig Baghdassarian, Co-Chair
And Honorable Members, Issues Committee
Human Rights Commission
City and County of San Francisco
25 Van Ness Avenue; Suite 800
San Francisco CA 94102

**RE: Impact of "Racial Privacy Initiative" on Mission and Operations
Of the Office of Citizen Complaints**

Dear Chair and Committee Members,

Thank you for the opportunity to address the Issues Committee of HRC concerning the impact of the purported "Racial Privacy Initiative" on the mission and operations of the Office of Citizen Complaints of the City and County of San Francisco. Let me first respond to the four questions set forth in the letter of Co-Chair Baghdassarian to my agency concerning this matter.

1) Does [the OCC] collect racial data? Yes. Some data is voluntarily provided by complainants alleging police misconduct, and some data is required to be provided to or gathered by OCC investigators, in cases involving allegations of racially discriminatory law enforcement. See response to question 2), below, for details.

2) What is the purpose of [OCC] collecting racial data?

(a) The complaint form used by OCC calls for voluntary indication of "ethnicity" by complainants. This voluntarily provided information from complainants is used to statistically track and study the racial and ethnic composition of the groups of complainants whom OCC serves (see, e.g., "OCC Complainants, By Selected Demographic Characteristics, Year 2000", at p. 55 of OCC's Year 2000 Annual Report, and the report's discussion of complainant race/ethnicity statistics from OCC's Years 1996 through 2000 reports, showing, relative to a City population approximating 9-10% African-American

persons, based upon the United States Census, of "...a disproportionate percentage of complaints about police misconduct registered by African-American persons...", numbering 26-32% of OCC's complainants and increasing in the 5-year period; OCC's Year 2000 Annual Report, cited above, is available to members of the public from OCC upon request, and is also on-line at OCC's website, www.ci.sf.ca.us/occ).

b) In cases as to which identified or potential allegations of misconduct include discriminatory policing, "racial profiling" by police officers, racial slurs/epithets and/or unequal enforcement of law, and because OCC investigative staff are required to "...promptly, fairly and impartially..." investigate and propose findings as to such misconduct allegations (see SF City Charter section 4.127), OCC investigative staff are in such cases required to determine race, ethnicity, color and/or national origin of persons involved in the complaint, including individual complainants, and, in some cases, officers involved and witnesses.

c) Because OCC has a legal duty to "... prepare recommendations quarterly concerning policies or practices of the department which could be changed or amended to avoid unnecessary tension with the public or a definable segment of the public while insuring effective police services" (see SF City Charter section 4.127), and because some of OCC's policy recommendations have concerned and will tend to concern prevention and remediation of racially discriminatory policing, OCC staff are sometimes required to determine the race/ethnicity of persons and groups impacted by particular SFPD policing orders, policies, practices and actions.

3) What will happen if [OCC] cannot obtain racial data?

OCC's legally mandated investigative and policy recommendation functions, as set forth in 2) b) and c) above, will be directly jeopardized and undermined by the unavailability of required racial data. Moreover, OCC's ability to know, assess, study and publicly report accurately and completely as to the racial, ethnic and national origin compositions of the population of approximately 1000-1200 individual complainants (based on OCC's complaint numbers during 1996-2001) who present complaints to OCC annually in order to seek investigation and resolution of these citizens' (i. e ., "civilians") allegations of SFPD officer misconduct, currently based on statistical totals of voluntarily provided race, ethnicity and national origin identifications to OCC from complainants, will be nullified. (See response at 2) a), above). Bluntly, OCC will not be able to intelligently and informedly investigate and resolve race discrimination complaints, OCC will not be able to make policy recommendations regarding the impact of SFPD policies and practices

on particular racially identified populations or groups, and OCC will not even be able to accurately know and report to the Police Commission, SFPD and the public as to the racial demographics of complainant populations served by OCC.

4) How will the city department and/or program(s) be impacted?

OCC is an agency whose function is mandated by state as well as local law. California Penal Code section 832.5 (a) states in pertinent part that "...[e]ach department or agency in this state that employs peace officers shall establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies..." San Francisco City Charter section 4.127 renders OCC, a civilian-run agency, "...an independent body [that] in effect acts as the police department's internal affairs unit for citizen complaints about police misconduct", Citizen Review of Police: Approaches and Implementation p. 60 (National Institute of Justice March 2001) Key to OCC's functioning and to its fulfillment of its SFPD accountability mission, is impartial and thorough, professionally aggressive investigation of allegations of officer misconduct including neglect of duty. If racial discrimination and/or racial bias forms a part of any complaint of officer misconduct, and OCC is prevented from gathering racial information in order to analyze and resolve such part of a complaint, and specifically in order to make a finding that such discrimination did or did not occur, then OC will be prevented from performing its state-mandated and City Charter-mandated function as to this important body of OCC complaints alleging racial discrimination and/or racial bias in policing.

