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By U.S. Mail and Electronic Mail

April 23, 2012

Members of San Francisco Ethics Commission
25 South Van Ness Avenue, Suite 220
San Francisco, CA 94102-6053

San Francisco City Attorney
Attn: Peter Keith and Sherri Kaiser
1390 Market Street, Suite 700
San Francisco, CA 94102-5408

Re: *Agenda for April 23, 2012 meeting*

Dear Commission Members and Counsel,

We are in receipt of the memo dated April 17, 2012 from John St. Croix regarding recommendations on how to proceed with hearings on the charges of official misconduct against Sheriff Ross Mirkarimi. We raise the following points for consideration at today's meeting. Please note our objection to the Commission doing anything other than terminating these proceedings, as the removal proceedings set forth in San Francisco Charter section 15.105(a) and (e) are unconstitutionally vague, and do not accord Sheriff Mirkarimi the process he is due under the law. Moreover, the flagrant abuse of these Charter sections by Mayor Lee is an attempt to thwart the will of the electorate.

In recognition of the political reality that the Commission will nonetheless likely proceed with this process, we make the following points.

Standard of Proof and Requirement of Unanimity

To best address the Charter's glaring lack of any rules or procedure for removal proceedings such as this, Sheriff Mirkarimi suggests that the only way to preserve a semblance of fairness would be to adopt the strict protections for officials accused of misconduct under the California Government Code. Under GC §§ 3060-75, trial of an accusation of misconduct against an official is governed by the same rules governing a trial of criminal charges brought by grand jury indictment.

Accordingly, before it may recommend that the Board of Supervisors vote to remove Sheriff Mirkarimi, the Commission should have to be convinced beyond a reasonable doubt that Sheriff

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Mirkarimi committed official misconduct, and all five members of the Commission should have to agree and vote to make such a recommendation.

Notice, Discovery, and Compulsory Process rights

Sheriff Mirkarimi cannot prepare to defend against these charges without knowing exactly which charges, witnesses, and what physical evidence, will be used by Mayor Lee. Accordingly, it is of paramount importance that the Mayor disclose this information at the earliest time possible.

The Written Charges of Official Misconduct also make two separate and distinct sets of charges: one version of the charges do not require any nexus to the office while the other version does. This lack of clarity and admission that Charter § 15.105(e) is vague and unclear is one of the many reasons why the Ethics Commission should stop this process. Sheriff Mirkarimi could not possibly have been on notice as to what might constitute official misconduct if the Mayor himself did not know. At this point, both the Mayor, through the charging instrument (3:9-13), and Director St. Croix¹ have admitted that Charter is vague. Accordingly, the Commission should dismiss the entire proceedings. Failing that, the Commission must decide what, exactly, 15.105(e) means.

Depending on what evidence will be offered against him, Sheriff Mirkarimi may need to take discovery and issue subpoenas. As set forth below, Sheriff Mirkarimi is currently at a serious disadvantage as the City Attorney has commenced a “City Attorney investigation” into claimed allegations that Sheriff Mirkarimi has violated certain provisions of the San Francisco Campaign and Governmental Conduct Code (please see attached correspondence; letters dated April 16, 18 and 20, 2012, between Deputy City Attorney Peter J. Keith and David P. Waggoner). We strongly suspect that this “investigation” is a subterfuge to allow the City Attorney to obtain discovery for use in this proceeding, which he might otherwise be unable to obtain. Sheriff Mirkarimi has no ability at present to conduct any discovery or subpoena witnesses or documents.

Advisory Opinion Needed On Sheriff Mirkarimi’s Duty To Comply With City Attorney “Investigation”

As mentioned above, the City Attorney has commenced an “investigation” into whether Sheriff Mirkarimi has violated provisions of the San Francisco Campaign and Governmental Conduct Code. (hereafter “SFC&GCC”). Under Charter Appendix section C3.699-13, “[a]ny person may request the commission to issue a written opinion with respect to that person's duties under provisions of this charter or any ordinance relating to campaign finance, conflicts of interest,

¹ (“‘Because the charter is vague, the interpretation is a little on the broad side,’ said St. Croix,” *City Enters Uncharted Territory in Mirkarimi Case*, by Matt Smith, The Bay Citizen, March 21, 2012)

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lobbying or governmental ethics.” Sheriff Mirkarimi hereby requests that the Commission issue a written opinion into whether he must comply with the City Attorney’s requested cooperation. Furthermore, Sheriff Mirkarimi requests that because the City Attorney has recused himself from advising the Ethics Commission in connection with removal proceedings against Sheriff Mirkarimi, the City Attorney play no role in advising the Commission on this request for written opinion.

In order to assist the Commission in this request, we offer the following analysis of the relevant charter and code sections.

San Francisco City Charter § 6.102.9 grants the City Attorney authority to investigate claims for money or damages, or incidents where the City faces potential civil liability. However, there is nothing in the City Charter authorizing the City Attorney to investigate alleged violations of the SFC&GCC. While SFC&GCC Code § 3.240 references a possible City Attorney investigation as to “an alleged violation of this chapter,” City Charter § C3.699-13 provides: “The commission shall conduct investigations in accordance with this subdivision of alleged violations of this charter and City ordinances relating to campaign finance, lobbying, conflicts of interest and governmental ethics.”

Thus, the City Charter seems to clearly mandate that the Ethics Commission has sole authority to conduct investigations as to alleged violations of the SFG&GCC. The Charter is the highest law of the City. Rather than act as investigator, the Charter mandates that the City Attorney shall be the legal advisor to the Ethics Commission, pursuant to City Charter § 15.102.

Here, the City Attorney recused itself as the legal advisor to the Ethics Commission, and has appointed outside counsel to represent the Commission. Accordingly, the City Attorney should properly have no further role in these proceedings as either advisor to the Commission or investigator of any alleged violations. The proper investigating authority is the San Francisco Ethics Commission, along with its chosen outside counsel.

