



DENNIS J. HERRERA
City Attorney

PETER J. KEITH
Deputy City Attorney

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

April 30, 2012

Members of the Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

By Electronic Mail

Re: Sheriff Mirkarimi's Duty to Cooperate with the Official Misconduct Investigation and the Role of the Ethics Commission in that Investigation

Honorable Commissioners:

On April 23, 2012, Sheriff Mirkarimi requested a formal written opinion as to whether Campaign and Governmental Conduct ("C&GC") Code section 3.240(b) requires him to cooperate with the City Attorney's investigation. Subdivision (b) of that section 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.

Through its counsel after the hearing, the Commission requested that the Mayor submit a letter brief addressing two broader questions: (1) whether Sheriff Mirkarimi is required by law to comply with the Mayor or City Attorney's investigation in this matter, and (2) what role, if any, the Ethics Commission has relating to that investigation.

As discussed in Sections A and B below, the answer to the question framed by Sheriff Mirkarimi – whether Sheriff Mirkarimi has a duty to cooperate with the City Attorney's present investigation – is unequivocally yes. Sheriff Mirkarimi has a duty under C&GC Code § 3.240 to cooperate with the City Attorney's investigation, for two separate reasons. First, as discussed in section A below, the Sheriff has a duty under C&GC Code section 3.240(b) to cooperate with the Ethics Commission, District Attorney, or City Attorney, if any of these three bodies is conducting an investigation into violations of local ethics laws. Second, as discussed in section B below, even if section 3.240 did not apply, the Sheriff has a separate legal obligation to cooperate with the City Attorney and the Mayor under longstanding principles that impose a duty of disclosure and cooperation on public servants, particularly law enforcement officials. Finally, as discussed in section C below, the question whether Sheriff Mirkarimi has a duty to cooperate with the City Attorney or Mayor is different from the question whether Sheriff Mirkarimi (or anyone else) must obey a subpoena issued by the Mayor. Any person who receives a subpoena – whether or not he is an employee or officer of San Francisco – has a legal obligation to obey the subpoena.

The answer to the Commission's second question, discussed in Section D below, is that the Commission does not participate in the investigation conducted by the Mayor and City Attorney. The Commission is an adjudicator, and does not make prosecutorial decisions. In its capacity as adjudicator, however, the Commission may issue subpoenas or otherwise facilitate discovery in order to assemble the evidentiary record required here under the Charter.

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This letter brief addresses the full range of issues raised by the Commission's questions, but we note that Section A specifically addresses Sheriff Mirkarimi's request for formal written advice under Charter section C3.699-12(a). Although the Sheriff's request arose in the context of the official misconduct proceedings, it invokes the Commission's separate authority under Charter section C3.699-12(a) to issue formal opinions advising individuals about their duties under local ethics laws. Under Charter section C3.699-12(a), the Commission's formal opinion must be limited to Sheriff Mirkarimi's specific question about his duties under the C&GC Code. A formal opinion that Sheriff Mirkarimi has no duty to cooperate would protect him from sanctions for future noncooperation. However, for the reasons explained in Section A, the Commission should advise Sheriff Mirkarimi that section 3.240 *does* require him to cooperate with the City Attorney's investigation here.

A. Sheriff Mirkarimi Has A Statutory Duty To Cooperate With And Assist In The City Attorney's Investigation Into Alleged Violations Of The Campaign And Governmental Conduct Code.

Sheriff Mirkarimi has a specific duty to cooperate with and assist in the City Attorney's investigation under C&GC Code section 3.240. That section provides that every City employee and officer has a mandatory duty to cooperate and assist with City Attorney, District Attorney and Ethics Commission investigations regarding alleged violations of the Government Ethics Ordinance (the "GEO," C&GC Code Art. III, Ch. 2). Sheriff Mirkarimi does not dispute that he has a legal obligation to cooperate with investigations into violations of the GEO. But he argues that section 3.240 only requires him to cooperate with Ethics Commission investigations – not investigations handled by the City Attorney or the District Attorney – because "the Ethics Commission has *sole* authority to conduct investigations as to alleged violations" of the GEO. (See April 23, 2012 letter from David Waggoner and Shepard Kopp at 3 [emphasis added].) Under Sheriff Mirkarimi's theory, the City Attorney cannot investigate violations of local ethics laws, so the Sheriff has no duty to cooperate. That theory contradicts the Charter and the GEO.

