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Date: March 1, 2021
To: Chair Shimokubo and the Human Relations Commissioners
From: Sharon Cini, Diversity & Inclusion Program Manager; Christina Brady, Acting Executive Assistant to the City Manager; Kelly Corsette, Communications and Public Affairs Director; Bill Hylan, Sr. Asst. City Attorney; Brent Stockwell, Assistant City Manager;
Subject: Anti-Discrimination Ordinance

Background

In the context of the national discourse on race in Summer 2020, the Human Relations Commission recommended at their August meeting that the City Council consider a non-discrimination ordinance and anti-harassment policy. Their recommendation was shared with the City Council via the attached letter (Attachment 2) with a follow-up letter sent by the Chair and Vice-Chair on February 24, 2021 (Attachment 3).

Other Arizona cities, including Flagstaff, Phoenix, Sedona, Tempe, Tucson and Winslow have passed anti-discrimination ordinances, as have at least 225 cities or counties nationwide including economic development and tourism peers, Austin, Texas; Myrtle Beach, South Carolina; and Orlando, Florida, Palm Springs, California and San Diego, California.

Scottsdale currently has two ordinances that provide civil rights protections. Scottsdale Revised Code Section 14-2 provides employment opportunities to all persons based solely on ability, regardless of race, color, religion, sex, national origin, age, sexual orientation, gender identity or disability. S.R.C. Section 15-17 relates to fair housing and is intended to mirror federal protections and does not cover sexual orientation or gender identity.

Other than as noted above, there are not currently any Scottsdale-specific ordinances that cover discrimination in these areas:

- private employment,
- public accommodations or
- city services, including contracting

An anti-discrimination ordinance would expand anti-discrimination laws to include local businesses and employers and require their compliance with the law. It would also provide a mechanism for responding to complaints of discrimination. Finally, if discrimination occurs, violators would be subject to civil prosecution.

Different types of anti-discrimination laws can be found at all levels of government. These laws vary from jurisdiction to jurisdiction, sometimes significantly. Laws traditionally prohibit discrimination based on a person's race, color, religion, sex, national origin, age or disability. Generally, discrimination is unfavorably treating someone differently because they are in a protected class.

However, there are gaps in the patchwork of laws. For example, neither federal law nor state law currently specifically protect persons from discrimination in public accommodations based on their sexual orientation or gender identity. Federal and state law do not prohibit discrimination based on

sexual orientation or gender identity by employers who employ less than 15 people. As a result of a U.S. Supreme Court decision, employers with 15 or more employees are prohibited from discriminating against their employees based on sexual orientation or gender identity, and it has also been announced that the federal government will be investigating complaints of housing discrimination based on sexual orientation or gender identity under the federal Fair Housing Act. In addition, federal contractors are prohibited from discriminating based on sexual orientation or gender identity.

In summary, persons can be legally denied service in Scottsdale based on such factors as sexual orientation or gender identity and can be discriminated against in employment if they work for an employer with less than 15 employees, which comprise the vast majority of all businesses in Scottsdale. There are no records on how often such discrimination occurs, as it is currently not illegal.

Ordinance Overview and Implications

Anti-discrimination in City Services, Programs and Activities and Contracting – The proposed ordinance opens with statements of public policy regarding anti-discrimination in the provision of city services, programs, activities and contracting. Some of these requirements existed previously in City Code, for example equal employment opportunity in employment (S.R.C. 14-2), and prohibitions against discrimination and harassment for city employees (S.R.C. 14-72). The ordinance outlines classes that have historically been covered by the City of Scottsdale under the Human Resources Ordinance which include race, color, religion, sex, national origin, age, sexual orientation, gender identity or disability. These are often referred to as “protected classes” and includes people whether they are an actual member of a protected class, or just perceived to be a member.

This is the overall statement of public policy (15-2)

“It is the policy of the city to not discriminate and provide equal opportunity to all persons regardless of actual or perceived race, color, religion, sex, national origin, age, sexual orientation, gender identity, or disability in the access, provision and treatment of city services, programs and activities. It is the policy of the city that all persons be treated with respect and dignity as specified in sections 15-4 through 15-7. Each person has the right to receive service from the city in a professional atmosphere that promotes equality under the law and prohibits unlawful discrimination, including harassment and retaliation.”

The word “anti-discrimination” has been used rather than “non-discrimination” to take a stronger stance. It is consistent with the word choice in Scottsdale’s Administrative Regulation 333 which provides anti-discrimination and non-harassment regulations for Scottsdale employees and volunteers. It is also the title of Tempe’s ordinance, although Phoenix has a non-discrimination ordinance.

The ordinance expands application to include all elected and appointed officials, volunteers, and contractors, vendors and consultants (15-3) in addition to city employees and volunteers which have been covered under language in Chapter 14 of City Code. The proposed ordinance also promotes equality under the law and prohibits unlawful discrimination (15-4) which is defined and includes harassment (15-5) and retaliation (15-6). In addition, the definition of gender identity has been updated to reflect current understanding.

