DENNIS J. HERRERA, State Bar #139669
City Attorney
JESSE C. SMITH, State Bar #122517
Chief Assistant City Attorney
SHERRI SOKELAND KAISER, State Bar #197986
PETER J. KEITH, State Bar #206482
Deputy City Attorneys
1390 Market Street, Suite 700
San Francisco, California 94102-5408
Telephone: (415) 554-3886 (Kaiser)
Telephone: (415) 554-3908 (Keith)
Facsimile: (415) 554-6747
E-Mail: sherri.kaiser@sfgov.org
peter.keith@sfgov.org

Attorneys for Third-Party Movant
CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ROSS MIRKARIMI, Defendant.	Court No. 12001311 **REPLY OF THIRD-PARTY MOVANT CITY AND COUNTY OF SAN FRANCISCO TO MS. L.'S OPPOSITION TO MOTION FOR RELEASE OF COURT RECORD** Hearing Date: May 15, 2012 Hearing Judge: Hon. Garrett Wong Time: 1:30 p.m. Place: Department 15, 850 Bryant
CITY AND COUNTY OF SAN FRANCISCO, Third-Party Movant.	

INTRODUCTION

On April 23, 2012, third-party movant City and County of San Francisco ("San Francisco") moved for an order from this Court releasing the video statement of the victim in this action, Ms. L., to San Francisco, for use in the ongoing official proceedings to remove Defendant from the office of Sheriff of the City and County of San Francisco, and the investigation accompanying those

proceedings, or, in the alternative, for an order authorizing the seizing agency (the San Francisco Police Department (SFPD)) and the San Francisco District Attorney, and the Defendant to release the record to San Francisco for copying.

Neither the Defendant nor the People opposed San Francisco's motion. Ms. L. initially did not file an opposition but requested a continuance of hearing, which the Court granted. Ms. L. now argues that this Court should deny San Francisco's motion on the following grounds: (1) there is no authority for the Court to grant such a motion; (2) the Court is no longer in actual possession of the video statement; (3) a request for an order authorizing the District Attorney (and presumably the SFPD) to release the video statement amounts to an inappropriate request for an advisory opinion; and (4) if the video statement is released to the City, Ms. L.'s constitutional right to privacy supports a protective order that would prohibit the City from showing anyone the video.[1] None of these arguments has merit.

I. THIS COURT HAS THE INHERENT POWER TO ORDER THE RELEASE OF THE VIDEOTAPE, AND NO CASE CITED BY MS. L. STATES OTHERWISE

As set forth in the Motion, Penal Code section 1536 empowers a court in constructive possession of seized items to entertain nonstatutory motions for the return or release of seized items regardless of whether those items were introduced into evidence and regardless of whether those items remain in the physical possession of the Court. (Pen. Code § 1536; see *People v. Super. Ct. (Loar)* (1972) 28 Cal.App.3d 600, 608; *Oziel v. Super. Ct. (CBS, Inc.)* (1990) 223 Cal.App.3d 1284, 1293.) Ms. L argues that neither *Loar* nor *Oziel* provide such authority, because neither involved a third party's request for release of an item. At least with respect to *Oziel*, Ms. L. is wrong. *Oziel* involved a challenge to the trial court's order granting a third party's request (the media) for disclosure of search warrant videotapes. (*Oziel*, 223 Cal.App.3d at p. 1289.) Moreover, here San Francisco is seeking this

[1] Ms. L. appears to have abandoned her claim that the videotape is a privileged and confidential communication. That is appropriate in light of this Court's prior ruling and the overwhelming evidence that Ms. L. consulted Ms. Madison as a friend, as opposed to in a professional capacity, and did not intend that the substance of the communication remain confidential. (See Evid. Code § 952.) As discussed in greater detail below (Part IV), Ms. L. also appears to have abandoned the position – which was the basis for her motion to continue the hearing – that her right of privacy prohibits release of the video to San Francisco. Rather, Ms. L. now urges that if the Court releases the video, her right of privacy compels the Court to issue a protective order.

evidence with the permission of its owner, Ms. Madison. That further supports the propriety of releasing this evidence to San Francisco.