Sincerely,

/s/ *David P. Waggoner*

David P. Waggoner

/s/ *Shepard S. Kopp*

Shepard S. Kopp

Attorneys for Sheriff Ross Mirkarimi

CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

PETER J. KEITH
Deputy City Attorney

DIRECT DIAL: (415) 554-3908
E-MAIL: peter.keith@sfgov.org

April 16, 2012

David P. Waggoner, Esq.
1777 Haight Street
San Francisco CA 94117

By E-Mail and U.S. Mail

Re: Investigation of Sheriff Ross Mirkarimi

Dear Mr. Waggoner:

Under the authority of section 3.240 of the San Francisco Campaign and Governmental Conduct Code, a copy of which is attached, the City Attorney hereby requests Sheriff Ross Mirkarimi's cooperation and assistance with the City Attorney's investigation into alleged violations of Chapter 2 of article III of the San Francisco Campaign & Governmental Conduct Code.

Sheriff Mirkarimi is advised that he has a duty to cooperate and assist with the City Attorney's investigation. Section 3.240(b) of the San Francisco Campaign and Governmental Conduct Code provides: "Duty to Cooperate and Assist. The Ethics Commission, District Attorney or City Attorney may request and shall receive from every City officer and employee cooperation and assistance with an investigation into an alleged violation of this Chapter." If Sheriff Mirkarimi does not provide the requested cooperation and assistance in this investigation, he may be subject to further proceedings under the Campaign & Governmental Conduct Code and/or the San Francisco Charter, which could lead to removal from office as well as other penalties.

Sheriff Mirkarimi is the subject of this investigation. The investigation concerns:

1. Whether Sheriff Mirkarimi violated section 3.210(a) of the San Francisco Campaign & Governmental Conduct Code by "attempt[ing] to influence a governmental decision involving his or her own character or conduct," namely by attempting to dissuade witnesses to the events on and around December 31, 2011 and influence their statements to authorities during a law enforcement investigation.
2. Whether Sheriff Mirkarimi violated section 3.218(a) of the San Francisco Campaign & Governmental Conduct Code by "engag[ing] in any employment, activity, or enterprise that the department, board, commission, or agency of which he or she is a member or employee has identified as incompatible in a statement of incompatible activities adopted under this Section," namely a three-year sentence of probation to run concurrently with his four-year term as Sheriff. A copy of the Sheriff's Department Statement of Incompatible Activities is attached.
3. Whether Sheriff Mirkarimi violated section 3.240(b) of the San Francisco Campaign & Governmental Conduct Code by violating his duty to provide "cooperation and assistance with an investigation into an alleged violation of this Chapter," namely by encouraging other witnesses not to cooperate with the City Attorney's investigation of the above violations and by aiding their efforts not to cooperate with this investigation.

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The City Attorney requests the following cooperation and assistance:

INVESTIGATIVE INTERVIEW. The City Attorney requests that Sheriff Mirkarimi appear for an investigative interview at the San Francisco City Attorney's Office, 1390 Market Street, 7th floor, at 11am on Monday April 23, 2012. The interview will be conducted by George Cothran, Chief of Investigations, and Jeff Cretan, Investigator, and it will be audio-recorded. Sheriff Mirkarimi has the right to bring a representative to this interview.

Sheriff Mirkarimi's statements and information or evidence gained by reason of his statements cannot be used against him in a criminal proceeding; however, they can be used in other proceedings, including administrative proceedings related to Sheriff Mirkarimi's removal from office. If Sheriff Mirkarimi refuses to answer questions relating to the investigation described in this notice, he will be subject to further charges that could lead to his removal from office.

DOCUMENTS. The City Attorney requests that Sheriff Mirkarimi deliver for inspection and copying the following original documents to the San Francisco City Attorney's Office, 1390 Market Street, 7th floor, c/o Chief of Investigations George Cothran, no later than noon on Thursday April 19, 2012:

1. All documents received by Sheriff Mirkarimi or his attorneys from the District Attorney or the San Francisco Police Department in the recent criminal proceedings against Sheriff Mirkarimi.
2. All documents that Sheriff Mirkarimi or his attorneys provided to the District Attorney or the San Francisco Police Department in the recent criminal proceedings against Sheriff Mirkarimi.
3. Other than attorney's writings or Sheriff Mirkarimi's confidential communications with his attorneys, all text messages and emails sent or received by Sheriff Mirkarimi between 12:01am on December 31, 2011 and 11:59pm on January 13, 2011. These should be provided as print-outs in chronological order.
4. Other than attorney's writings or Sheriff Mirkarimi's confidential communications with his attorneys, all documents that reference or discuss Sheriff Mirkarimi's actions or communications that occurred between 12:01am on December 31, 2011 and 11:59pm on January 13, 2011.
5. All documents that Sheriff Mirkarimi considers relevant to the subject matter of this investigation.

To the extent that Sheriff Mirkarimi does not have any of the above documents in his personal possession, he is requested to obtain them from his attorneys, assistants, or agents, and take any other necessary action so that he can provide these documents at the time and place noted above. If Sheriff Mirkarimi once had, but no longer has, any of the documents listed above, he is requested to provide a list of all such documents and an account in writing of why, how, and when he disposed of each document, and if it was given to another, the name of the person.

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We look forward to Sheriff Mirkarimi's cooperation and assistance with the City Attorney's investigation, consistent with his duty as an elected official of the City and County of San Francisco.

Very truly yours,

DENNIS J. HERRERA
City Attorney

A handwritten signature in black ink, appearing to read 'P. Keith', is written over the printed name of Peter J. Keith.

PETER J. KEITH
Deputy City Attorney

encl.

cc (w/encl., email only): Shepard Kopp, Esq.

Letter to David P. Waggoner, Esq.
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Attachment

**SAN FRANCISCO CAMPAIGN & GOVERNMENTAL CONDUCT
CODE**

SEC. 3.210. VOTING ON OWN CHARACTER OR CONDUCT.