Including a policy statement covering the city's operations would demonstrate that Scottsdale is fully committed to anti-discrimination in all its practices before requiring Scottsdale businesses to do the same. Many large Scottsdale businesses have already adopted similar policies, as noted in the Commission's letter including the San Francisco Giants, Nationwide, HonorHealth, Mayo Clinic, Vanguard and GoDaddy. This policy is also similar to those promulgated for organizations by the Society of Human Resources Management.

Unlawful practices which constitute a violation are outlined in the proposed ordinance as well (15-7). All are prohibited from discrimination in provision of access to services (15-7A) or employment decisions (15-7B and D), or membership (15-7C). Further, all groups are prohibited from coercing, intimidating, threatening or interfering with any person exercising rights under the policy (15-7E) or from harassment against a person for opposing an unlawful practice or filing a complaint (15-7F). In addition, city vendor, contractors or consultants are required to provide a copy of its anti-discrimination policy to the city's purchasing director (15-7D).

The proposed ordinance also encourages reporting of perceived incidents of discrimination, harassment or retaliation, and outlines disciplinary action. Different processes are used for different classes, for example, complaints regarding elected or appointed officials are made to the City Attorney (similar to the Code of Ethical Behavior), employees and volunteers to the Human Resources Director, and contractors, vendors and consultants to the Purchasing Director (15-8 and 15-9). The city is required to make reasonable efforts at policy education and training (15-10), and this policy is not intended to alter or abridge other rates (15-11), and does not create a separate cause of action or impose legal liability in regard to a violation of this article (15-12).

Anti-discrimination in Employment and Public Accommodations – In addition, as recommended by the Human Relations Commission, the proposed ordinance also prohibits discrimination in employment and places of public accommodating within the City of Scottsdale to the same classes (15-14). In addition, there are defined terms included in this section for:

- age,
- contractor,
- disability,
- discriminate or discrimination,
- dwelling,
- educational institution,
- employee,
- employer,
- employment agency,
- familial status,
- gender identity,
- labor organization,
- person,
- place of public accommodation,
- religion,
- religious organization,
- sex discrimination, and
- sexual orientation (15-17)

The proposed ordinance also outlines prohibited acts in employment and public accommodation (15-16). This includes posting a notice saying that access is refused or restricted to persons of a certain class in places of public accommodation (15-16A), in employment actions by employers (15-16B and 15-16-D), for labor organizations in membership decisions (15-16C), in taking action against someone who files a complaint under this ordinance (15-16E), in causing an employer to discriminate against an individual (15-16F), for participating in the commission of any act prohibited under the ordinance (15-16G), or for otherwise discrimination because the person has been involved in a matter under this ordinance (15-16H).

The proposed ordinance outlines eight exemptions that are not subject to this ordinance:

- private clubs (15-17A)
- other governments (15-17B)
- any policies or regulations of places of public accommodation that apply to all persons, regardless of class (15-17C)
- religious organizations (15-17D)
- employment by the City of Scottsdale, because it's already covered under S.R.C. 14-2 (15-17E)
- prohibition of the illegal use of drugs or the use of alcohol (15-17F1-4)
- for places of public accommodation to provide beneficial pricing or policies to senior citizens, students, veterans or individuals with disabilities (15-17F5)
- For employers to establish dress codes applied uniformly and reasonably related to the employer's business needs (15-17F6)

Penalties– The proposed ordinance makes it a civil violation to violate any provisions (15-18A). The fines imposed by the City Court will range from \$500-2,500 per violation, with each day that a violation continues deemed a separate violation. (15-18B1) Failure to comply with an order contained in a judgement may result in additional fines as established by the City Court. (15-18B2).

Complaint Procedures – The proposed ordinance outlines a complaint process that would ultimately result in charges filed by the City Prosecutor for valid complaints, not within state or federal jurisdiction, that cannot be resolved through mediation. Here are the key steps in the process.

- A. Complaints may be filed with the city manager or designee within 90 days of the alleged violation. The written complaint must set forth the facts of the complaint, the person alleged to have violated the ordinance, and shall be signed by the complainant (15-19A).
- B. Within 45 days following receipt of the written complaint, the city will conduct an initial screening to determine whether the city has jurisdiction, whether it was filed timely, and whether the allegations, if true, would constitute a violation of the ordinance (15-19B).
- C. If a state or federal agency has jurisdiction, the city will refer the complainant to the appropriate agency and no further action will be taken by the city (15-19C). This would include most complaints regarding employers or businesses of 15 or more employees.
- D. If the city has jurisdiction, a copy of the written charge shall be provided to the person alleged to have violated the ordinance, with a response requested within 20 days (15-19D).
- E. The city can dismiss charges if the city does not have jurisdiction, the charge is untimely, or if the allegations would be insufficient to show a violation. The complainant would be notified of the decision to dismiss charges (15-19E).