Sheriff Mirkarimi acknowledges that section 3.240 "references a possible City Attorney investigation," but asserts that the Charter nonetheless prohibits the City Attorney from investigating GEO violations, because "there is nothing in the City Charter authorizing the City Attorney to investigate alleged violations" of the GEO. (See April 23, 2012 letter at 3.) That is not true.

First, Sheriff Mirkarimi cites Charter section C3.699-13 as evidence that the City Attorney lacks authority to initiate an ethics investigation. But that is not what section C3.699-13 says. Rather, section C3.699-13 simply outlines the procedures that the Ethics Commission must follow when the Ethics Commission receives a sworn complaint or has reason to believe that a campaign finance or governmental ethics violation has occurred. Those procedures include forwarding the complaint and information about it to the City Attorney and District Attorney, so those agencies can make an independent decision whether to investigate. (Charter § C3.699-13(a).) Then, the Ethics Commission can investigate and undertake administrative enforcement proceedings. (*Id.* § C3.699-13(b), (c), (d).)

Sheriff Mirkarimi is incorrect to argue that this Charter provision, which enables the Ethics Commission to investigate ethics violations and to act on them, *disables* the City Attorney and the District Attorney from doing so. The Charter provides that the Ethics Commission "shall conduct investigations," but it does not provide that the City Attorney or District Attorney shall not do so without permission from the Ethics Commission. If the Charter meant to take the extraordinary step of preventing civil and criminal law enforcement authorities from investigating governmental ethics violations, it would have explicitly said so.

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And the legislative history shows that the opposite is true – the Charter provisions that created the Ethics Commission were designed to increase, not decrease, the number of agencies empowered to enforce governmental ethics laws in San Francisco. The legislative history of the Charter shows a clear intent to authorize multiple offices to investigate ethics violations independently. Before the voters created the Ethics Commission in 1993, the Charter charged the City Attorney and District Attorney with investigating and enforcing conflict of interest laws. (Ballot Simplification Committee Analysis of Prop. K, November 1993 Voter Information Pamphlet at 103.) Proposition K gave the Ethics Commission investigative and enforcement powers without limiting the existing authority of the City Attorney or the District Attorney. The ballot materials accompanying Proposition K explained that the Ethics Commission would have the power to “fully investigate any ethics violation” when “the District Attorney and the City Attorney declined to investigate.” (Ballot Simplification Committee Analysis, November 1993 Voter Information Pamphlet at 103.)¹ Following Proposition K, the Ethics Commission has legal authority to investigate ethics violations, and the City Attorney and District Attorney have concurrent authority over these violations. Just as the Sheriff has an undisputed duty to cooperate with the Commission’s investigations, he has a concurrent duty to comply with District Attorney and City Attorney investigations into violations of the same laws.

Second, Sheriff Mirkarimi is wrong about the Charter because the Charter actually empowers the District Attorney and City Attorney to initiate and pursue their own separate investigations and prosecutions of ethical violations. The Charter empowers these officers to investigate violations and enforce the law in criminal and civil actions, respectively. Under section 6.103 of the Charter, the District Attorney may commence criminal prosecutions and conduct an investigation of possible criminal law violations. Likewise, the Charter empowers the City Attorney to “commence legal proceedings” in civil court “[w]henever a cause of action exists in favor of the City and County.” (Charter § 6.102(3).) Of course the power to commence legal proceedings includes the power to investigate. Moreover, the Charter expressly requires the City Attorney to employ investigators (*id.* § 6.102(9)), in recognition of the practical need to conduct an investigation before deciding to commence legal proceedings. The Charter does not limit or condition the City Attorney’s authority to investigate or to commence legal proceedings on behalf of the City, based on the subject matter. There is no exception or “carve-out” from the City Attorney’s authority (or the District Attorney’s authority, for that matter) for investigations and prosecutions of governmental ethics violations. Nor should there be.

