CITY ATTORNEY DENNIS HERRERA

NEWS RELEASE

FOR IMMEDIATE RELEASE
WEDNESDAY, DECEMBER 16, 2009

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Herrera Responds to Campos Request on Sanctuary Amendment's Implementation

Memorandum reiterates legal advice, addresses roles of City Attorney and executive, legislative branches

SAN FRANCISCO (Dec. 16, 2009)—City Attorney Dennis Herrera today issued a memorandum in response to Sup. David Campos's public request last week that sought clarification on the scope of mayoral authority in implementing a recently-enacted amendment to the City's Sanctuary Ordinance. The supervisor's request additionally asked whether the Juvenile Probation Department could comply with the ordinance's directive by adopting a proposed policy drafted by the Asian Law Caucus, which was also submitted last week.

Herrera's 10-page response details provisions of the San Francisco Charter that delineate executive and legislative branch powers, and notes that the plain language of the ordinance enacted by the Board of Supervisors over a mayoral veto on Nov. 10 requires the Juvenile Probation Department to implement the ordinance "to the extent permitted by state and federal law." The legal effect of such a rarely-included provision "is to require the Department to make the judgment about the extent to which current state and federal law allow it to change its reporting to implement the Ordinance's new policy." The memo goes on to explain that such discretion should be exercised in consideration of independent legal assessments by the City Attorney and also outside criminal defense counsel, which was retained by the City late last year in connection with a federal criminal grand jury convened by U.S. Attorney Joseph P. Russoniello to investigate the department's past practices with respect to juvenile detainees.

Herrera also responded that, notwithstanding "serious legal issues," the Juvenile Probation Department could implement the ordinance by adopting a draft policy proposed by the Asian Law Caucus, but noted that the department "does not have to make any changes that it reasonably determines would violate state or federal law." The City Attorney memorandum reiterated cautions about enforcing the policy: "Moreover, as we stated in our earlier cautionary memorandum, and particularly in light of the ongoing explicit threat of criminal prosecution by the federal authorities, even if the Department were to decide to adopt the Draft Policy we have advised and will continue to advise the Department that it may not take any adverse employment action against an employee who provides information to immigration authorities about a juvenile, until federal authorities change their position or the courts clarify federal law. Whether it makes sense for the Department to change its policies and practices in view of this caution, and any advice outside criminal counsel may give to Department officials, is a judgment for the Department to make….We are prepared to assist the Department or the Commission in reviewing the Draft Policy or other policies it may wish to consider under the Ordinance."

[MORE]

The memorandum additionally sought to address any confusion about the role and responsibilities of the City Attorney, explaining that the San Francisco Charter "vests in the City Attorney the authority and the duty to act as the City's independent legal advisor," but that "the role is limited to giving legal advice and not directing action."

Herrera reaffirmed his stated intention to be an aggressive legal advocate for the measure's validity, saying: "Now that the Ordinance has become effective, we are prepared to discharge our Charter and ethical responsibility to vigorously defend the Ordinance." The memo also restated previous public explanations that the City Attorney's "approval as to form" of proposed measures may be made "even in the face of risks of legal invalidity—as long as legally tenable arguments consistent with the ethical duties of a lawyer support the legislation."

# # #

DENNIS J. HERRERA
City Attorney

MEMORANDUM

TO: Supervisor David Campos

FROM: Dennis J. Herrera, City Attorney DJH
Therese M. Stewart, Chief Deputy TMS
Jesse Capin Smith, Chief Assistant JSS
Buck Delventhal, Deputy City Attorney BSH

DATE: December 16, 2009

RE: Implementation of Amendments to the City of Refuge Ordinance Regarding the Confidentiality of the Immigration Status of Juveniles

