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## MEMORANDUM

TO: Members of the Ethics Commission of the City and County of San Francisco  
John St. Croix, Executive Director

FROM: Peter J. Keith, Deputy City Attorney  
Sherri Sokeland Kaiser, Deputy City Attorney  
Counsel for the Mayor

DATE: May 25, 2012

RE: Charges of Official Misconduct Against Sheriff Ross Mirkarimi  
Summary of Meet and Confer Efforts; Hearing Procedures & Scheduling

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We write to inform the Commission of the results of our meet and confer efforts with counsel for the Sheriff, following the parties' exchange of briefs and witness lists. We also write to offer our views on matters of procedure and scheduling, in light of the briefs and witness lists. We have also submitted a proposed order addressing these matters.

### Stipulated Facts

Counsel for the parties have met and conferred and exchanged drafts of stipulated facts. The parties are still exchanging drafts and have not yet reached agreement, but we expect to continue to work with counsel for the Sheriff to develop stipulated facts.

### Proposed Order Regarding Procedures And Schedule

The parties met and conferred regarding hearing procedures and scheduling matters. Counsel for the Sheriff indicated that they wished to wait for rulings from the Commission before reaching agreement on any matters related to hearing procedures and scheduling. The meet and confer efforts not having succeeded, the Mayor has submitted a proposed order that reflects the Mayor's proposals regarding hearing procedures and scheduling.

Paragraphs 1-5 of the proposed order reflect the Mayor's position on procedural matters that the parties have already briefed: discovery, burden of proof, standard of proof, voting requirements, and evidentiary rules.

Paragraphs 6-11 of the proposed order reflect the Mayor's position on additional procedural and scheduling matters, after consideration of the issues raised by the Commission on April 23, as well as the parties' briefs and witness lists. Those matters include: the use of witness declarations; trial briefs; subpoenas to compel attendance at hearing; exhibits; order of presentation at hearing; and hearing dates. Most of the statements in the proposed order are self-explanatory. To a large extent, the Mayor's proposed order borrows from the procedures contained in the Commission's existing regulations for enforcement proceedings. The proposed order also contains procedures to require or encourage the use of written declarations, subject to the opposing party's right to cross-examine.

We have left blanks in our proposed order with regard to specific dates. We have done so in light of the several factors involved in scheduling dates for the hearing on the merits. We discuss those next.

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**Scheduling Considerations**

In addition to the availability of the Commission and the availability of witnesses, we respectfully note the following additional considerations regarding scheduling:

1. **Board of Supervisors' Recess.** Under Charter section 15.105(a), the Board of Supervisors has 30 days from receipt of the full record of the Ethics Commission in which to vote whether to sustain the Charges. This 30-day limit for the Board to take action balances a desire for prompt Board action, against the time necessary for each member of the Board to fulfill his or her duty to make a decision "after reviewing the complete record." S.F. Charter § 15.105(a). We respectfully urge the Commission to consider the availability of the Board during the 30-day period mandated by the Charter. The Board is in recess from August 1 to August 31, 2012. It returns from recess on Tuesday September 4, 2012. Therefore, we respectfully urge the Commission to transmit its record and recommendation so that the 30-day period does not overlap with the Board's recess.

2. **Time for Discovery & Preparation of Fact Witness Declarations.** The Commission has not yet authorized mutual discovery in this action. The Mayor has proposed mutual discovery under the Administrative Procedure Act (APA), which governs discovery in Commission enforcement actions. The Sheriff's does not object to this proposal in his brief, and in fact complains that the Sheriff has not yet had a right to take discovery. (Sheriff Br. 4:20.)

The Mayor respectfully proposes that the Commission adopt a schedule that permits this mutual discovery to occur. The APA contemplates that discovery requests will be responded to within 30 days. A party can file a motion to compel if there is no response within 30 days, and if there is a refusal to provide documents, a motion to compel must be filed and served within 15 days of the refusal. Cal. Gov. Code § 11507.7. The motion to compel must be heard less than 15 days after filing, and the hearing officer must issue a ruling on the motion within 15 days after hearing. *Id.*

In order to move the proceedings along, the Mayor proposes that the parties' time to conduct this mutual discovery also be used to prepare the declarations of fact witnesses. The Mayor proposes that the parties' fact witness declarations be filed and served by July 20.

3. **Time for Preparation of Expert Witness Declarations & Trial Briefs.** The Mayor respectfully proposes that expert witness declarations be due after fact witness declarations and fact discovery, so that expert witnesses' testimony can be based on the facts obtained in discovery and included in fact witness declarations.

The Mayor respectfully proposes that the parties' expert witness declarations be filed and served by August 10. Based on Sheriff Mirkarimi's identifying one expert witness, the Mayor further proposes filing and serving the Mayor's trial brief simultaneously with expert witness declarations on August 10. Finally, the Mayor proposes that Sheriff Mirkarimi file and serve his responsive trial brief on August 17.

We thank the Commission for this opportunity to offer our views.