

BOARD of SUPERVISORS



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MEMORANDUM

TO: Bevan Dufty, Director, Housing Opportunity, Partnership and Engagement
Theresa Sparks, Executive Director, Human Rights Commission
Greg Suhr, Chief, San Francisco Police Department
Anne Hinton, Executive Director, Department of Aging and Adult Services
Barbara A. Garcia, Director, Department of Public Health
George Gascon, District Attorney, Office of the District Attorney

FROM: Erica Major, Assistant Committee Clerk, Government Audit and Oversight
Committee, Board of Supervisors

DATE: February 9, 2015

SUBJECT: LEGISLATION INTRODUCED

The Board of Supervisors' Government Audit and Oversight Committee has received the following proposed legislation, introduced by Supervisor Wiener on February 3, 2015:

File No. 150118

Ordinance amending the Police Code to prohibit discrimination against residents or patients at long-term care facilities in San Francisco on the basis of sexual orientation or gender identity; to provide aggrieved persons with the right to seek investigation and mediation by the Human Rights Commission, as well as a private right of action; and to impose treble damages on violators.

If you have any additional comments or reports to be included with the file, please forward them to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

c:
Dee Schexnayder, Housing Opportunity, Partnership and Engagement
Christine Keener, Housing Opportunity, Partnership and Engagement
Christine Fountain, San Francisco Police Department
LaShaun Williams, Department of Aging and Adult Services
Greg Wagner, Department of Public Health
Colleen Chawla, Department of Public Health
Cristine Soto DeBerry, Office of the District Attorney

1 [Police Code - Prohibiting Discrimination Against Lesbian, Gay, Bisexual, and Transgender
2 Residents by Long-Term Care Facilities]

3 **Ordinance amending the Police Code to prohibit discrimination against residents or**
4 **patients at long-term care facilities in San Francisco on the basis of sexual orientation**
5 **or gender identity; to provide aggrieved persons with the right to seek investigation**
6 **and mediation by the Human Rights Commission, as well as a private right of action;**
7 **and to impose treble damages on violators.**

8 NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.
9 **Additions to Codes** are in *single-underline italics Times New Roman font*.
10 **Deletions to Codes** are in *strikethrough italics Times New Roman font*.
11 **Board amendment additions** are in double-underlined Arial font.
12 **Board amendment deletions** are in ~~strikethrough Arial font~~.
13 **Asterisks (* * * *)** indicate the omission of unchanged Code
14 subsections or parts of tables.

15 Be it ordained by the People of the City and County of San Francisco:

16 Section 1. The Police Code is hereby amended by adding Sections 3304.1 and 3313,
17 and by revising Sections 3305.2, 3306, 3307, and 3310, to read as follows:

18 **SEC. 3304.1. LONG-TERM CARE FACILITIES.**

19 *(a) Short Title. This Section 3304.1 shall be known and may be referenced as the "LGBT*
20 *Long-term Care Facility Residents' Bill Of Rights."*

21 *(b) Findings and Purpose.*

22 *In 2006, the California Legislature found that "lifelong experiences of marginalization place*
23 *lesbian, gay, bisexual, and transgender (LGBT) seniors at high risk for isolation, poverty,*
24 *homelessness, and premature institutionalization. Moreover, many LGBT seniors are members of*
25 *multiple underrepresented groups, and as a result, are doubly marginalized. Due to these factors,*

1 many LGBT seniors avoid accessing elder programs and services, even when their health, safety, and
2 security depend on it.” California Welfare and Institutions Code § 9103.

3 Recent studies confirm the state’s findings and provide evidence that LGBT seniors experience
4 discrimination, including in long-term care facilities, where residents are particularly vulnerable
5 because they must rely on others for necessary care and services, and may no longer enjoy the privacy
6 of having their own home or even their own room.

7 Discrimination against LGBT individuals in long-term care facilities has gone largely
8 unaddressed according to “Stories from the Field: LGBT Older Adults in Long-Term Care Facilities,”
9 a 2011 study published by the National Senior Citizens Law Center. In that study, 43% of respondents
10 reported personally witnessing or experiencing instances of mistreatment of LGBT seniors in a long-
11 term care facility, including: verbal or physical harassment from other residents; being refused
12 admission or re-admission or being abruptly discharged; verbal or physical harassment from staff;
13 staff refusal to accept medical power of attorney from the resident’s spouse or partner; discriminatory
14 restrictions on visitation; and staff refusal to refer to a transgender resident by his or her preferred
15 name or pronoun. 81% of respondents believed that other residents would discriminate against an
16 LGBT elder in a long-term care facility; 89% of respondents believed that staff would discriminate
17 against an LGBT elder in a long-term care facility; and 53% believed that staff discrimination would
18 rise to the level of abuse or neglect.