You have asked for a written opinion on the Mayor's obligation to implement Board of Supervisors Ordinance No. 228-09 (Board File No. 091032) regarding the confidentiality of juveniles' immigration status (the "Ordinance"). The Ordinance amends San Francisco's City of Refuge Ordinance (San Francisco Administrative Code, §§ 12H.2, 12H.2-1 and 12H.3) relating to when City law enforcement officers and employees may report information regarding the immigration status of a juvenile to any state or federal agency. The reporting may occur when (1) the juvenile has been adjudicated to be a ward of the court on the ground of felony conduct, (2) the court makes a finding of probable cause after the District Attorney directly files felony criminal charges against the minor, or (3) the juvenile court determines that the minor is unfit to be tried in juvenile court and the superior court makes a finding of probable cause. On November 10, 2009, the Board of Supervisors (the "Board") overrode the Mayor's veto. The Ordinance became effective on December 10, 2009.

The Ordinance expressly directs the San Francisco Juvenile Probation Department, within 60 days of the effective date of the Ordinance, to make its policies and practices consistent with the changed policy regarding the confidentiality of the immigration status of youth in the juvenile justice system "to the extent permitted by state and federal law."

You have specifically asked "whether Mayor Newsom has the authority to unilaterally refuse to implement the duly-enacted civil rights legislation at issue, where such legislation was reviewed and approved as to form by you and your office." Also, you have asked whether the Juvenile Probation Department could comply with the directive in the Ordinance by adopting a Draft Policy that the Asian Law Caucus submitted on December 8, 2009 to our office.

Summary

In general, the Charter vests in the Mayor the responsibility for the general administration of all executive branch departments, including the Juvenile Probation Department (the "Department"). The Mayor may provide direction to the Department and the Juvenile Probation Commission (the "Commission") that oversees it, and the Mayor may hold the head of the Department and the commissioners accountable for their failure to follow his direction. But ultimately the decision-making authority reposes in the Department head, subject to the supervision of the Commission. The Commission may defer to the Department head's policy

decisions, give policy directions to the Department head, or revise the Department head's policies.

Also, here, as mentioned above, the plain language of section 3 of the Ordinance makes the Department responsible for implementing the provisions of the Ordinance "to the extent permitted by state and federal law." That provision is rare in City ordinances, and we added it, at your request, to enable us to approve the Ordinance as to form. The provision's effect is to require the Department to make the judgment about the extent to which current state and federal law allow it to change its reporting to implement the Ordinance's new policy. The Department must make that determination, exercising its reasonable discretion, after considering an independent assessment of the applicable state and federal law, based on advice from the City Attorney's Office. And the Department may take into account advice from outside criminal counsel retained by the City for certain Department officials in connection with the U.S. Attorney's investigation of the Department's past practices and express threats of possible prosecution.

Since the plain language of the Ordinance requires the Department to make changes to the extent allowed by law and, further, and to avoid any possible confusion stemming from your statements about the significance of our approval of the Ordinance as to form, we must address the role of the City Attorney. The San Francisco Charter vests in the City Attorney the authority and the duty to act as the City's independent legal advisor. As a former Deputy City Attorney, you know that we discharge this duty by giving our honest and best assessment of the law, including legal issues, consequences and options, to the City's policymakers. In this way, the policymakers, having received the same advice, can make an informed decision about how to proceed. But our role is limited to giving legal advice and not directing action. In this capacity, the City Attorney is not an executive or legislative decision-maker.

Here, as we have advised during the legislative process in a confidential memorandum addressed to the Mayor that he made public, the Ordinance presents potential serious civil and criminal legal issues. Still, the state of the law involving local sanctuary ordinances, particularly in their application to juveniles, is uncertain. Therefore, reasonable minds can differ as to how courts will eventually resolve federal, state and local powers in this area. It is in light of that uncertainty, and in reliance on the express qualifying language you requested in the implementation clause, that we have approved the Ordinance as to form and given confidential advice to the Board, the Mayor, the Department and the Commission about the legal risks and options associated with the Ordinance.

