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9 ETHICS COMMISSION

10 CITY AND COUNTY OF SAN FRANCISCO

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12 In the Matter of Charges Against  
13 ROSS MIRKARIMI,  
14 Sheriff, City and County of San Francisco.

**MAYOR'S RESPONSE TO SHERIFF'S  
REQUEST FOR PROTECTIVE  
ORDER**  
[San Francisco Charter Section 15.105]

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18 There is no immediate need for the Ethics Commission to issue a protective order here,  
19 because the City Attorney and other city agencies are invoking an extension of time to respond to  
20 the pending Immediate Disclosure Requests for the video statement of Ms. Lopez, responses to  
21 which would otherwise be due by the close of business today. S.F. Admin. Code § 67.25(a). Under  
22 the Sunshine Ordinance, an agency is permitted to invoke an extension of time of up to 10 business  
23 days for the purposes of consulting with other interested department. S.F. Admin. Code § 67.25(b).  
24 The basis for our invocation of this extension of time is the Ethics Commission's request here, as  
25 well as the need for the San Francisco Police Department and the City Attorney's Office to consult.  
26 Moreover, we note that Ms. Lopez has indicated her intent to file a writ and immediate stay request  
27 today regarding the video, and disclosure of the video could interfere with the Court of Appeal's  
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1 ability to adjudicate her claims. Because there is no risk of immediate disclosure, there is no need  
2 for the Ethics Commission to issue a protective order.

3         Given the absence of any immediate need to intervene in the course of events, we  
4 respectfully urge the Ethics Commission to allow this matter to be decided by the courts for the  
5 following reasons:

6           1.         The precise issue whether a protective order should issue to protect Ms. Lopez’s  
7 privacy rights is currently being litigated in the courts, and the Sheriff and Ms. Lopez have received  
8 and will receive a full opportunity to be heard on this precise issue. In moving for an order from the  
9 Superior Court to release the video, the City gave notice to all parties to the underlying criminal  
10 proceeding (including the Sheriff, through both his criminal attorney Ms. Stiglich and his present  
11 attorney Mr. Waggoner) of a May 8 hearing. As of May 7, no one had filed any opposition, but Ms.  
12 Lopez filed a request for a continuance. The Court granted the request and continued the hearing to  
13 May 15. In the interim, Ms. Lopez filed an opposition. Ms. Lopez opposed release of the video,  
14 and requested a protective order on the basis of her privacy rights, to apply if the video was  
15 released. Sheriff Mirkarimi did not file anything. Instead, at the hearing, Sheriff Mirkarimi  
16 (through counsel) orally joined in Ms. Lopez’s opposition. After hearing, the Court granted San  
17 Francisco’s motion, denied the request for a protective order, and denied Ms. Lopez’s oral request  
18 for a stay. Ms. Canny stated that she intended to take a writ, and according to the report in the *San*  
19 *Francisco Chronicle*, she intends to file for that writ today. We presume that Ms. Lopez will also  
20 seek a stay pending decision on the writ.

21         The courts are well-equipped to assess claims of privacy rights regarding material obtained  
22 by a search warrant, later reviewed by the Superior Court for an evidentiary hearing, and  
23 subsequently discussed in the media. Ms. Lopez and the Sheriff have had and will have a full  
24 opportunity to be heard on this issue in a fully adequate forum.

25           2.         Given that this issue is currently before the courts, there is a serious concern of  
26 inconsistent rulings and extended litigation if the Ethics Commission decides to exercise  
27 jurisdiction. Here, the Sheriff and Ms. Lopez disagree with the Superior Court’s ruling on this  
28 issue. The proper remedy when one disagrees with a Superior Court ruling is to appeal to the Court

1 of Appeal (by way of a writ and stay request). The Court of Appeal unquestionably has jurisdiction  
2 to review orders of the Superior Court, with no concern about inconsistent rulings (because the  
3 Superior Court is bound to follow orders of a higher court). It is not proper for the Sheriff (or Ms.  
4 Lopez, through the Sheriff) to “appeal” to the Commission, or to seek a second bite at the apple, on  
5 an issue that has already been decided by a Superior Court exercising its jurisdiction under Penal  
6 Code section 1536 to make orders concerning items seized by a search warrant.<sup>1</sup> Conflicting  
7 rulings from the Ethics Commission and the courts would result in a stalemate and further  
8 protracted litigation on this issue. That would only delay a hearing on the merits of the official  
9 misconduct charges – a result contrary to the desire of the parties and the Commission for these  
10 proceedings to move forward.

11         3.         City agencies are duty bound to comply with San Francisco’s Sunshine Ordinance.  
12 Our office and the San Francisco Police Department have received more than one Immediate  
13 Disclosure Request for the video, including from the *San Francisco Chronicle*. Counsel for the  
14 *Chronicle* has already inquired whether legal action will be necessary to enforce the *Chronicle*’s  
15 request. The issues related to the Sunshine Ordinance are difficult, but the courts have jurisdiction  
16 to resolve how it applies here in light of the many interests at stake.

17         a.         There is a serious question whether – in light of the Superior Court’s ruling that Ms.  
18 Lopez’s privacy rights do not support issuance of a protective order – Ms. Lopez’s privacy rights  
19 can properly be asserted as a basis for City agencies refusing to disclose the video before the Ethics  
20 Commission hearing.

21         b.         As prosecutors of the official misconduct charges, our purpose in obtaining the video  
22 was and is to make it part of the record of these official misconduct proceedings. As prosecutors,  
23 we have no need to disclose this video or its contents except in relation to these proceedings, and we  
24 have no desire to create a “media circus” regarding this video. At the same time, as a City agency,  
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26         <sup>1</sup> Penal Code section 1536 provides: “All property or things taken on a warrant must be  
27 retained by the officer in his custody, subject to the order of the court to which he is required to  
28 return the proceedings before him, or of any other court in which the offense in respect to which the  
property or things taken is triable.”

1 we are also subject to the requirements of the Sunshine Ordinance and we take our duties very  
2 seriously. Nevertheless, under these circumstances, advocates for the media and the interested  
3 public might wish to intervene to ensure that there is vigorous advocacy on the issue of public  
4 disclosure, by parties whose sole and only interest is public disclosure. The courts are well-  
5 equipped to adopt a procedure for those parties to intervene and be heard on this issue, and to issue  
6 a definitive ruling that resolves the various interests.

7 c. Finally, we note the question whether the Ethics Commission has jurisdiction to  
8 issue decisions regarding duties under the Sunshine Ordinance. We express no opinion on this  
9 question. However, the existence of this important question is a good reason why, as a prudential  
10 matter, the Ethics Commission could properly decline to exercise jurisdiction.

11 For all of the foregoing reasons, we urge the Commission to decline to exercise jurisdiction  
12 and to abide by the final result in court.

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

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