19 Even more recently, in 2013, the San Francisco LGBT Aging Policy Task Force commissioned
20 a report by Professor Karen Fredriksen-Goldsen of the University of Washington, “Addressing the
21 Needs of LGBT Older Adults in San Francisco: Recommendations for the Future,” based on
22 information collected from over 600 LGBT seniors residing in San Francisco, including nearly 140
23 LGBT seniors of color. This report found that nearly 60% of the study participants lived alone, and of
24 the 15% with children, 60% reported that these children would not be available to assist them. Many
25 reported poor physical and mental health: nearly one third of all respondents reported poor general

1 health; close to half reported having one or more disabilities; and one third of male participants
2 reported that they were living with HIV or AIDS. These results indicate that, as compared to seniors in
3 San Francisco generally, LGBT seniors have a heightened need for care but often lack family support
4 networks available to non-LGBT seniors. Further, LGBT seniors' fear of accessing services is
5 justified. Nearly half of the participants in the San Francisco study reported experiencing
6 discrimination in the prior 12 months because of their sexual orientation or gender identity.

7 While state and local laws already prohibit discrimination in public accommodations on the
8 basis of actual or perceived sexual orientation, gender identity, gender expression, and HIV status, the
9 promise of these laws has not yet been fully actualized in long-term care facilities. The purpose of this
10 LGBT Long-term Care Facility Residents' Bill Of Rights is to accelerate the process of freeing LGBT
11 residents and patients from discrimination, both by specifying prohibited discriminatory acts in the
12 long-term care setting and by providing additional information and remedies to ensure that LGBT
13 residents know their rights—and have the means to vindicate them.

14 (c) Definitions. For the purposes of this Section 3304.1,

15 “City” means the City and County of San Francisco.

16 “Gender Expression” means a person's gender-related appearance and behavior
17 whether or not stereotypically associated with the person's assigned sex at birth.

18 “Gender Identity” means a person's gender as designated by that person. A person's
19 gender identity shall be determined based on the individual's stated gender identity, without regard to
20 whether the self-identified gender accords with the individual's physical appearance, surgical history,
21 genitalia, legal sex, sex assigned at birth, or name and sex as it appears in medical records, and
22 without regard to any contrary statement by any other person, including a family member, conservator,
23 or legal representative. An individual who lacks the present ability to communicate his or her gender
24 identity shall retain the gender identity used by that individual prior to losing his or her expressive
25 capacity.

1 “Gender-nonconforming” means a person whose Gender Expression does not conform
2 to stereotypical expectations of how a man or woman should appear or act.

3 “HRC” means the San Francisco Human Rights Commission.

4 “LGBT” means lesbian, gay, bisexual, or transgender.

5 “Long-term Care Facility” or “Facility” has the same meaning as in California
6 Welfare and Institutions Code section 9701, as amended from time to time, and refers only to those
7 Facilities that are located within the geographical boundaries of the City. Long-term Care Facilities
8 include both privately owned and City-owned Facilities.

9 “Long-term Care Facility Staff” or “Facility Staff” means all directors, medical
10 personnel, administrators, employees, independent contractors, and others who provide services or
11 care to Residents of a Long-term Care Facility on Facility premises and on behalf of or with the
12 permission of the Facility.

13 “Ombudsman Program” means the San Francisco Long-Term Care Ombudsman
14 Program, a program mandated by the Older Americans Act and the Older Californians Act to
15 investigate and resolve complaints regarding care in long-term care facilities.

16 “Resident” means a short-term or long-term resident or patient of a Long-term Care
17 Facility.

18 “Transgender” means a person whose Gender Identity differs from his or her assigned
19 or presumed sex at birth.

20 “Transition” means to undergo a process by which a person changes their physical sex
21 characteristics and/or Gender Expression to match their inner sense of being male or female. This
22 process may include, among other things, a name change, a change in preferred pronouns, and a
23 change in social Gender Expression as indicated by hairstyle, clothing, and restroom use. Transition
24 may or may not include hormone use and surgery.