Neither the plain language of Penal Code section 1536 nor the cases relied upon by San Francisco limit a court's power to entertain such motions to those brought on behalf of the parties to the proceedings or the owner of property.

II. THE EXHIBIT REMAINS IN THE CONSTRUCTIVE POSSESSION OF THIS COURT

Ms. L. argues that because the videotape was physically returned to the District Attorney, this Court has no authority to order its release. Ms. L. accuses San Francisco of forum-shopping based on an alleged failure to file a motion to compel compliance with a subpoena served on the District Attorney.

Initially, this argument has no basis in fact because San Francisco did not attempt to subpoena the videotape from the District Attorney. And San Francisco's motion is not a motion to enforce any subpoena. Rather, San Francisco properly made this motion in this Court, because under Penal Code section 1536 and the cases interpreting it, evidence seized pursuant to a search warrant remains in the constructive possession of the Court and subject to the orders of the Court. Although the Court's copy was physically returned to the District Attorney, it remains in the constructive possession of this Court. Moreover, the SFPD copy of the video remains in the constructive possession of this Court and subject to this Court's jurisdiction, because SFPD holds the video as the seizing agency. (Penal Code § 1536.) No statutes or cases cited by Ms. L. support the contrary conclusion. And Ms. L. makes no argument that the Court lacks authority to make orders regarding the copy held by the SFPD as the seizing agency.

Moreover, other sections of the Penal Code support bringing this motion in this Court. Penal Code sections 1417 *et. seq.* provide procedures for the disposition of evidence in criminal cases. Section 1417 states that all exhibits must be retained by the clerk of the court until final determination of the action – defined as 30 days after the notice of appeal has been filed or the day for such filing has expired. In this case, that date is June 18, 2012. (Pen. Code § 1417; Cal. Rules of Court, Rule 8.308.) Penal Code section 1417.3 allows for the earlier return of exhibits that pose security, storage, or safety problems to the party offering the exhibit, in this case the District Attorney. (Pen. Code § 1417.3.) In

light of these statutes, the most reasonable interpretation of the Court's action of releasing the videotape to the District Attorney is that it did so for security or storage purposes but that it did not intend to relinquish its constructive possession or control.[2]

For all of these reasons, this Court retains the power to control and release the videotape.

III. THIS MOTION IS NOT A REQUEST FOR AN "ADVISORY OPINION" REGARDING SUBPOENA POWER

As already explained above, San Francisco did not serve a subpoena on the District Attorney's Office for the video statement. Therefore, there is no factual basis for Ms. L.'s argument (Opp. at 8-9) that San Francisco is seeking an advisory opinion regarding subpoena power. Rather, San Francisco is asking this Court to make an order releasing the Court's record to San Francisco. Here, the Court's record is physically held by two other agencies, the District Attorney and the San Francisco Police Department, but it is still the Court's record. An order by the Court releasing its record to San Francisco necessarily operates through these agencies, which are a virtual arm of the Court when they hold the Court's record.

IV. THE COURT SHOULD REJECT MS. L.'S REQUEST FOR A PROTECTIVE ORDER THAT WOULD PROHIBIT SAN FRANCISCO FROM USING THIS VIDEO STATEMENT IN THE OFFICIAL MISCONDUCT PROCEEDINGS

Ms. L. earlier sought a continuance on the basis that she wished to submit an opposition with evidence to support a claim that releasing the video to the City and County of San Francisco would violate her right of privacy, and to obtain a declaration to support a claim that release would be psychologically detrimental to Ms. L. (Ms. L.'s Motion for Continuance at 1:27-2:1, 4:1-3.) Having obtained a continuance, Ms. L. has not submitted any evidence in opposition and appears to have abandoned the argument of psychological detriment to Ms. L. Moreover, Ms. L.'s opposition does not raise privacy as a reason not to release the video to San Francisco. (Ms. L.'s Opposition at 9-14.)