(a) Prohibition. No officer or employee of the City and County shall knowingly vote on or attempt to influence a governmental decision involving his or her own character or conduct, or his or her appointment to any office, position, or employment.

...

SEC. 3.218. INCOMPATIBLE ACTIVITIES.

(a) Prohibition. No officer or employee of the City and County may engage in any employment, activity, or enterprise that the department, board, commission, or agency of which he or she is a member or employee has identified as incompatible in a statement of incompatible activities adopted under this Section. No officer or employee may be subject to discipline or penalties under this Section unless he or she has been provided an opportunity to demonstrate that his or her activity is not in fact inconsistent, incompatible or in conflict with the duties of the officer or employee.

...

**SEC. 3.240. PROVISION OF FALSE OR MISLEADING
INFORMATION; WITHHOLDING OF INFORMATION; AND DUTY
TO COOPERATE AND ASSIST.**

(a) Prohibition. No person shall knowingly and intentionally furnish false or fraudulent evidence, documents, or information to the Ethics Commission, District Attorney or City Attorney, or knowingly and intentionally misrepresent any material fact, or conceal any evidence, documents, or information relevant to an investigation by the Ethics Commission, District Attorney or City Attorney of an alleged violation of this Chapter.

(b) Duty to Cooperate and Assist. The Ethics Commission, District Attorney or City Attorney may request and shall receive from every City officer and employee cooperation and assistance with an investigation into an alleged violation of this Chapter.



San Francisco Sheriff's Department

INTER-OFFICE CORRESPONDENCE

October 7, 2008

Reference: US 08-157

TO: All Personnel

FROM: Undersheriff Jan Dempsey

A handwritten signature in cursive script, appearing to read "Jan Dempsey", written over the printed name.

RE: Statement of Incompatible Activities

Attached is the Sheriff's Department Statement of Incompatible Activities.

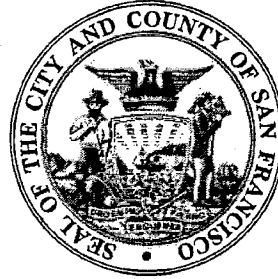
This Statement is adopted under the provisions of San Francisco Campaign and Governmental Conduct Code section 3.218. The Statement of Incompatible Activities is intended to guide officers and employees about the kinds of activities that are incompatible with their public duties and therefore prohibited.

All employees are required to follow all requirements of the Statement of Incompatible Activities.

Any specific questions should be submitted to me in writing.

City and County of San Francisco

OFFICE OF THE SHERIFF



Michael Hennessey
SHERIFF

(415) 554-7225

SAN FRANCISCO SHERIFF'S DEPARTMENT STATEMENT OF INCOMPATIBLE ACTIVITIES

I. INTRODUCTION

This Statement of Incompatible Activities is intended to guide officers and employees of the San Francisco Sheriff's Department ("Department") about the kinds of activities that are incompatible with their public duties and therefore prohibited. For the purposes of this Statement, and except where otherwise provided, "officer" shall mean the Sheriff, and "employee" shall mean all employees of the Department.

This Statement is adopted under the provisions of San Francisco Campaign & Governmental Conduct Code ("C&GC Code") section 3.218. Engaging in the activities that are prohibited by this Statement may subject an officer or employee to discipline, up to and including possible termination of employment or removal from office, as well as to monetary fines and penalties. (C&GC Code § 3.242; Charter § 15.105.) Before an officer or employee is subjected to discipline or penalties for violation of this Statement, the officer or employee will have an opportunity to explain why the activity should not be deemed to be incompatible with his or her City duties. (C&GC Code § 3.218.) Nothing in this document shall modify or reduce any due process rights provided pursuant to the officer or employee's collective bargaining agreement.

In addition to this Statement, employees and officers are subject to Department policies and State and local laws and rules governing the conduct of public employees and officers, including but not limited to:

- The Political Reform Act, California Government Code § 87100 *et seq.*;
- California Government Code § 1090;
- The San Francisco Charter;
- San Francisco Campaign and Governmental Conduct Code;
- San Francisco Sunshine Ordinance; and
- Applicable Civil Service Rules.

Nothing in this Statement shall exempt any officer or employee from applicable provisions of law, or limit his or her liability for violations of law. Examples provided in this Statement are for illustration purposes only, and are not intended to limit application of this Statement. Nothing in this Statement shall interfere with the rights of employees under a collective bargaining agreement or Memorandum of Understanding applicable to that employee.

Nothing in this Statement shall be construed to prohibit or discourage any City officer or employee from bringing to the City's and/or public's attention matters of actual or perceived malfeasance or misappropriation in the conduct of City business, or from filing a complaint alleging that a City officer or employee has engaged in improper governmental activity by violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws; regulations or rules; violating the California Penal Code by misusing City resources; creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's City position; or abusing his or her City position to advance a private interest.

No amendment to any statement of incompatible activities shall become operative until the City and County has satisfied the meet and confer requirements of State law and the collective bargaining agreement.

If an employee has questions about this Statement, the questions should be directed to the employee's supervisor or to the Sheriff. Similarly, questions about other applicable laws governing the conduct of public employees should be directed to the employee's supervisor or the Sheriff, although the supervisor or Sheriff may determine that the question must be addressed to the Ethics Commission or City Attorney. Employees may also contact their unions for advice or information about their rights and responsibilities under these and other laws.

If the Sheriff has questions about this Statement, the questions should be directed to the Ethics Commission or the City Attorney.

II. MISSION OF THE SHERIFF'S DEPARTMENT

The mission of the Sheriff's Department is as follows:

- *Keep the county jail;*
- *Receive all prisoners committed to jail by competent authorities;*
- *Execute the orders and legal processes issued by courts of the State of California;*
- *Upon court order detail necessary bailiffs; and*
- *Execute the orders and legal processes issued by the Board of Supervisors or by any legally authorized department or commission.*

(Charter § 6.105.)