1 (d) Prohibited Activity. It shall be unlawful for any Long-term Care Facility or Facility Staff to
2 take any of the following actions wholly or partially on the basis of a person's actual or perceived
3 sexual orientation, Gender Identity, Gender Expression, or HIV status:

4 (1) Deny admission to a Long-term Care Facility; transfer or refuse to transfer a
5 Resident within a Facility or to another Facility; or evict or involuntarily discharge a Resident from a
6 Facility;

7 (2) Deny a request by two Residents to share a room;

8 (3) Where rooms are assigned by gender, assign or refuse to assign a room to a
9 Transgender Resident other than in accordance with the Transgender Resident's Gender Identity,
10 unless at the Transgender Resident's request;

11 (4) Involuntarily reassign a Resident to a different room based on any person's
12 complaints or concerns about that Resident's Gender Identity or Gender Expression;

13 (5) Prohibit a Resident from using, or harass a Resident who seeks to use or does use, a
14 restroom available to other persons of the same Gender Identity, regardless of whether the Resident is
15 making a gender Transition or appears to be Gender-nonconforming. Harassment includes, but is not
16 limited to, requiring a Resident to show identity documents in order to gain entrance to a restroom
17 available to other persons of the same Gender Identity;

18 (6) Refuse to use a Resident's preferred name or preferred pronoun;

19 (7) Deny a Resident the right to wear or be dressed in clothing, accessories, or
20 cosmetics that are permitted for any other Resident;

21 (8) Restrict a Resident's right to associate with other Residents, including the right to
22 sexual intimacy;

23 (9) Deny a Resident's right to receive or restrict a Resident's right to associate with
24 visitors of his or her choice, including the right to sexual intimacy; or

1 (10) Deny or restrict medical or non-medical care that is appropriate to a Resident's
2 organs and bodily needs, or provide medical or non-medical care in a manner that demeans the
3 Resident's dignity or causes avoidable discomfort.

4 (e) Exception. The prohibitions in subsection (d) of this Section 3304.1 shall not apply to the
5 extent that they are incompatible with any professionally reasonable clinical judgment that is based on
6 articulable facts of clinical significance.

7 (f) Additional Requirements.

8 (1) Recordkeeping. Facilities shall employ procedures for recordkeeping, including
9 but not limited to records generated at the time of admission, that include the Gender Identity,
10 preferred name, and preferred pronoun of each Resident.

11 (2) Confidentiality and Privacy.

12 (A) Confidentiality. Long-term Care Facilities shall protect personally
13 identifiable information regarding Residents' sexual orientation, Transgender status, Transition
14 history, and HIV status from unauthorized disclosure, as required by the Health Insurance Portability
15 and Accountability Act, the California Medical Information Act, Article 1 of the California
16 Constitution, the California Health and Safety Code and regulations promulgated thereunder, and any
17 other applicable provision of federal or state law. Facilities shall take such steps as reasonably
18 necessary to minimize the likelihood of inadvertent or incidental disclosure of such information to other
19 Residents, visitors, or Facility Staff, except to the minimum extent necessary for Facility Staff to
20 perform their duties.

21 (B) Privacy. Persons not directly involved in providing personal or medical
22 care to a Transgender or Gender-nonconforming Resident shall not be present during case discussions,
23 physical examination, treatment, or the provision of personal care to that Resident without the express
24 permission of that Resident. Facilities shall use doors, curtains, screens, or other effective visual
25 barriers to provide bodily privacy to Transgender or Gender-nonconforming Residents whenever such

1 Residents are partially or fully unclothed. In addition, LGBT Residents shall be informed and have the
2 right to refuse to be examined, observed, or treated by any Facility Staff when the primary purpose is
3 educational or informational rather than therapeutic, and such refusal shall not diminish the Resident's
4 access to care for the primary purpose of diagnosis or treatment.

5 (3) LGBT Liaison. Each Facility shall designate a staff member to serve as an LGBT
6 liaison and shall submit the name and contact information of the designated staff member to the HRC
7 and Ombudsman Program. The LGBT liaison shall complete an annual training concerning the
8 requirements of this Section 3304.1 and general LGBT cultural competency that shall be organized and
9 sponsored by the HRC and Ombudsman Program.

10 (4) Anti-discrimination Notice. Each Facility shall post the following notice alongside
11 its current nondiscrimination policy, in all places and on all materials where that policy is posted:

12 "[Name of Facility] does not discriminate and does not permit discrimination, including
13 bullying, abuse, or harassment, on the basis of actual or perceived sexual orientation, gender
14 identity, gender expression, or HIV status, or based on association with another individual on
15 account of that individual's actual or perceived sexual orientation, gender identity, gender
16 expression, or HIV status. You may file a complaint with the San Francisco Human Rights
17 Commission [provide contact information] or the Long-Term Care Ombudsman [provide
18 contact information] if you believe that you have experienced this kind of discrimination."