Based on my experience as Director of OCC from May 1996 to the present, may I add:

OCC has been termed an "excellent" mechanism for addressing citizen complaints about police misconduct. E. Chemerinsky, "O'er the Ramparts We Watched", Prof. Erwin Chemerinsky, California Lawyer 26 (January 2001) OCC's powers of investigation and of recommended disciplinary action to SFPD's Chief and the SF Police Commission impose "...some measure of public scrutiny and accountability..." as to the disciplinary decisions of SFPD. Community-Centered Policing: A Force for Change p. 74 (PolicyLink, in partnership with the Advancement Project 2001).

Part of OCC's effectiveness turns on its' ability to adduce facts, howsoever unpopular or provocative, concerning allegedly unfair policies, practices or actions by SFPD as a department or by SFPD officers. If OCC is precluded from gathering racial data from complainants, and from requiring as part of its investigation or policy analysis that parties to complaints provide relevant racially identifying information, then OCC's effectiveness in addressing racism, racial bias and racial discrimination in policing in San

Francisco will be gravely undermined. Without the facts about the racial identities of persons involved, OCC will be unable to urge, advocate for or advance the application of federal, state and local laws, rules and policies, including SFPD's own Department General Orders, which prohibit racially discriminatory policing, both directly and indirectly. OCC will also be unable to exonerate officers where the facts establish that racial discrimination and/or racial bias did not occur, or did not play a part in the behavior complained of by citizens. Allegations of biased or discriminatory policing based upon race will go undetected, unanalyzed, incompletely investigated and, ultimately, unresolved.

Recent years have brought wider public as well as governmental recognition of the distinctive and quite damaging part that racial discrimination and racial bias can play in policing, including bringing attention to the phenomenon of "racial profiling." In a groundbreaking study just issued, entitled Driving While Black or Brown: The California DWB Report, A Report From The Highways, Trenches and Halls of Power in California (M. Alexander, 2002), the American Civil Liberties Union Foundation of California recounts the testimony of numerous African-American and Hispanic/Latino/a persons who have reported publicly and in detail about experiencing racially discriminatory police actions against themselves, or who have witnessed such actions, ranging from unjustified stops, detentions and searches, through harassing questioning and explicit racially derogatory remarks, to false arrest and infliction of physical injury.

Complaints of racially discriminatory policing of the nature extensively and impactfully documented by the ACLU Foundation study comprise an active, significant part of the workload of the OCC. For example, in 2000, OCC received 39 complaints of "racial slurs" against SFPD officers and 13 complaints of racial discrimination by SFPD officers, out of a total of 1053 complaints filed; the 73 complaints of racial discrimination represented two and one-half times the number of racial discrimination complaints filed with OCC in 1998 (Year 2000 Annual Report, pp. 29-30 and 40). OCC is legally mandated and chartered to find out the truth or falsity of such complaints. Deprived by application of the RPI of its ability to identify the race, ethnicity, color or national origin of persons making such complaints, and of others involved in the underlying interactions leading to such complaints, OCC would essentially be prevented from doing the part of its job that relates to investigating and resolving these complaints, and OCC would be deprived of its capacity to contribute positively and concretely to the overarching goal of preventing and remedying racial discrimination in policing.

Finally, I note that the language of the purported "Racial Privacy Initiative" is clear in its application to OCC's gathering of racial identification data. Section 32 (c) would prohibit OCC, as

a governmental agency within the state, from "...inquiring, profiling, or collecting such data on government forms". The "individual" protected from OCC gathering such racial identification data "...refers to persons subject to the state operations" of classifying "...any individual by race, ethnicity, color or national origin." OCC complainants, witnesses and police officers are all "subject to the state operations" of OCC investigations and policy recommendations currently requiring OCC's race-related inquiries. (Furthermore, OCC is arguably not a "law enforcement agency" within the exemption set forth in Section 32(g), because OCC staff are civilians and not "law enforcement officers", although also arguably, OCC performs a law enforcement function.)