III. RESTRICTIONS ON INCOMPATIBLE ACTIVITIES

This section prohibits outside activities, including self-employment, that are incompatible with the mission of the Department. Under subsection C, an officer or employee may seek an advance written determination whether a proposed outside activity that is not expressly prohibited by subsections A or B of this section is incompatible and therefore prohibited by this Statement. Outside activities other than those expressly identified here may be determined to be incompatible and therefore prohibited. For an advance written determination request from an employee, if the Sheriff delegates the decision-making to a designee and if the designee determines that the proposed activity is incompatible under this Statement, the employee may appeal that determination to the Sheriff.

A. RESTRICTIONS THAT APPLY TO ALL OFFICERS AND EMPLOYEES

1. ACTIVITIES THAT CONFLICT WITH OFFICIAL DUTIES.

No officer or employee may engage in an outside activity (regardless of whether the activity is compensated) that conflicts with his or her City duties. An outside activity conflicts with City duties when the ability of the officer or employee to perform the duties of his or her City position is materially impaired. Outside activities that materially impair the ability of an officer or employee to perform his or her City duties include, but are not limited to, activities that disqualify the officer or employee from City assignments or responsibilities on a regular basis. Unless (a) otherwise noted in this section or (b) an advance written determination under subsection C concludes that such activities are not incompatible, the following activities are expressly prohibited by this section.

- a. No employee of the Department shall serve on the Board of Directors or as an employee of a non-profit entity that receives funding from the Department.*
- b. No officer or employee, or legal entity in which the officer or employee has a legal or beneficial ownership interest of 10 percent or more, may apply for or enter into any contract or subcontract with the Department.*

2. ACTIVITIES WITH EXCESSIVE TIME DEMANDS.

Neither an officer nor an employee may engage in outside activity (regardless of whether the activity is compensated) that would cause the officer or employee to be absent from his or her assignments on a regular basis, or otherwise require a time commitment that is demonstrated to interfere with the officer's or employee's performance of his or her City duties.

Example. An employee who works at the Department's front desk answering questions from the public wants to take time off every Tuesday and Thursday from 2:00 to 5:00 to coach soccer. Because the employee's duties require the employee to be at the Department's front desk during regular business hours, and because this outside activity would require the employee to be absent from the office during regular business hours on a regular basis, the director or his/her designee may, pursuant to subsection C, determine that the employee may not engage in this activity.

3. ACTIVITIES THAT ARE SUBJECT TO REVIEW BY THE DEPARTMENT

Unless (a) otherwise noted in this section or (b) an advance written determination under subsection C concludes that such activities are not incompatible, no officer or employee may engage in an outside activity (regardless of whether the activity is compensated) that is subject to the control, inspection, review, audit or enforcement of the Department. In addition to any activity permitted pursuant to subsection C, nothing in this subsection prohibits the following activities: appearing before one's own department on behalf of oneself; filing or otherwise pursuing claims against the City on one's own behalf; running for City elective office; or making a public records disclosure request pursuant to the Sunshine Ordinance or Public Records Act.

Unless (a) otherwise noted in this section or (b) an advance written determination under subsection C concludes that such activities are not incompatible, the following activities are expressly prohibited by this section:

Assistance in Responding to City Bids, RFQs, and RFPs. No officer or employee may knowingly provide selective assistance (i.e., assistance that is not generally available to all competitors) to individuals or entities in a manner that confers a competitive advantage on a bidder or proposer who is competing for a City contract. Nothing in this Statement prohibits an officer or employee from providing general information about a bid for a City contract, a Department Request for Qualifications or Request for Proposals or corresponding application process that is available to any member of the public. Nothing in this Statement prohibits an officer or employee from speaking to or meeting with individual applicants regarding the individual's application, provided that such assistance is provided on an impartial basis to all applicants who request it.

B. RESTRICTIONS THAT APPLY TO EMPLOYEES IN SPECIFIED POSITIONS

In addition to the restrictions that apply to all officers and employees of the Department, and except as provided in subsection C of this section, the following activities are incompatible for individual employees holding specific positions.

[RESERVED.]

C. ADVANCE WRITTEN DETERMINATION

As set forth below, an employee of the Department or the Sheriff may seek an advance written determination whether a proposed outside activity that is not expressly prohibited by subsections A or B of this section, if any, conflicts with the mission of the Department, imposes excessive time demands, is subject to review by the Department, or is otherwise incompatible and therefore prohibited by section III of this Statement. For the purposes of this section, an employee or other person seeking an advance written determination shall be called "the requestor"; the individual or entity that provides an advance written determination shall be called "the decision-maker".

1. PURPOSE

This subsection permits an officer or employee to seek an advance written determination regarding his or her obligations under subsections A or B of this section. A written determination by the decision-maker that an activity is not incompatible under subsection A or B provides the requestor immunity from any subsequent enforcement action for a violation of this Statement if the material facts are as presented in the requestor's written submission. A written determination cannot exempt the requestor from any applicable law or authorize the requestor to engage in an activity expressly prohibited by this Statement. If an individual has not requested an advance written determination under subsection C as to whether an activity is incompatible with this Statement, and the individual engages in that activity, the individual will not be immune from any subsequent enforcement action brought pursuant to this Statement. Similarly, if an individual has requested an advance written determination under subsection C as to whether

an activity is incompatible with this Statement, and the individual engages in that activity, the individual will not be immune from any subsequent enforcement action brought pursuant to this Statement if: (a) the requestor is an employee who has not received a determination under subsection C from the decision-maker, and 20 working days have not yet elapsed since the request was made; or (b) the requestor is an officer who has not received a determination under subsection C from the decision-maker; or (c) the requestor has received a determination under subsection C that an activity is incompatible.