Thus, Sheriff Mirkarimi is incorrect in claiming that the GEO has somehow exceeded the Charter grant of authority, because the GEO has provided for vigorous enforcement of ethics laws in administrative, civil, and criminal proceedings. To the contrary, the GEO is consistent with the Charter’s assignment of independent authority to the Ethics Commission, the City Attorney, and the District Attorney. The plain language of the GEO indicates that each of these three agencies has independent power to investigate and enforce governmental ethics violations. Section 3.240(a) prohibits City employees and officers from providing false information, misrepresenting facts or concealing information “relevant to an investigation by the Ethics Commission, District Attorney or City Attorney of an alleged violation of this Chapter.” Section 3.240(b) likewise provides that “[t]he 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.” Depending on the results of their investigations, the District Attorney, City Attorney, and Ethics Commission have independent and complementary powers to initiate enforcement proceedings to remedy violations of the

¹ Proposition E in 2001 later granted the Ethics Commission additional authority to investigate complaints even if the City Attorney and District Attorney have not yet declined to initiate their own investigations. But Proposition E did not limit the City Attorney’s investigatory authority.

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GEO. The District Attorney may seek criminal penalties. (C&GC Code § 3.242(a).) The City Attorney may seek civil penalties or injunctive relief (*Id.* § 3.242(b),(c).) Such a civil action is, of course, a “cause of action...in favor of the City and County” that the City Attorney is empowered to pursue under S.F. Charter § 6.102(3). And the Ethics Commission may impose administrative penalties. (C&GC Code § 3.242(d).) Like its investigative powers, the City Attorney’s enforcement authority under the GEO is separate from the Ethics Commission’s and the District Attorney’s. Thus, the City Attorney has conducted independent investigations and civil prosecutions of governmental ethics and C&GC Code violations, without a referral from the Ethics Commission.²

Here, in the course of pursuing the official misconduct charges, the City Attorney has discovered and is investigating Sheriff Mirkarimi’s possible violation of C&GC Code section 3.218, and specifically sections III(A)(1), III(A)(3) and IV of the Sheriff’s Department’s Statement of Incompatible Activities. The City Attorney is also investigating whether Sheriff Mirkarimi may have attempted to dissuade other witnesses from cooperating with this investigation, in violation of section 3.240(b). The City Attorney is fully within his authority to investigate potential violations of the GEO, and section 3.240 imposes on the Sheriff a duty to cooperate.

Sheriff Mirkarimi has not argued that as an elected official, he is exempt from this provision. And he is not. Section 3.240 imposes a duty to cooperate on “every City officer.” The GEO expressly defines an “officer” to include “any person holding City elective office,” which expressly includes the “sheriff.” (C&GC Code § 3.203(a),(b).) Moreover, Sheriff Mirkarimi has not argued that his suspension affects his duty to cooperate. And it does not. Unless and until Sheriff Mirkarimi is removed from office, he remains an “officer” even while suspended. Indeed, the Charter removal provisions continue to refer to a City officer who is suspended pending removal proceedings as an “officer.” (Charter § 15.105(a).) This is consistent with the law in California that a public employee has a duty to cooperate, regardless of paid or unpaid status. “A public employee who is on leave of absence does not thereby cease to be a public employee.” (*Crowley v. City and County of San Francisco* (1978) 83 Cal.App.3d 776, 779 [law enforcement officer on unpaid leave of absence still had duty to cooperate in investigation of his own misconduct].)