19 (g) Publications. Within six months of the effective date of this Section 3304.1, the HRC, in
20 collaboration with the Ombudsman Program, shall publish a layperson's handbook to assist Facilities
21 in complying with this Section 3304.1 and to suggest model practices to serve the needs of LGBT
22 Residents. The HRC shall also collaborate with the Ombudsman Program to publish a list of medical
23 providers available to provide medical care to Transgender Residents of Long-term Care Facilities and
24 shall update this list on an annual basis.

25 (h) Enforcement.

1 (1) Human Rights Commission. Any person who believes that a Facility or Facility
2 Staff has discriminated against him or her in violation of Sections 3304.1 or 3305.2, as that Section
3 3305.2 applies to the rights protected by Section 3304.1, may file a complaint with the Human Rights
4 Commission, which shall serve as a request to have the Commission investigate and mediate the
5 complaint pursuant to Section 12A.5 of the Administrative Code.

6 (2) Civil Action. Any aggrieved person may enforce the provisions of Sections 3304.1
7 or 3305.2, as that Section 3305.2 applies to the rights protected by Section 3304.1, against privately
8 owned Facilities or their Staff by means of a civil action. Any privately owned Facility or its Staff
9 found to have violated any of the provisions of Sections 3304.1 or 3305.2, as that Section 3305.2
10 applies to the rights protected by Section 3304.1, or to have aided in any such violation, shall be liable
11 for, and the court must award to the individual whose rights are violated, three times the amount of
12 special and general damages. The court may also award punitive damages in an amount not less than
13 \$200 but not more than \$400, as well as attorneys' fees and costs of action. There shall be no right of
14 action under this subsection 3304.1(h)(2) against the City or its officers, agents, or employees.

15 (3) Injunction. Any privately owned Facility or its Staff that commits, or proposes to
16 commit, an act in violation of Sections 3304.1 or 3305.2, as that Section 3305.2 applies to the rights
17 protected by Section 3304.1, may be enjoined therefrom by any court of competent jurisdiction. An
18 action for injunction under this subsection (h)(3) may be brought by any aggrieved person, by the
19 District Attorney, by the City Attorney, or by any person or entity that will fairly and adequately
20 represent the interests of the protected class. There shall be no right to injunctive relief under this
21 subsection 3304.1(h)(3) against the City or its officers, agents, or employees.

22 (4) Limitation. An aggrieved person must file a complaint with the Human Rights
23 Commission pursuant to subsection 3304.1(h)(1) or a civil action pursuant to subsection 3304.1(h)(2)
24 within one year of the alleged violation of Section 3304.1 or 3305.2, as that Section 3305.2 applies to
25 the rights protected by Section 3304.1.

1 (5) Bar. A complaint to the Human Rights Commission pursuant to subsection
2 3304.1(h)(1) is not a prerequisite to the filing of a civil action pursuant to subsection 3304.1(h)(2) or to
3 seeking injunctive relief pursuant to subsection 3304.1(h)(3). The pendency of a complaint before the
4 Human Rights Commission shall not bar any civil action, but a final judgment in any civil action
5 involving the same parties and claims shall bar any further proceedings by the Human Rights
6 Commission.

7 (6) Exclusive Remedies. Sections 3306 and 3307 notwithstanding, the provisions of this
8 Section 3304.1(h) shall be the exclusive remedies for violations of Sections 3304.1 or 3305.2, as that
9 Section 3305.2 applies to the rights protected by Section 3304.1.

10 **SEC. 3305.2. ASSOCIATION AND RETALIATION.**

11 (a) Association. It shall be unlawful for any person to do any of the acts described in
12 Sections 3303(a), 3304(a), 3304.1(d), 3305(a), or 3305.1(a) wholly or partially because a
13 person associates with a person or persons who are protected by this Article 33 from
14 discrimination based on their actual or perceived race, color, ancestry, national origin, place of
15 birth, sex, age, religion, creed disability, sexual orientation, gender identity, weight or height.