In addition to the advance written determination process set forth below, the San Francisco Charter also permits any person to seek a written opinion from the Ethics Commission with respect to that person's duties under provisions of the Charter or any City ordinance relating to conflicts of interest and governmental ethics. Any person who acts in good faith on an opinion issued by the Commission and concurred in by the City Attorney and District Attorney is immune from criminal or civil penalties for so acting, provided that the material facts are as stated in the opinion request. Nothing in this subsection precludes a person from requesting a written opinion from the Ethics Commission regarding that person's duties under this Statement.

2. THE DECISION-MAKER

Decision-maker for request by an employee: An employee of the Department may seek an advance written determination from the Sheriff or his or her designee. The Sheriff or his or her designee will be deemed the decision-maker for the employee's request.

Decision-maker for request by the Sheriff: The Sheriff may seek an advance written determination from the Ethics Commission. The Ethics Commission will be deemed the decision-maker for the Sheriff's request.

3. THE PROCESS

The requestor must provide, in writing, a description of the proposed activity and an explanation of why the activity is not incompatible under this Statement. The written material must describe the proposed activity in sufficient detail for the decision-maker to make a fully informed determination whether it is incompatible under this Statement.

When making a determination under this subsection, the decision-maker may consider any relevant factors including, but not limited to, the impact on the requestor's ability to perform his or her job, the impact upon the Department as a whole, compliance with applicable laws and rules and the spirit and intent of this Statement. The decision-maker shall consider all relevant written materials submitted by the requestor. The decision-maker shall also consider whether the written material provided by the requestor is sufficiently specific and detailed to enable the decision-maker to make a fully informed determination. The decision-maker may request additional information from the requestor if the decision-maker deems such information necessary. For an advance written determination request from an employee, if the director delegates the decision-making to a designee and if the designee determines that the proposed activity is incompatible under this Statement, the employee may appeal that determination to the director.

The decision-maker shall respond to the request by providing a written determination to the requestor by mail, email, personal delivery, or other reliable means. For a request by an employee, the decision-maker shall provide the determination within a reasonable period of time depending on the circumstances and the complexity of the request, but not later than 20 working days from the date of the request. If the decision-maker does not provide a written determination to the employee within 20 working days from the date of the employee's request, the decision-maker shall be deemed to have determined that the proposed activity does not violate this Statement.

The decision-maker may revoke the written determination at any time based on changed facts or circumstances or other good cause, by providing advance written notice to the requestor. The written notice shall specify the changed facts or circumstances or other good cause that warrants revocation of the advance written determination.

4. DETERMINATIONS ARE PUBLIC RECORDS

To assure that these rules are enforced equally, requests for advance written determinations and written determinations, including approvals and denials, are public records to the extent permitted by law.

IV. RESTRICTIONS ON USE OF CITY RESOURCES, CITY WORK-PRODUCT AND PRESTIGE

A. USE OF CITY RESOURCES

No officer or employee may use City resources, including, without limitation, facilities, telephone, computer, copier, fax machine, e-mail, internet access, stationery and supplies, for any non-City purpose, including any political activity or personal purpose. No officer or employee may allow any other person to use City resources, including, without limitation, facilities, telephone, computer, copier, fax machine, e-mail, internet access, stationery and supplies, for any non-City purpose, including any political activity or personal purpose. Notwithstanding these general prohibitions, any incidental and minimal use of City resources does not constitute a violation of this section. Nothing in this subsection shall be interpreted or applied to interfere with, restrict, or supersede any rights or entitlements of employees, recognized employee organizations, or their members under state law or regulation or pursuant to provisions of a collective bargaining agreement to use City facilities, equipment or resources, as defined herein.

Example. An officer or employee may use the telephone to make occasional calls to arrange medical appointments or speak with a childcare provider, because this is an incidental and minimal use of City resources for a personal purpose.

Nothing in this Statement shall exempt any officer or employee from complying with more restrictive policies of the Department regarding use of City resources, including, without limitation, the Department's e-mail policy.

B. USE OF CITY WORK-PRODUCT

No officer or employee may, in exchange for anything of value and without appropriate authorization, sell, publish or otherwise use any non-public materials that were prepared on City time or while using City facilities, property (including without limitation, intellectual property), equipment and/or materials. For the purpose of this prohibition, appropriate authorization includes authorization granted by law, including the Sunshine Ordinance, California Public Records Act, the Ralph M. Brown Act as well as whistleblower and improper government activities provisions, or by a supervisor of the officer or employee, including but not limited to the officer or employee's appointing authority. Nothing in this subsection shall be interpreted or applied to interfere with, restrict or supersede any rights or entitlements of employees, recognized employee organizations, or their members under state law or regulation or pursuant to provisions of a collective bargaining agreement to use public materials for collective bargaining agreement negotiations.

C. USE OF PRESTIGE OF THE OFFICE

No officer or employee may use his or her City title or designation in any communication for any private gain or advantage. The following activities are expressly prohibited by this section.

1. USING CITY BUSINESS CARDS

No officer or employee may use his or her City business cards for any purpose that may lead the recipient of the card to think that the officer or employee is acting in an official capacity when the officer or employee is not.

Example of inappropriate use. An employee's friend is having a dispute with his new neighbor who is constructing a fence that the friend believes encroaches on his property. The friend invites the employee over to view the disputed fence. When the neighbor introduces herself, the employee should not hand the neighbor her business card while suggesting that she could help resolve the dispute. Use of a City business card under these circumstances might lead a member of the public to believe that the employee was acting in an official capacity.

Example of acceptable use. An employee is at a party and runs into an old friend who has just moved to town. The friend suggests meeting for dinner and asks how to get in touch with the employee to set up a meeting time. The employee hands the friend the employee's business card and says that he can be reached at the number on the card. Use of a City business card under these circumstances would not lead a member of the public to believe that the employee was acting in an official capacity. Nor would use of the telephone to set up a meeting time constitute a misuse of resources under subsection A, above.