- F. If the city determines that the city has jurisdiction, the complaint was filed within 90 days, and the allegations, if true, would be sufficient to show a violation, the city may offer mediation services to both parties in an attempt to resolve the matter (15-19F).
- G. If the complainant does not respond or act as requested by the city, the complaint may be considered withdrawn (15-19G).
- H. If the city determines there is reason to believe a violation occurred, the matter will be referred to the city attorney's office to determine whether to prosecute by filing a civil complaint in City Court (15-19H).

Housing – The ordinance also updates language in the housing section and relocates it from SRC 15-16 – 15-20 to new sections 15-22 – 15-24. The ordinance adds “familial status” to the listing of protected classes used elsewhere in the ordinance. This is because familial status (such as being pregnant or a parent with children under 18) is covered under state and federal laws applicable to housing and not to employment or public accommodations. The housing section also clarifies what would constitute a violation. The ordinance provides for exemptions that mirror the exemptions in state and federal housing laws, including an exemption for an individual choosing a roommate, which a court has found to implicate the 1st Amendment right to free association.

Community Involvement

As noted in the background section, the need for an ordinance was identified by a citizen advisory group, the Human Relations Commission, and discussion and deliberation regarding the recommendation was noticed on Commission agendas. In addition, since the recommendation was transmitted to the City Council, an update item has been included on each agenda as well.

The draft ordinance has been provided to diversity partners and advocacy organizations, as well as the city's LGBTQ liaisons for review and comment. It will be discussed at the March 23, 2021 City Council work study session, before being placed on the April 20, 2021 City Council agenda for action.

A news release has been prepared and shared through the city's electronic newsletters, and a web page created to explain the proposed ordinance with a method was provided for the community to provide their comments. All comments received will be included with this City Council Report when the item comes forward for City Council action.

Staffing, Workload Impact

To develop the ordinance, staff reached out to staff in local governments within Arizona and nationally to learn more about their ordinances and how they have been implemented. Information gained during this process has been included in the ordinance.

Research identified other cities with similar ordinances have experienced very limited costs and complaints under their ordinances. Examples from other Arizona municipalities below forecast Scottsdale's workload impacts involving complaints would be similar:

1. Sedona has not received any complaints or had any charges/investigations/mediations etc., since adopting the human rights ordinance. The adoption did not result in any significant media attention or public input.
2. Tempe has had minimal to no cases that have seen full adjudication, if at all regarding nondiscrimination ordinance violations.
3. Phoenix reported a handful of cases since their ordinance was adopted in 2015.

Current city structures include policies and procedures in place for specific areas of employee or citizen discrimination complaints, that could also be used for complaints made under the ordinance. For example, Human Resources currently investigates internal employee discrimination complaint process and coordinates with employee relations and if necessary, the Personnel Board for resolution. Human Resources also provides training relating to nondiscrimination in the workplace. In addition, the Diversity and Inclusion Program Manager assists city departments in addressing complaints from the public involving city services, programs and activities. Currently, if a citizen has a discrimination complaint against the city, designated city staff will coordinate with the City Manager's Office and/or the City Attorney's Office to assess the complaint. Depending on the circumstances, the city also refers to the appropriate state or federal civil rights office. The City Attorney's Office also coordinates the process outlined in the Code of Ethical Behavior for complaints. Concerns may also be addressed to the seven Council-appointed members of the Scottsdale Human Relations Commission as well as two staff-appointed LGBTQ liaisons – one to the city manager and the other to the Police Chief.

In addition, the Diversity and Inclusion Program Manager also implements preventative, educational and inclusive strategies and programs both for city employees and for the community. This office is the staff contact for the Human Relations Commission, the appointed LGBTQ liaisons, city-wide Americans with Disabilities Act coordination and oversight for the city's Title VI Civil Rights coordination. It is also a resource for citizens to air positive and negative diversity perceptions, which is a valuable opportunity for staff to revise programs, activities and services in response.

As noted in the ordinance, mediation is also available to resolve complaints if both parties are willing. In addition to private mediation services, which could be obtained at a cost to the city, the city also has a Mediation Program with trained community mediators. The mediation program is a private, voluntary process in which an impartial person facilitates communication between parties to promote settlement. It does not involve a decision by the mediator. The mediator is a neutral person selected by the parties to assist in the identification of issues, generation of options, and facilitation of a mutually acceptable agreement.

Attachments:

1. Anti-Discrimination Ordinance
2. Human Relations Commission Letter and Recommendations
3. February 24, 2021 Chair and Vice Chair Letter
4. Anti-Discrimination Ordinance Presentation