Finally, Sheriff Mirkarimi cannot assert that he has no duty to cooperate because the City Attorney may use the evidence from its investigation in the pending removal proceeding. Local law authorizes several remedies for violations of local ethics laws, ranging from administrative penalties (*see* C&GC Code § 3.242(d)) to incarceration (*see* C&GC Code § 3.242(a)) to removal for official misconduct. (*See* Charter § 15.105 [“any violation of a specific conflict of interest or governmental ethics law” is official misconduct subjecting the violator to removal from office].) Here, as counsel for the Mayor the City Attorney is seeking one of those remedies – removal from office – authorized by the Charter. Section 3.240 does not limit Sheriff Mirkarimi’s duty to cooperate depending on the particular authorized remedy that is sought on behalf of the City. Instead, section 3.240 imposes a simple, unambiguous official duty to cooperate with all investigations regarding GEO violations, whether by the Ethics Commission, City Attorney, or District Attorney. Sheriff Mirkarimi must do so here.

² For example, in *City and County of San Francisco et al. v. Deanda et al.*, San Mateo Superior Court No. CIV482-183, the City Attorney investigated and civilly prosecuted San Francisco Public Utilities Commission managers who made purchasing decisions in which they had a financial interest and who received repeated kickbacks from a contractor, which violated C&GC Code sections 3.206 (financial conflicts of interest), 3.216 (prohibition on bribery and gifts), and 3.236 (aiding and abetting others’ violations).

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Thus, just as Sheriff Mirkarimi would have a duty to cooperate with an Ethics Commission investigation of his conduct, he has the same duty to cooperate with the City Attorney's investigation.

B. As A Public Servant And A Law Enforcement Officer, Sheriff Mirkarimi Has An Additional Duty To Cooperate With The Mayor's Investigation On Behalf Of The City And County Of San Francisco.

In addition to his duty to cooperate under section 3.240, the Sheriff has a separate and independent obligation to cooperate with the City Attorney's investigation supporting the official misconduct charges on behalf of the Mayor. The Mayor has Charter authority to bring official misconduct charges against elected officials under section 15.105. The Mayor's power to investigate official misconduct is inherent in his Charter authority to file charges. Moreover, the Charter empowers the Mayor to conduct investigations of the conduct of elected officials. Specifically, section 16.114 of the Charter empowers the Mayor to "inquire into matters affecting the conduct of any department or office of the City and County." (S.F. Charter § 16.114.) There can be no question here that the Mayor is authorized to investigate, on behalf of the City and County of San Francisco, Sheriff Mirkarimi's conduct in relation to the office of Sheriff.³

And every public servant has a duty to cooperate with the government's investigation of his conduct. Because of the trust reposed in them by the public, public employees and officials have a duty to cooperate in administrative investigations, even those into their own conduct. "In performing their official functions, government officers and employees owe unique duties of loyalty, trust, and candor to their employers, and to the public at large." (*Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704, 724.) Refusing to provide information necessary to an investigation is a valid ground for dismissal of a public officer. (*Id.* at p. 721 [quoting *Sanitation Men v. Sanitation Comm'r* (1968) 392 U.S. 280, 285 ("[P]etitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust.")].)

That obligation to cooperate is even greater when, as here, the public official is in law enforcement. Law enforcement officers are "guardians of the peace and security of the community." (*Riverside County Sheriff's Dept v. Zigman* (2008) 169 Cal.App.4th 763, 768-69.) Thus, they have a duty to cooperate with any investigation into criminal conduct, whether that investigation is criminal or administrative. (*Ibid.*) An officer's refusal to provide information is a violation of the public trust and a basis for termination. (*Id.* at 771.)