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[2] The decision *Franklin v. Municipal Court* (1972) 26 Cal.App.3d 884, does not support Ms. L.'s position. *Franklin* stands for the proposition that property received as evidence in a criminal proceeding is in the possession of the Court, rather than a judge acting in his personal, unofficial capacity. Here, San Francisco's motion is based on the Court having constructive possession of the video, not a judge in his personal, unofficial capacity.

Ms. L. misinterprets *Franklin* in arguing that the Court lacks jurisdiction to make an order regarding the evidence here. In any case, the Penal Code sections discussed here make clear that the Court remains in possession of this exhibit.

Rather, Ms. L.'s opposition urges that if the Court decides to release the video to San Francisco, Ms. L.'s privacy rights require the Court to issue a protective order "that the City Attorney be prohibited from disseminating or publicizing the video." (*Id.* at 14:5-6.)

Such a protective order makes no sense. San Francisco is seeking this video because it is important evidence in ongoing official proceedings to remove the Sheriff from office. An order that San Francisco cannot disseminate or publicize the video would prevent San Francisco from introducing that video in those proceedings.[3] But that is the very reason why San Francisco seeks the video. There is a compelling public interest in the video being available for these official misconduct proceedings. Ms. L. does not argue to the contrary. Under the circumstances of this case, Ms. L.'s privacy claim is not an interest sufficient to override the compelling need for these public hearings to be based on all of the evidence.

A. Ms. L.'s Privacy Claim Is Diminished By The Already Wide Public Dissemination Of Information About This Video And Its Contents

To fairly determine whether Ms. L.'s privacy claim constitutes an overriding interest sufficiently compelling to overcome the public's right to access and San Francisco's need for the video for these official proceedings, this Court must consider what has and has not been publicly disseminated.

Initially, as set forth more fully in the Motion, this video statement is a court record. Unless the law requires confidentiality and/or the records are sealed based on an "overriding interest" that

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[3] It is not clear from Ms. L.'s brief what terms she urges for her proposed protective order. Elsewhere in her brief (at 2:15-18), she argues that the publication of the video should turn on the Ethics Commission ruling that the video is admissible and the Ethics Commission making "findings thereon." But this proposal – to make publication turn on an admissibility ruling and the Ethics Commission's "findings" – does not make sense, because it misunderstands the role of the Ethics Commission in these Charter proceedings. (S.F. Charter § 15.105(a) [Keith Decl. Exh. 5].) The Ethics Commission does not make any ultimate decision or finding regarding the Charges. Rather, it conducts a hearing and then "transmit[s] the full record of the hearing to the Board of Supervisors with a *recommendation* as to whether the charges should be sustained." (*Ibid.* [emphasis added].) The Board of Supervisors then "review[s] the complete record" and votes whether to sustain the charges. If the Board sustains the charges the Sheriff will be removed, and if the Board does not sustain the charges within 30 days the Sheriff will be reinstated. (*Ibid.*) The "full record" and "complete record" transmitted to the Board of Supervisors necessarily includes all documents tendered to the Ethics Commission, whether or not the Ethics Commission views them as admissible or relies on them in reaching its *recommendation* whether to sustain the Charges.

In any case, for the reasons described in greater detail below, Ms. L. has not demonstrated that any protective order is warranted.

overcomes the right of public access, court records are presumed to be open to the public. (Motion at pp. 7-8.) This record has never been sealed, as Ms. L. acknowledges. (Ms. L.'s Opposition at 9:22-10:10.)

Moreover, a transcript of the audio portion of the videotape and multiple still photographs taken from the videotape have been released to the public and, as Ms. L. concedes, widely disseminated. (Ms. L.'s Opposition at 10:1-10.) The transcript and photos show Ms. L crying, displaying a bruise, and identifying the Sheriff as the person who caused the bruise. This information is already publicly available. Dissemination of the actual recording will add little to the alleged harm. (See *Gilbert v. Nat'l Enquirer* (1996) 43 Cal.App.4th 1135, 1149 [finding public right of access to court records outweighed claimed privacy interests relying in part on fact that matters are already public].)