16 (b) Retaliation. It shall be unlawful for any person to do any of the acts described in
17 Sections 3303(a), 3304(a), 3304.1(d), 3305(a), or 3305.1(a) wholly or partially in retaliation
18 against a person because that person: (1i) Hhas opposed any act or practice made unlawful
19 by this Article 33; (2ii) Hhas supported this Article 33 and its enforcement; (3iii) Hhas filed a
20 complaint under this Article 33 with the San Francisco Human Rights Commission or any
21 court; or (4iv) Hhas testified, assisted or participated in any investigation, proceeding, or
22 litigation under this Article 33.

23 **SEC. 3306. LIABILITY.**

24 Any person who violates any of the provisions of this Article 33 or who aids in the
25 violation of any provisions of this Article 33 shall be liable for, and the court must award to the

1 individual whose rights are violated, three times the amount of special and general damages,
2 or, in the case of unlawful discrimination in the rental of a unit, three times the amount of one
3 month's rent that the landlord charges for the unit in question. In all cases, the court may also
4 award ~~in addition thereto,~~ punitive damages in an amount not less than \$200 but not more than
5 \$400, ~~together with attorney's as well as attorneys' fees, and~~ costs of action, ~~and punitive damages.~~

6 **SEC. 3307. ENFORCEMENT.**

7 (a) Human Rights Commission. Any person who believes that he or she has been
8 discriminated against in violation of Sections 3303, 3305, and/or 3305.2 of this Article *relating*
9 ~~to employment or business establishments and public accommodations~~ may file a complaint with the
10 Human Rights Commission, which shall serve as ~~and~~ a request to have the Commission
11 investigate and mediate ~~his or her~~ the complaint pursuant to ~~under the provisions of Chapter~~
12 Section 12A.5 of the Administrative Code ~~of the City and County of San Francisco.~~

13 * * * *

14 (c) Civil Action. Any aggrieved person may enforce the provisions of this Article 33 by
15 means of a civil action.

16 (d) Injunction.

17 (1) Any person who commits, or proposes to commit, an act in violation of this
18 Article 33 may be enjoined therefrom by any court of competent jurisdiction.

19 (2) ~~An a~~ Action for injunction under this subsection 3307(d) may be brought by
20 any aggrieved person, by the District Attorney, by the City Attorney, or by any person or entity
21 ~~which~~ that will fairly and adequately represent the interests of the protected class.

22 (e) Bar. A complaint to the Human Rights Commission is not a prerequisite to the
23 filing of a civil action under this Section 3307. The pendency of a complaint before the Human
24 Rights Commission shall not bar any civil action under this Section 3307, but a final judgment
25

1 in any civil action *involving the same parties and claims* shall bar any further proceedings by the
2 Human Rights Commission.

3 **SEC. 3310. DEFINITION.**

4 The word "person" as used in this Article 33 shall mean any individual, person, firm,
5 corporation, business or other organization or group of persons however organized. For the
6 purposes of Section 3305(a)(5), "person" shall also mean, and include the partners,
7 managers, employees, agents, business associates, suppliers or customers of a firm,
8 corporation, business or other organization. *For the purposes of Section 3304.1, the word*
9 *"person" as used in this Article 33 shall mean any individual, or Long-term Care Facility or Facility*
10 *Staff as those terms are defined in Section 3304.1, except as otherwise stated.*

11 **SEC. 3313. NO CONFLICT WITH STATE OR FEDERAL LAW.**

12 *Nothing in this Article 33 shall be interpreted or applied so as to create any requirement,*
13 *power, or duty in conflict with any federal or state law.*

14
15 Section 2. Effective Date. This ordinance shall become effective 30 days after
16 enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the
17 ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board
18 of Supervisors overrides the Mayor's veto of the ordinance.

19
20 Section 3. Undertaking for the General Welfare. In enacting and implementing Section
21 3304.1, the City is assuming an undertaking only to promote the general welfare. It is not
22 assuming, nor is it imposing on its officers and employees, an obligation for breach of which it
23 is liable in money damages to any person who claims that such breach proximately caused
24 injury.

1 Section 4. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors
2 intends to amend only those words, phrases, paragraphs, subsections, sections, articles,
3 numbers, letters, punctuation marks, charts, diagrams, or any other constituent parts of the
4 Police Code that are explicitly shown in this ordinance as additions, deletions, Board
5 amendment additions, and Board amendment deletions in accordance with the "Note" that
6 appears under the official title of the ordinance.

7
8 APPROVED AS TO FORM:
9 DENNIS J. HERRERA, City Attorney

10 By: 
11  SHERRI KAISER
12 Deputy City Attorney

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