Under this law, there can be no question that Sheriff Mirkarimi has a duty to cooperate with the Mayor's present investigation of official misconduct. These charges relate to Sheriff Mirkarimi's fitness for high office. And they also relate to crimes – a particularly important point, for a high official who is head of a law enforcement agency. Here, Sheriff Mirkarimi was actually convicted of a crime. Sheriff Mirkarimi's conviction and sentence is not a reason to end a Mayoral investigation – it is a reason to continue it. Sheriff Mirkarimi is obligated to fulfill the trust reposed in him by being fully forthcoming, so that the Mayor, this Commission, and the people of San Francisco can know the truth and evaluate his fitness for office in light of his actions.

³ As the Superior Court recently confirmed, the Mayor's pursuit of official misconduct charges against Sheriff Mirkarimi is an act on behalf of the City and County of San Francisco. And the City Attorney properly represents the Mayor for this official act on behalf of the City. Order, *Mirkarimi v. City and County of San Francisco*, S.F. Superior Court No. CPF-12-512-077 (April 19, 2012).

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C. When Witnesses Do Not Cooperate, The Mayor Is Empowered To Issue Subpoenas To Compel Testimony And The Production Of Documents.

If Sheriff Mirkarimi does not cooperate with the official investigation voluntarily, as required by law, he may be compelled to comply with the investigation by means of subpoena. Under section 16.114 of the Charter, the Mayor has the power of inquiry into “matters affecting the conduct of any department or office of the City and County.” This power of inquiry includes the authority to “subpoena witnesses, administer oaths and compel the production of books, papers, testimony and other evidence.” (*Id.*) (As discussed in greater detail below, the Commission also has Charter authority to issue subpoenas for documents and testimony related to matters before the Commission.)

Compliance with a subpoena is not voluntary or optional. Compliance with a subpoena is very different from the “cooperation” and “assistance” with an investigation specifically required under section 3.240 of the C&GC Code and generally required of all public servants in California. Every person, public official or not, is obligated to obey a mayoral subpoena that seeks information pertinent to the conduct of an office or department of the City and County of San Francisco. A subpoena is a different means by which the Mayor may properly obtain information necessary to the prosecution of this matter. Given the nature of the official misconduct charged here – which includes witness dissuasion by persons working on behalf of Sheriff Mirkarimi – it should not be surprising that the Mayor has been forced to resort to his subpoena power with regard to some witnesses. What is surprising here, however, is that Sheriff Mirkarimi himself has given the Mayor no other option.

D. The Ethics Commission Does Not Oversee The Official Misconduct Investigation By The Mayor And City Attorney.

The Charter specifies the Ethics Commission’s role in official misconduct proceedings: The Commission must hold a hearing on the charges, make a recommendation as to whether they should be sustained, and transmit that recommendation and the full record of the hearing to the Board of Supervisors. (Charter § 15.105(a).) In the context of this hearing, the Commission “may subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, papers, records or other items material to the performance of the Commission’s duties or exercise of its powers.” (Charter § 15.100.) These powers give the Commission the tools necessary to ensure that it is presented with a full and accurate record.

The Charter does not, however, give the Commission any authority over the City Attorney and Mayor’s independent investigation of the matter. As discussed in Section A, *supra*, the City Attorney, District Attorney, and Ethics Commission have independent investigation and enforcement authority when investigating violations of the GEO. Just as the City Attorney and District Attorney do not oversee the Ethics Commission’s investigations into violations of the GEO or other local ethics laws, the Ethics Commission does not oversee the City Attorney or District Attorney’s independent investigations.

Similarly, the Ethics Commission does not play a role in the Mayor’s investigation into official misconduct. As discussed in Section B, *supra*, the Mayor’s authority to inquire into matters affecting City offices is distinct from the Commission’s authority to hold a hearing on official misconduct charges. As a practical matter, the Mayor must investigate official misconduct before bringing charges. And even after bringing charges, he maintains his full powers of inquiry under Charter section 16.114 and should be expected to use these powers to develop the record for presentation to the Commission. The truth-seeking process will be served

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here by the Mayor's use of subpoena power to ensure that the Commission can consider relevant documents and independent witness testimony that can be obtained only by subpoena.