Under the RPI, then, the California Legislature would be obliged to determine whether OCC's classification serves a compelling state interest and would have to approve such classification by a 2/3- majority in both houses, then to be approved by the Governor of California, if OCC were to succeed in being able to keep doing the part of its job that involves investigation and resolution of race discrimination related citizen complaints about alleged police misconduct. In practice, OCC would be obliged (along with literally hundreds of other state and local human relations, civil rights and anti-discrimination operations, agencies and departments currently needing to inquire about and gather individual information as to race as part of their work on issues of race discrimination, that are not exempted under the narrow and specific DFEH, law enforcement officers', prisoners', undercover officers' and federal law compliance exceptions, see RPI Section 32(e) through (i)) to demonstrate, at the legislative and executive levels of state government in Sacramento, that OCC's racial identifications specifically serve compelling state interests, such as, for example, overcoming racial discrimination by SFPD and its officers.

This process would "politicize" the work of OCC, as it would the work of hundreds of other state and local agencies not currently within the exemptions of the RPI, by requiring OCC to go to Sacramento (at considerable City expense) and present its race discrimination-related work for as-yet unprecedented state political "blessings". If OCC and the hundreds of other agencies currently identifying persons by race for lawful public purposes came out of this process with those "blessings", and were exempted from the RPI by 2/3 votes and the Governor's signature, the time, effort and public funds spent to justify OCC's necessary racial identification practices to the Legislature and the Governor would nonetheless have been wasted in a hollow, ill-advised political exercise. If OCC and other agencies were not so "blessed", then the work against racial discrimination that OCC and other agencies are legally required or permitted to do would be impaired or set aside, in the sorts of ways set forth above. It, would be fair to term the RPI's provisions for

legislative and executive exemption a "no win" situation for agencies such as OCC, that currently and properly use race to "classify" as part of necessary agency fact gathering, such as OCC does in its investigative and policy recommendation functions, which clearly are not exempted on the face of the RPI. Throwing the anti-discrimination work of many state and local agencies, departments and operations into question, and into escalated and unprecedented types and levels of political justification and "accounting" in the State Legislature and Governor's office, the RPI would leave agencies such as OCC vulnerable to the political judgments, agendas and even whims of elected officials at the state level. Even if OCC came out of such a process with an exemption from the RPI, it is difficult to see what would be gained, and it is impossible not to see what would be lost: OCC would be distracted from its legally mandated functions, engaged in an expensive, time-consuming struggle to retain the ability to do a vital part of its job.

I also note that the RPI casts doubt on the lawfulness of SFPD's Police Commission-mandated data gathering aimed at determining the nature and extent of "racial profiling" by SFPD in stops and detentions. That data gathering, mandated by Police Commission action in 2001, is supposed to assist SFPD and the public in realizing and addressing the nature and extent of "racial profiling" by SFPD members. Section 32 (g) is unclear as to its application to the SFPD study, as it is unclear as to its application to the dozens of similar studies commenced by other California cities' law enforcement agencies during the past several years. It is uncertain whether the exempting language of the first sentence of 32(g) includes law enforcement "racial profiling" studies. If that exemption does not including such "racial profiling studies", by the clause permitting law enforcement officers to gather race-related information as "...describing particular persons in otherwise lawful ways" (which is obviously ambiguous language within 32(g)), then the general prohibitory language of 32(a)-(d) would apply to prevent such law enforcement "racial profiling" studies. As OCC Director, I actively urged the SF Police Commission and SFPD to adopt the current "racial profiling" data gathering study, because it was and is apparent to me that such data are crucial to assist SFPD in determining whether and how it practices "racial profiling", so that SFPD and the Police Commission could correct and prevent such practices intelligently. Among its threatened harms, then, the RPI contributes needless and regrettable legal uncertainty to continuing implementation of SFPD's police Commission-mandated and much-needed "racial profiling" study, in my opinion.

CONCLUSION

In sum, the purported Racial Privacy Initiative would, if passed, actively interfere with OCC's performance of its public and legally mandated responsibilities to investigate complaints of SFPD officer misconduct, to make findings in complaints, to seek discipline of individual officers found to have engaged in misconduct and to make policy recommendations to SFPD and the Police Commission, where complaints concern matters of racial discrimination. OCC would be prevented in its investigations from getting to the factual bottom of allegations of racial discrimination by SFPD as an institution and/or by SFPD officers, by obscuring the racial identities of the persons involved.