B. There Is A Compelling Public Interest In The Video Being Part Of The Record Of These Public Official Misconduct Proceedings

On the other hand, there is a compelling public interest in the actual video being available in the pending official misconduct proceedings. That is because the video itself is an important piece of evidence going to the merits of the charges, and because it is important that the decision whether to remove the Sheriff be based on a record that is both public and complete.

As this Court observed (RT 29:17-28, 30:1-12 (February 27, 2012)), the actual video provides powerful evidence of the demeanor of Ms. L. at the time of the statement and, therefore, the credibility of that statement. (See also *United States v. Yida* (9th Cir. 2007) 498 F.3d 945, 950 [noting that a transcript fails to provide the opportunity to observe the demeanor of the witness while testifying].) Therefore, this video was a central piece of evidence in the criminal proceedings. For the same reasons, it likewise will be a central piece of evidence in the official misconduct proceedings. The charged official misconduct here includes the Sheriff's abuse of Ms. L., which the Sheriff has repeatedly attempted to minimize, before and especially after his conviction. In contrast to the Sheriff's story, Ms. L.'s video includes a credible statement that the Sheriff abused her not only on December 31, 2011, but also in March 2011. Moreover, the charged official misconduct also includes

the Sheriff's attempts to dissuade witnesses from cooperating with police, which included efforts to prevent the police from getting this video.

It is also important that the official misconduct proceedings and decision be based on a record that is both public and complete. As the California Supreme Court observed, "open trials serve to demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings." (*NBC Subsidiary v. Super. Ct.* (1999) 20 Cal.4th 1178, 1201.) That logic applies with equal force to the criminal proceedings and the proceedings before the Ethics Commission. Likewise, a decision based on a complete record will promote public confidence. In short, the theoretical marginal harm that might result from release of the videotape for use in these public proceedings is far outweighed by the need for these proceedings and their outcome to be based on a public and complete record.

C. Ms. L. Cannot Strategically Invoke Her Right Of Privacy To Block The Use Of Evidence Damaging To The Sheriff, While At The Same Time Making Public Statements Attacking The Evidence Claimed To Be Private

We also note that Ms. L.'s claim of privacy must be evaluated in light of Ms. L.'s own public conduct. That public conduct includes statements about the videotape itself as well as statements about the criminal proceedings and the official misconduct proceedings.

Ms. L. cannot selectively invoke her right of privacy – claiming privacy in an effort to block the use of a videotape that is damaging to the Sheriff's position, while at the same time making public statements in the mass media about the very same videotape. Ms. L. has already filed a declaration with the Court maintaining that her video statement was "scripted" by Ivory Madison. (Declaration of Ms. L. In Support Of Claim of Privilege (Feb. 28, 2012).) Ms. L. also attacked the credibility of the video in an Op-Ed piece published in the San Francisco Chronicle, stating that she intended the video "to be used only in the event of a custody dispute." (Ross Mirkarimi's wife gives her side of story, *San Francisco Chronicle*, at A-10 (April 6, 2012).) Having so publicly attacked the credibility of her own videotaped statement, Ms. L. cannot now be allowed to use a claim of privacy to block public scrutiny of powerful evidence that the video statement was true: the video itself. (See *Gilbert,* 43 Cal.App.4th at pp. 1146-1147 [In weighing privacy interests, court observes that the plaintiff is a

well-known actress and notes, "We cannot ignore the fact that Gilbert's publicist has sought media attention on her behalf."].)

The same principle applies to Ms. L.'s claims regarding her child. Ms. L. herself has repeatedly and publicly spoken about her child in connection with these proceedings. (*San Francisco Chronicle*, *supra* (April 6, 2012) [mentioning son by name four different times].) Under California law, a public figure who makes public comments on a matter of public importance, and discusses a child as part of these comments, cannot then invoke the child's privacy to selectively prevent dissemination of information that tends to undermine the public figure's public position. (*Gilbert,* 43 Cal.App.4th at 1147 [acknowledging that public figure's son was an "unfortunate bystander" to public dispute between his parents].)