2. USING CITY LETTERHEAD, CITY TITLE, OR E-MAIL

No officer or employee may use City letterhead, City title, City e-mail, or any other City resource, for any communication that may lead the recipient of the communication to think that the officer or employee is acting in an official capacity when the officer or employee is not. (Use of e-mail or letterhead in violation of this section could also violate subsection A of this section, which prohibits use of these resources for any non-City purpose.)

Example. An officer or employee is contesting a parking ticket. The officer or employee should not send a letter on City letterhead to the office that issued the ticket contesting the legal basis for the ticket.

3. HOLDING ONESELF OUT, WITHOUT AUTHORIZATION, AS A REPRESENTATIVE OF THE DEPARTMENT

No officer or employee may hold himself or herself out as a representative of the Department, or as an agent acting on behalf of the Department, unless authorized to do so.

Example. An employee who lives in San Francisco wants to attend a public meeting of a Commission that is considering a land use matter that will affect the employee's neighborhood. The employee may attend the meeting and speak during public comment, but should make clear that he is speaking in his private capacity and not as a representative of the Department.

V. PROHIBITION ON GIFTS FOR ASSISTANCE WITH CITY SERVICES

State and local law place monetary limits on the value of gifts an officer or employee may accept in a calendar year. (Political Reform Act, Gov't Code § 89503, C&GC Code §§ 3.1-101 and 3.216). This section imposes additional limits by prohibiting an officer or employee from accepting any gift that is given in exchange for doing the officer or employee's City job.

No officer or employee may receive or accept gifts from anyone other than the City for the performance of a specific service or act the officer or employee would be expected to render or perform in the regular course of his or her City duties; or for advice about the processes of the City directly related to the employee's or officer's duties and responsibilities, or the processes of the entity they serve.

Example. A member of the public who regularly works with and receives assistance from the Department owns season tickets to the Giants and sends a pair of tickets to an employee of the Department in appreciation for the employee's work. Because the gift is given for the performance of a service the employee is expected to perform in the regular course of City duties, the employee is not permitted to accept the tickets.

Example. A member of the public requests assistance in resolving an issue or complaint that is related to the City and County of San Francisco, but that does

not directly involve the Department. The employee directs the member of the public to the appropriate department and officer to resolve the matter. The member of the public offers the employee a gift in appreciation for this assistance. The employee may not accept the gift, or anything of value from anyone other than the City, for providing this kind of assistance with City services.

As used in this statement, the term gift has the same meaning as under the Political Reform Act, including the Act's exceptions to the gift limit. (See Gov't Code §§ 82028, 89503; 2 Cal. Code Regs. §§ 18940-18950.4.) For example, under the Act, a gift that, within 30 days of receipt, is returned, or donated by the officer or employee to a 501(c)(3) organization or federal, state or local government without the officer or employee taking a tax deduction for the donation, will not be deemed to have been accepted. In addition to the exceptions contained in the Act, nothing in this Statement shall preclude an employee's receipt of a bona fide award, or free admission to a testimonial dinner or similar event, to recognize exceptional service by that employee, and which is not provided in return for the rendering of service in a particular matter. Such awards are subject to the limitation on gifts imposed by the Political Reform Act and local law.

In addition, the following gifts are de minimis and therefore exempt from the restrictions on gifts imposed by section V of this Statement:

- i. Gifts, other than cash, with an aggregate value of \$25 or less per occasion; and
- ii. Gifts such as food and drink, without regard to value, to be shared in the office among employees or officers.

Example. A member of the public who regularly works with and receives assistance from the Department sends a \$15 basket of fruit to an employee as a holiday gift. Although the fruit may in fact be offered in exchange for performing services that the employee is expected to perform in the regular course of City duties, the employee may accept the fruit because the value is de minimis. (Because the reporting requirement is cumulative, an employee may be required to report even de minimis gifts on his or her Statement of Economic Interests if, over the course of a year, the gifts equal or exceed \$50.)

Example. A member of the public who regularly works with and receives assistance from the Department sends a \$150 basket of fruit to the Department as a holiday gift. Although the fruit may in fact be offered in exchange for performing services that the Department is expected to perform in the regular course of City duties, the Department may accept the fruit basket because it is a gift to the office to be shared among employees and officers.

VI. AMENDMENT OF STATEMENT

Once a Statement of Incompatible Activities is approved by the Ethics Commission, the Department may, subject to the approval of the Ethics Commission, amend the Statement. C&GC Code § 3.218(b). In addition, the Ethics Commission may at any time amend the Statement on its own initiative. No statement of incompatible activities or any amendment thereto shall become operative until the City and County of San Francisco has satisfied the meet and confer requirements of State law and the collective bargaining agreement.

REQUEST FOR ADVANCE WRITTEN DETERMINATION

Under section 3.218 of the San Francisco Campaign and Governmental Conduct Code, each Department, Board, or Commission has adopted a Statement of Incompatible Activities ("SIA") that lists those outside activities that are inconsistent or incompatible with the duties of the officers and employees of the Department, Board, or Commission. Section III.C of the SIA permits an officer or employee to seek an Advance Written Determination whether a proposed outside activity is prohibited because it is inconsistent or otherwise in conflict with the officer's or employee's duties. A written Determination by the Decision-Maker that an activity is not incompatible with the SIA provides the Requestor immunity from any subsequent enforcement action for a violation of the SIA, if the material facts are as presented in the Requestor's written submission. A written Determination does not provide immunity from any other laws that prohibit the proposed activity. An officer or employee may also seek a written opinion from the Ethics Commission to determine whether the person's proposed activities violate the SIA or any other local law relating to conflicts of interest and governmental ethics.

To obtain a written Determination, please fill out Sections A-E legibly and completely, and submit this form to the Decision-Maker identified in Section C. Please note that the Decision-Maker may require you to provide additional information in order to make a Determination. At any time, the Decision-Maker may revoke the Determination, by providing written notice to you specifying the changed facts, circumstances or other good cause that warrants the revocation.