OCC would also be prevented in its Charter-mandated policy recommendation function from studying and analyzing the role of race, and the role of racially discriminatory policies, practices and actions in SFPD policing, and from providing guidance to SFPD and the Police Commission about ways that SFPD can change those policies and practices to avoid or diminish the impact of racial discrimination on people and communities in San Francisco. Also, the RPI would appear to cast SFPD's current and continuing "racial profiling" data gathering study into legal doubt.

The effectiveness of OCC would be dramatically diminished by passage and implementation of the RPI. And, even if OCC were to prevail in establishing to 2/3rds of the State Legislature's members and to the Governor of California that its use of racial identity information serves the compelling state interest of overcoming racial discrimination in policing, such agency self-defense to the State's political branches would be costly, wasteful, and distracting from OCC's local legal duties and mission.

As OCC Director, I commend each member of the Issues Committee of the Human Rights Commission, and of the HRC staff, for affording City department heads such as myself this opportunity to respond to the Committee's questions about, and to outline the likely impacts of, the purported "Racial Privacy Initiative" on the functioning and mission of the Office of Citizen Complaints. If I may provide any further information or clarification as to this report, please know that I am at your service.

Respectfully submitted,

MARY C. DUNLAP, Director
Office of Citizen Complaints

APPENDIX C

Eric Mar – SF Board of Education

9/24/02 – Report to the SF Human Rights Commission and Youth and Education Committee

Impact of the Connerly Racial Privacy Initiative [RPI] on SF Schools

- Why is racial information so important? How can we judge our progress towards equity for all?
- School Districts Would be Hampered in their Efforts to Improve the Performance of all Students
- RPI Hurts the Health and Educational Opportunities of CA Children

Background – Author of the 1996 Prop 209 Ward Connerly and his ‘American Civil Rights Coalition’ have been unsuccessful in placing their Racial Privacy Initiative [see handout] on the March 2002 or Nov. 2002 ballots. The measure may qualify for the **March 2004** statewide ballot.

WHY IS INFORMATION ON RACE SO IMPORTANT?

- Race and ethnicity data makes a *life and death difference* in diagnosing and preventing disease and addressing current inequities in children’s educational and healthcare opportunities. That is why teachers and health workers strongly oppose the RPI.
 - A fundamental principle of education polity-making is to analyze demographic data – including age, gender, race/ethnicity/language background to determine the educational needs of students; similarly, public health policy makers look at demographic data to determine what causes illnesses and how to prevent them.
 - Without this information, teachers & public health professionals won’t know where to target their prevention, education, outreach, and research efforts
 - PROGRESS? – Because some progress has been made in the area of civil rights over the last 50 years, many people mistakenly believe that communities of color in the United States no longer suffer significant discrimination, and instead are as well off as whites in terms of jobs, incomes, schooling and health care.
 - In order to learn the true facts about discrimination – where it still exists and why – we need information. Statistics on race are also critical to monitoring whether or not discrimination is decreasing or increasing and whether our state’s programs really are color blind.
-

Impact on SF Schools and district statewide

- **Harms our ability to address inequality in schools –**
SFUSF & CA dept. of Education [CDE] collect and publish demographic information, along with other statistics related to student performance and needs. Teachers & educators use the crucial information for many purposes, one of which is to pinpoint disparities in students’ academic performance, in order to equalize educational opportunities and improve achievement.