Finally, the Commission's authority to hold a hearing in this matter does not give it supervisory authority over the Mayor and City Attorney's investigation. To the contrary, due process considerations require a clear division between the prosecutorial function assumed here by the Mayor and City Attorney and the adjudicatory function assumed by the Ethics Commission. In ordinary Ethics Commission enforcement proceedings, due process is ensured by walling off Commissioners from the Executive Director's investigation so that the Commissioners may sit as unbiased adjudicators. So it is here: the Commission should play no role in the Mayor and City Attorney's investigation.

In the Ethics Commission's usual enforcement proceedings, Ethics Commission staff – supervised by the Executive Director – are solely responsible for preliminary review and investigation of complaints. (*See generally Ethics Commission Regulations for Investigations and Enforcement Proceedings* §§ IV, V.) This investigation “may include, but shall not be limited to, the interview of the respondent(s) and any witnesses, the deposition of respondent(s) and/or witnesses, and the review of documentary and other evidence.” (*Id.* § V(A).) The Executive Director may issue subpoenas during the course of the investigation, with no involvement by the Commission. (*Id.* § V(B).)

Ethics Commission regulations provide that materials obtained during an investigation may form the basis for a probable cause report by the Executive Director (*id.* § VII(A)) and may be used in an eventual hearing on the merits (*id.* § XII(A)(3)). Furthermore, the regulations specifically contemplate that the Executive Director may continue his investigation after the probable cause determination. (*See id.* §§ XI(A)(B) [the Executive Director must disclose exculpatory information discovered after the probable cause determination]; *id.* XIII(B)(2) [subject to certain exceptions, investigative documents created prior to and after the probable cause determination shall be confidential].)

In the present proceeding, the Mayor and City Attorney have assumed the role of prosecutor. As in the Ethics Commission's typical proceedings, the Commission has not and should not play a role in the prosecuting agencies' investigation. In addition to due process considerations that would arise if the Commission were to play this dual role, it would significantly delay the course of the proceedings if the investigating agencies were required to seek authorization from the Ethics Commission to proceed with the investigation. Here, the Mayor and City Attorney have worked diligently to develop the record so that they will be able present a complete evidentiary record to the Commission, but refusals to cooperate have caused delays. These delays would have only been exacerbated if the Mayor and City Attorney had put the investigation on hold for the past month while waiting for the Commission to hold its first hearing on the matter. This is not the process contemplated by the Charter or any City ordinance or regulation.

Finally, we note that Sheriff Mirkarimi has the power to bring this matter to a speedier resolution. He can simply decide to cooperate. Putting aside for a moment the question of Sheriff Mirkarimi's legal duty, Sheriff Mirkarimi has an ethical duty to be forthcoming to the Mayor about what occurred. Under the Charter, the Mayor acts on behalf of San Francisco to ensure that elected officials properly discharge their duties and conduct themselves consistent with their responsibilities. When an elected official falls below that standard, the Mayor initiates the removal process. Then, this Commission assembles the necessary evidence and makes its recommendation, and the Board of Supervisors considers that evidentiary record and recommendation and makes the ultimate decision. Sheriff Mirkarimi does not discharge his duties as an elected official, when he refuses to provide the information necessary to the determination whether he is fit to hold the office of Sheriff.

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We thank the Commission for this opportunity to provide our views on these matters.

Very truly yours,

DENNIS J. HERRERA
City Attorney
PETER J. KEITH
SHERRI SOKELAND KAISER
Deputy City Attorneys

/s/ Peter J. Keith

cc (e-mail only): David P. Waggoner, Esq., Counsel for Sheriff Mirkarimi
Shepard Kopp, Esq., Counsel for Sheriff Mirkarimi
John St. Croix, Executive Director
Mabel Ng, Deputy Executive Director
Scott Emblidge, Esq., Counsel for the Ethics Commission