A. I am a:

- ☐ City employee (Submit completed form to your Department head or his or her designee, or as directed in your SIA.)
- ☐ Department head (Submit completed form to your appointing officer.)
- ☐ Appointed member of a City board or commission (Submit completed form to your appointing officer, your Board or Commission, or the Ethics Commission, as directed in section III.C of the SIA. If the form is to be submitted to the Ethics Commission, please send the completed form to the Ethics Commission office at 25 Van Ness Avenue, Suite 220, San Francisco, CA 94102 or by faxing it to (415) 252-3112.)
- ☐ Elected official (Submit completed form to the Ethics Commission.)

B. Requestor Information (Please Print Clearly)

Name (Last, First) _____

Title _____

Office Phone _____

Email _____

Name of Department, Board, or Commission _____

Office Address _____

Zip Code _____

C. Decision-Maker Information (Please Print Clearly)

Name (Last, First) _____

Title _____

Office Phone _____

Email _____

Name of Department, Board, or Commission _____

Office Address _____

Zip Code _____

Decision-Maker is (check applicable):

☐ Department head

☐ Department head's designee

☐ Board or Commission

☐ Appointing officer

☐ Ethics Commission

S:\Conflicts of Interest\Incompatibility Statements\Unisc Advance Written Determination\Request for Advance Written Determination Form 08.14.08.doc

Please turn page over.

The Requester and Decision-Maker should retain a copy of this document for their records.

ADVANCE WRITTEN DETERMINATION – Page 2

The Written Request

Provide a description of the proposed activity and an explanation of why the activity is not incompatible under the SIA of your Department, Board, or Commission SIA. Describe the proposed activity in sufficient detail for the Decision-Maker to make a fully informed determination. If necessary, the Decision-Maker may require additional information from you. Attach additional documents as appropriate.

For Department Use Only—Date Written Request Received

D. Description of Proposed Activity:

E. Verification

☐ I certify under penalty of perjury that the information provided on this request for Advance Written Determination is true, complete, and correct. I understand that if the Decision-Maker determines that the proposed activity is incompatible, I will not be immune from prosecution from any subsequent enforcement action brought for a violation of the SIA. I further understand that if the Decision-Maker makes a determination that the proposed activity is not incompatible, the Decision-Maker may revoke that Determination at any time based on the changed facts, circumstances, or other good cause, by providing written notice to me.

Name of Requestor (Last, First)

Signature

Date Request Submitted

F. Written Determination by the Decision-Maker

Based on the information submitted, I, the undersigned, find that the proposed activity:

- ☐ is incompatible with the SIA of the Department, Board, or Commission.
☐ is not incompatible with the SIA of the Department, Board, or Commission.

Print Name of the Decision-Maker (Last, First)

Department, Board, or Commission

Signature

Date

G. Comments:

For Department Use Only—Date Notice provided to Requestor

The Requester and Decision-Maker should retain a copy of this document for their records.

REVOCATION OF DETERMINATION

For Department Use Only — Date Written
notice provided to Requestor

To: _____
Name of the Requestor (Last, First)
_____ Date Advance Determination Issued or Effective

Under section 3.218 of the San Francisco Campaign and Governmental Campaign Code, each Department, Board, or Commission has adopted a Statement of Incompatible Activities ("SIA") that lists those outside activities that are inconsistent or incompatible with the duties of the officers and employees of the Department, Board, or Commission. Under Section III.C of the SIA, you requested an Advance Written Determination whether a proposed outside activity is prohibited under the SIA. Since your request, one of the following occurred:

- (1) On _____, an Advance Written Determination was issued, finding that the proposed activity in your request was not incompatible; or
- (2) 20 days had passed and you had not received a written Determination. Thus, the proposed activity in your request was determined not incompatible.

However, for the reasons set forth below, I am now revoking that Determination. Henceforth, if you engage in the activities described in your request, you will not be immune from any enforcement action that may be brought against you for a violation of the SIA.

Reasons for revoking the Determination:

_____	_____	_____
Name of the Decision-Maker (Last, First)	Title	Name of Department, Board, or Commission
_____	_____	_____
Office Address	Zip Code	Office Phone
_____	_____	Email
<input type="checkbox"/> Based on changed facts or circumstances, or other good cause, as set forth above, I hereby revoke the Determination issued or made on _____		
Signature	_____	Date

The Requester and Decision-Maker should retain a copy of this document for their records.

DAVID P. WAGGONER, ATTORNEY AT LAW

1777 Haight Street
San Francisco, CA 94117
(415) 305-7708
davidpwaggoner@gmail.com

By U.S. Mail and Electronic Mail

April 18, 2012

San Francisco City Attorney
Attn: Peter Keith and Sherri Kaiser
1390 Market Street, Suite 700
San Francisco, CA 94102-5408

Re: Investigation of Sheriff Ross Mirkarimi

Dear Mr. Keith,

We are in receipt of your letter regarding the City Attorney's investigation of our client regarding alleged violations of Chapter 2 of article III of the San Francisco Campaign & Governmental Conduct Code ("SFC&GCC"). Our client is committed to fully cooperating with any duly authorized investigation permitted by law.

However, the Ethics Commission has yet to promulgate any rules of discovery or evidence regarding this case. Given the unprecedented nature of the case, we are sure you will agree that all parties should proceed with utmost care for the integrity of the process. To that end, we are fully prepared to cooperate with the City Attorney, but think it prudent to allow the Ethics Commission to weigh in on process and discovery before taking any action in the absence of clear rules of procedure.

Finally, in your letter dated April 16, 2012, you demand the provision of five categories of documents by April 19, 2012, and that our client be interviewed on Monday, April 23, 2012. As you know, we are preparing for hearings set for April 19, 2012, April 20, 2012, and April 23, 2012. Accordingly, due to the time constraints and the extremely short timeframe you have provided, we are unable to comply with your request. We will revisit these issues once the Ethics Commission has weighed in on Monday, April 23, 2012.

