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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: April 23, 2012

RE: Hearing On Charges of Official Misconduct Against Sheriff Ross Mirkarimi

We look forward to appearing before you this afternoon to discuss the procedures for the hearing on the official misconduct charges against Sheriff Mirkarimi. To facilitate that discussion, we offer a description of some of the points we intend to raise for your consideration.

1. An Evidentiary Hearing With Live Witness Testimony Will Be Necessary To Create A Full And Fair Record.

We recommend that the Commission adopt procedures structured in direct contemplation of an evidentiary hearing, not a possible trial on the papers. In light of recent developments, we believe that an evidentiary hearing will be the only vehicle capable of providing a full and fair basis for decision. Last week, Sheriff Mirkarimi for the first time offered his version of the events underlying the misconduct charges. His statements conflict with the accounts of other witnesses and will require the Commission to resolve credibility disputes with live testimony. Live testimony is also preferable to limiting direct witness testimony to written declarations, a procedure that will hinder the Commission's ability to consider all of the evidence. Several important witnesses to the events are not parties to the proceedings. These independent witnesses can be subpoenaed to testify, but they cannot be compelled to prepare declarations. The Commission would hear only from those witnesses willing to shoulder that additional burden.

We do not believe that the public trust would be well-served if witness testimony were to be limited in these ways. Also, a full evidentiary hearing with live testimony would better fulfill the Charter role of the Ethics Commission, which is to collect the evidence relevant to the determination whether official misconduct occurred, and then make a recommendation and transmit what the Charter calls the "complete record" and "full record" to the Board of Supervisors for its ultimate decision. S.F. Charter § 15.105(a).

We suggest that the parties be required to stipulate to any agreed-upon facts in advance of the hearing, but be left free to prove additional facts by witnesses and documents at a live hearing.

2. The Hearing Schedule Should Take Into Account Delays Caused By Hostile Witnesses And Sheriff Mirkarimi's Ongoing Refusal To Cooperate.

We also recommend that the hearing schedule build in adequate time to allow the Mayor to complete the legal processes necessary to secure material evidence from hostile witnesses—and from Sheriff Mirkarimi.

Memorandum

TO: Members of the Ethics Commission & Executive Director John St. Croix
DATE: April 23, 2012
PAGE: 2
RE: Hearing On Charges of Official Misconduct Against Sheriff Ross Mirkarimi

We have been diligent in our attempt to collect relevant documents and information for presentation to the Ethics Commission, but Sheriff Mirkarimi's obstructionism has created ongoing delays. Despite the Mayor's and City Attorney's repeated requests for cooperation, Sheriff Mirkarimi has refused to be interviewed, refused to make requested documents available, and objected to the City's notice of intent to search his City-owned computer and phone equipment. As a result, we must obtain documents and interviews by Mayoral subpoena and other court processes.

Further, while several witnesses are cooperating with the Mayor and the City Attorney's Office, other witnesses have refused to cooperate. For example, we have sought the cooperation of one witness, Linette Peralta Haynes, who was Sheriff Mirkarimi's campaign manager. We have information that Ms. Haynes spoke with witness Ivory Madison and encouraged her to lie to police. When we contacted Ms. Haynes, she refused our requests to give a statement voluntarily. Then, Ms. Haynes refused to cooperate with service of a Mayoral subpoena, which delayed service of the subpoena for a week. After Ms. Haynes was served, she disobeyed the subpoena, which required our office to seek court enforcement. Even on shortened time, our motion to enforce the subpoenas will not be heard until May 1.

Finally, we note that one of the most important witnesses, Ms. Lopez, is currently unavailable in Venezuela. We would like to be able to call her as a witness at the hearing when she returns.

For all of these reasons, we anticipate that it will take at minimum several more weeks to complete the process of gathering evidence, and we are concerned, based on our current experience, that these disputes will be drawn out further. Nonetheless, we are committed to resolving the disputes expeditiously and ensuring that obstructionist tactics do not deprive the Ethics Commission of a full evidentiary basis for its deliberations.

3. Sheriff Mirkarimi's Ongoing Refusal To Cooperate With The Investigation May Result In An Additional Charge Of Official Misconduct.

Sheriff Mirkarimi has an official duty to cooperate in this investigation under Section 3.240(b) of the San Francisco Campaign and Governmental Conduct Code, which 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." As described above, Sheriff Mirkarimi is not cooperating and assisting with this investigation and he appears to have no plans to do so. We intend to amend the official misconduct charges to add a charge that Sheriff Mirkarimi has breached his official duty to cooperate and assist in the investigation, unless Sheriff Mirkarimi immediately and fully cooperates.

4. We Request That Sheriff Mirkarimi Waive Any Right To Closed Proceedings Under *Copley Press, Inc. v. Superior Court*

We ask that Sheriff Mirkarimi be directed to inform the Ethics Commission and the Mayor whether he contends that the removal proceedings should proceed in closed session and be kept confidential under Penal Code section 832.7 (which concerns the confidentiality of peace officer personnel records) and the California Supreme Court decision *Copley Press, Inc. v. Superior Court*, 39 Cal.4th 1272 (2006). We do not believe that these proceedings must be closed or confidential. To the contrary: the proceedings cannot restore public trust, whether they result in the retention or the removal of Sheriff Mirkarimi, unless they are open and transparent. At the same time, we also wish to ensure that the work of the Ethics Commission and the Board

Memorandum

TO: Members of the Ethics Commission & Executive Director John St. Croix
DATE: April 23, 2012
PAGE: 3
RE: Hearing On Charges of Official Misconduct Against Sheriff Ross Mirkarimi

of Supervisors is not undone by a claimed procedural defect at a later date. Therefore, we request that the Commission direct Sheriff Mirkarimi to decide whether he will assert an entitlement to a closed, non-public proceeding, or whether he will waive any such entitlement so that these proceedings can be open to the public.

5. Proposed Briefing Schedule And Next Steps

The Mayor seeks a prompt hearing on the basis of a full record. We propose the following next steps:

The parties should initially brief the following legal issues:

- The applicable standard of proof;
- Proposed rules and procedures for a live hearing, including advance disclosures;
- If Sheriff Mirkarimi objects to proceedings being open to the public, then that issue must be briefed.

When the above issues are argued at hearing, the Mayor will update the Commission regarding the status of our efforts to obtain evidence from the Sheriff and non-cooperating witnesses. The Commission may then be able to set a date to hear the merits of the official misconduct charges.