Ms. L.'s privacy claims must also be weighed in light of her public accusations that the proceedings to remove her husband from office constitute a "coup d'état" (*San Francisco Chronicle, supra* (April 6, 2012)) and a "political" and "media conspiracy" (Mirkarimi Speaks Out, *Bay Citizen* (April 12, 2012)). Release of the videotape will serve an absolutely critical function: to promote transparency in the proceedings to remove an individual from high office based on his post-election misconduct. And likewise the videotape itself rebuts the claim implicit in the charges of a "political conspiracy": that conspirators fabricated Sheriff Mirkarimi's abuse of his wife, and that it never actually happened. Ms. L.'s claim of privacy in what is arguably the most critical piece of evidence that began the investigation that led to these proceedings, must be weighed in light of her statements (and the Sheriff's statements) calling into question the motivation behind the charges of official misconduct and the integrity of the proceedings.

CONCLUSION

This Court should order that the videotaped statement of the victim in this action, Ms. L., may be released by the Clerk to the City and County of San Francisco, for use in the ongoing official proceedings to remove Defendant from the office of Sheriff of the City and County of San Francisco and the investigation accompanying those proceedings. Alternatively, if the Court no longer has actual physical possession of this record, the Court should authorize the seizing agency (the San

Francisco Police Department (SFPD)) and the San Francisco District Attorney to release the record to San Francisco for copying.

Dated: May 14, 2012

DENNIS J. HERRERA
City Attorney
JESSE C. SMITH
Chief Assistant City Attorney
SHERRI SOKELAND KAISER
PETER J. KEITH
Deputy City Attorneys

By: _____
PETER J. KEITH

Attorneys for Third-Party Movant
CITY AND COUNTY OF SAN FRANCISCO

PROOF OF SERVICE

I, COLLEEN M. GARRETT, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Sixth Floor, San Francisco, CA 94102.

On May 14, 2012, I served the following document(s):

REPLY OF THIRD-PARTY MOVANT CITY AND COUNTY OF SAN FRANCISCO TO MS. L.'S OPPOSITION TO MOTION FOR RELEASE OF COURT RECORD

on the following persons at the locations specified in the manner indicated below:

David P. Waggoner, Esq.
1777 Haight Street
San Francisco, CA 94117
Telephone: 415/305-7708
Facsimile: 415/386-8106
Email: davidpwaggoner@gmail.co,
Counsel for Ross Mirkarimi

Braden C. Woods – HAND DELIVERED
Assistant District Attorney
SF DISTRICT ATTORNEY'S OFFICE
850 Bryant Street, Room 322
San Francisco, CA 94103
Telephone: 415/553-1751
Facsimile: 415/575-8815

Lidia Stiglich, Esq.
STIGLICH & HINCKLEY, LLP
803 Hearst Avenue
Berkeley, CA 94710
Telephone: 510/486-0800
Email: www.stiglichhinckley.com
Counsel for Ross Mirkarimi

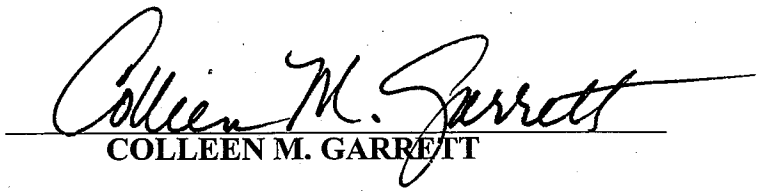
Paula Canny, Esq.
840 Hinckley Road, Suite 101
Burlingame, CA 94010
Telephone: 650/652.7862
Facsimile: 650/652.7835
Email: pcanny@paulacanny.com
Counsel for Ms. L.

☒ **BY OVERNIGHT DELIVERY**: I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the same day.

☒ **BY ELECTRONIC MAIL:** I caused a copy of such document to be transmitted *via* electronic mail in portable document format ("PDF") Adobe Acrobat from the electronic address: colleen.garrett@sfgov.org.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed May 14, 2012, at San Francisco, California.



COLLEEN M. GARRETT