Sincerely,



David P. Waggoner
Attorney for Ross Mirkarimi

cc: Shepard S. Kopp

CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

PETER J. KEITH
Deputy City Attorney

DIRECT DIAL: (415) 554-3908
E-MAIL: peter.keith@sfgov.org

April 18, 2012

David P. Waggoner, Esq.
1777 Haight Street
San Francisco CA 94117

By E-Mail and U.S. Mail

Re: Investigation of Sheriff Ross Mirkarimi

Dear Mr. Waggoner:

We received your letter of today's date stating that, despite Sheriff Mirkarimi's legal and ethical duty to cooperate and assist with the City Attorney's investigation under Section 3.240(b) of the San Francisco Campaign and Governmental Conduct Code, Sheriff Mirkarimi declines to supply documents tomorrow and appear for an investigative interview on Monday.

Your proffered reasons for Sheriff Mirkarimi's non-cooperation are improper. Sheriff Mirkarimi cannot properly refuse to cooperate and assist with the City Attorney's investigation on the basis of possible actions at the upcoming Ethics Commission hearing on Monday. Section 3.240(b) confers independent authority on the City Attorney to investigate violations of the Campaign & Governmental Conduct Code. Any additional provisions for disclosure or discovery that the Ethics Commission might adopt on Monday in regard to the official misconduct proceedings would be cumulative to the City Attorney's investigative authority – it would not displace it.

Your letter also states that "time constraints" make Sheriff Mirkarimi "unable to comply" with the City Attorney's requests. This is not credible. Just this morning, Sheriff Mirkarimi was able to find the time for an hour-long radio interview on KQED-FM (in which he again asserted that he is eager to tell his story but has been prevented from doing so by the City), and he has also gathered documentation effectively and in short order when it has served his interests in court. We note also that the Sheriff failed to propose an alternative date when he anticipates that he will have the time to cooperate, as one would expect if his need for an extension were genuine.

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Letter to David P. Waggoner, Esq.
Page 2
April 18, 2012

Sheriff Mirkarimi has a clear and present duty to cooperate and assist in this City Attorney investigation. This refusal and any future refusals may subject Sheriff Mirkarimi to disciplinary and/or enforcement proceedings under the Campaign & Governmental Conduct Code and supply a further basis for removal under Charter section 15.105. We urge Sheriff Mirkarimi to reconsider his refusal to cooperate immediately.

Very truly yours,

DENNIS J. HERRERA
City Attorney



PETER J. KEITH
Deputy City Attorney

cc (email only): Shepard Kopp, Esq.

DAVID P. WAGGONER, ATTORNEY AT LAW

1777 Haight Street
San Francisco, CA 94117
(415) 305-7708
davidpwaggoner@gmail.com

By Electronic Mail

April 20, 2012

San Francisco City Attorney
Attn: Peter Keith and Sherri Kaiser
1390 Market Street, Suite 700
San Francisco, CA 94102-5408

Re: Investigation of Sheriff Ross Mirkarimi

Dear Mr. Keith,

We are in receipt of your letter characterizing our response to your demand that we turn over five categories of documents within 72 hours and make our client available for an interview in less than a week – on the same day the Ethics Commission will consider proper procedures in this case – as improper and not credible.

We state again that we are NOT refusing to cooperate with your investigation. We have three hearings in less than one week, and your demand that we produce documents within 72 hours and make our client available on the same day as a hearing is unreasonable.

You have not given any reason as to why your demands can not wait until after the Ethics Commission hearing on April 23, 2012. We are cooperating with your investigation, as demonstrated by my responses to your demand letters. We will address your demands in greater detail after Monday.

Sincerely,

/s/ *David P. Waggoner*

David P. Waggoner
Attorney for Ross Mirkarimi

cc: Shepard S. Kopp

CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

PETER J. KEITH
Deputy City Attorney

DIRECT DIAL: (415) 554-3908
E-MAIL: peter.keith@sfgov.org

April 20, 2012

David P. Waggoner, Esq.
1777 Haight Street
San Francisco CA 94117

By E-Mail and U.S. Mail

Re: Investigation of Sheriff Ross Mirkarimi

Dear Mr. Waggoner:

We received your letter of today's date. The letter claims that Sheriff Mirkarimi is cooperating with the City Attorney's investigation under section 3.240(b) of the San Francisco Campaign and Governmental Conduct Code. But he is not. The City Attorney requested that Sheriff Mirkarimi provide certain documents and appear for an investigative interview. Sheriff Mirkarimi, however, has not provided the requested documents, and he has refused to appear for an investigative interview. Sheriff Mirkarimi is not providing the cooperation and assistance with this investigation that it is his duty to provide under section 3.240(b).

Sheriff Mirkarimi has delayed the City Attorney's investigation, and he continues to do so. Delay is not cooperation and assistance. We once again request that Sheriff Mirkarimi fulfill his duty to cooperate and assist with this investigation, by immediately committing in writing to (1) provide the requested documents by noon on Monday April 23, and (2) appear for an investigative interview on Friday April 27 at 2pm and answer all questions put to him truthfully and completely. And of course, Sheriff Mirkarimi must actually do these things.

We note that your letter was sent after the Court's rulings of yesterday and today in favor of the City and the Charter process. Those rulings must make clear to you that the City Attorney's investigation will move forward. We hope that Sheriff Mirkarimi will reconsider his refusal to cooperate and assist in this investigation in light of these rulings.

Sheriff Mirkarimi's ongoing refusal to cooperate and assist in this investigation, and any future refusals, may subject Sheriff Mirkarimi to disciplinary and/or enforcement proceedings under the Campaign & Governmental Conduct Code and supply a further basis for removal under Charter section 15.105.

Very truly yours,

DENNIS J. HERRERA
City Attorney

A handwritten signature in black ink, appearing to read "P. Keith", written over a horizontal line.

PETER J. KEITH
Deputy City Attorney

cc (email only): Shepard Kopp, Esq.