- While many of our ongoing programs that are funded by our Consent Decree may be shielded from the impact of the RPI, many other programs will likely have to abide by the RPI's ban on the use of race, national origin, etc. data.
- **Current inequities – the race/class/language opportunity gap**
 - the CA drop-out rate for high school students is two to three times as great for African Americans and Chicanos/Latinos as it is for white students
 - the 2001 CA High School Exit Exam [HSEE] showed that 82% of whites and 76% of Asians passed the English portion while only 50% of African Americans and 48% of Hispanics passed & disparities on the math portion of the test were even more pronounced; English Learners and immigrant students harmed also by the HSEE.
 - **Nationwide Re-segregation of schools** – the Harvard Civil Rights project has studied and emphasized the current trend of re-segregation in urban school districts. SF schools have become increasingly more segregated and unequal in educational outcomes since 1999 when the District was barred from using race in student assignment & we have only recently begun addressing this trend through our current “Excellence for All” plan.
 - **SF School Diversity & Inequality** –
SF public schools are currently 89% students of color, including 30% Chinese, 22% Latino, 16% African American, and 7% Filipino, with almost one third English Language Learners, while certified staff are only 44% teachers of color, including 14% Chinese, 10% Latino, 8.7% African American, and 3.6% Filipino.
 - **Glaring evidence of racial inequality** exists in the San Francisco schools including significant racial disparities in many key statistical performance indicators such as graduation rates, disciplinary and expulsion rates, and drop-out rates, as well as unequal access to safe and clean facilities, fully certified teachers, ample and adequate instructional materials and advanced courses.
 - **African American students**, in particular, are facing a widening achievement gap and are shockingly over-represented in both suspensions and expulsions and conspicuously underrepresented in GATE [Gifted and Talented Education] classes. Ex) while African Americans make up only 16% of the student population overall, they made up over 50% of all suspensions in SFUSD during the last two academic years. The number of expulsions has increased 37% over the last year and African Americans made up over 46% of all expulsions in the last two years. On the other hand, African Americans currently make up only 3.9% of the current GATE students in the district, a decrease from 50.5% two years ago.
 - **Current SFUSD policies** – 1983 consent decree; 2001 Excellence for All plan; 2002 Racial Justice in schools policy which requires in part –
“1. Full Commitment to Racial Equity:...the Board is committed, to the extent that the Consent Decree and

applicable law allow, to a racially conscious (rather than a 'colorblind') approach to addressing [education] issues. The Board acknowledges the existence of racial inequities in our society and our schools and is committed . . . to consciously and actively addressing racial inequalities and ensuring equal opportunity and equal treatment for all students and staff."

"2. Comprehensive Collection of Racial and Ethnic Data: In order to make the best informed policy decisions, the board, superintendent and staff and committed to collecting all significant student and staff data that is disaggregated by race, ethnicity, immigrant status, and language, in a manner consistent with the District's obligations under the Consent Decree. In addition, a plan for the disaggregation of the current "other non-white" category for all reports concerning district demographics will be developed by January 15, 2002. This data is necessary for policymaking, program planning, and evaluation to help eliminate racial disparities. To help ensure that board policymaking, program planning and evaluation work to eliminate racial disparities the Board requests that the District provide uniform comprehensive reports illustrating the demographics of the academic (including testing, special education and GATE) and disciplinary status of students, as well as the demographics of all district staff."

- Without demographic data collected by the SFUSD & the CDE, educators would be hindered in their efforts to turn around current efforts to equalize educational opportunities and close the race/class/language achievement gap.

Education and Health

- Child development and education research shows that children of color experience poorer outcomes and receive fewer services in school districts and city governments.
- Race-based data collected by the state is essential to finding children in need and providing educational support and health services.
- Immigrant children – 1/3 of all immigrant children have not had a doctor visit in the past year – twice the rate for other children.
- School Districts & State and other agencies use racial data
Ex) the CA Managed Risk Medical Insurance Board collects race-based data to determine which children do not have medical insurance, so that their families and communities may be properly educated about programs such as the Healthy Families Program – which provides critical health benefits for families who do not qualify for Medi-Cal but are still very low income.

Communities and Environmental Health

- **Environmental Racism** – Many studies show that environmental hazards, ranging from living near toxic dumps or other polluting facilities, breathing unhealthy air, suffering from childhood lead poisoning or pesticide-related illnesses, or eating contaminated fish, are disproportionately concentrated in communities of color, and

that race, not income or education or other factors, is the most important reason for this.

- Data on which these studies are based comes from the CA dept. of Finance, the CA dept. of Health, and County Health Departments, and could no longer be collected if the RPI were enacted into law.

- **LEAD POISONING AND RACE** –

Childhood lead poisoning is a devastating yet preventable disease. State data shows that children of color get poisoned at three or four times the rate of white children. This data allows public health workers and communities to target prevention efforts at kids most at risk – for example, by educating Asian-American families about traditional remedies, types of kitchenware or house paints laden with lead.

- * Do we want to live in a society where a person's race determines whether they get to breathe clean air or drink clean water? Without evidence about how pollution and other environmental hazards are distributed through society, we will never be able to take steps to remedy this serious and persistent problem.

Sources: Californians for Justice [CFJ]; National Lawyers' Guild; ACLU-Northern California; SFUSD Racial Justice in the Schools Resolution – Authors: Mar, Chin & Sanchez – passed January 2002. Thanks also to Ed Lee of CFJ for his advice and input.