Now that the Ordinance has become effective, we are prepared to discharge our Charter and ethical responsibility to vigorously defend the Ordinance. The Department must review its policies and practices consistent with the Ordinance, though the Ordinance does not require changes that the Department reasonably determines would violate state or federal law. As mentioned above, in carrying out its administrative duty to exercise this judgment under the Ordinance, the Department should consider our legal advice.

You have specifically asked whether the Department could implement the Ordinance by adopting the Draft Policy proposed by the Asian Law Caucus. Consistent with our earlier

advice, the Department could adopt that policy, though the Department is not obligated to do so if it determines that the Policy conflicts with state or federal law. Yet, even with the Draft Policy serious legal issues remain. As we stated in our earlier advice memorandum, particularly because of the ongoing express threat of criminal prosecution by the federal authorities, we have advised and will continue to advise the Department that it may not take any adverse employment action against an employee who provides information to immigration authorities about a juvenile, until federal authorities change their position or the courts clarify federal law in this matter. Whether it makes sense for the Department to change its policies and practices in view of this caution, and any advice outside criminal counsel may give to Department officials, is a judgment for the Department to make.

We are prepared to assist the Department head or the Commission in reviewing the Draft Policy or other policies it may wish to consider under the Ordinance.

Background

The Department's current policy is to report to the federal Immigration and Customs Enforcement Agency ("ICE") the identities of juveniles who are in custody at the Juvenile Hall after being booked for a felony and who are suspected of violating the federal immigration laws. This policy derives from an exception in San Francisco's City of Refuge Ordinance that permits reporting "any person pursuant to State or federal law or regulation who is in custody after being booked for the alleged commission of a felony and is suspected of violating the civil provisions of the immigration laws." (Admin. Code, § 12H.2-1.) As mentioned above, the Ordinance changes this policy – as to juveniles only – to defer reporting until the court has sustained a felony petition (subject to certain exceptions), "to the extent permitted by state and federal law."

Charter section 6.102(6) requires the City Attorney's approval as to form before the Board of Supervisors' enactment of legislation. In connection with the introduction of the Ordinance to the Board of Supervisors, we approved the Ordinance as to form and provided consistent confidential advice to the Board and the Mayor about the significant legal risks that adoption of the Ordinance could present. During the legislative process, the Mayor waived the attorney-client privilege and released to the public our cautionary memorandum.

On August 20, 2009, in response to that release, we issued a public opinion to the Mayor and the Board of Supervisors regarding the disclosure of confidential advice relating to proposed legislation.
(See http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=273.) In that opinion, we explained that the legislative authority of the Board and the Mayor includes the prerogative to push the limits of existing law, and even to attempt to shape case law, so long as there are legally tenable arguments to support doing so. We further explained that in those instances we approve the legislation as to form – even in the face of risks of legal invalidity – as long as legally tenable arguments consistent with the ethical duties of a lawyer support the legislation. But equally important is our duty to ensure that the Board and Mayor have full knowledge of the legal risks associated with the legislative proposal.

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TO: Supervisor David Campos
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On October 27, 2009, the Board of Supervisors finally passed the Ordinance. On October 28, 2009, the Mayor vetoed the Ordinance. On November 10, 2009, the Board overrode the veto by the necessary two-thirds vote.

On November 10, 2009, we wrote U.S. Attorney Russioniello, requesting an assurance that if the City proceeds to implement the Ordinance in accordance with its terms, City law enforcement officers and employees would not be prosecuted for violating federal criminal laws. On December 3, 2009, U.S. Attorney Russioniello responded, refusing to provide that assurance.

On December 8, 2009, we received from the Asian Law Caucus the proposed Draft Policy implementing the Ordinance. The Draft Policy would have the Department focus upon the protection and safety of the public and the protection and rehabilitation of minors who have contact with the juvenile justice system, and not on matters beyond the Department's mission or expertise, such as gathering information for reporting to federal immigration officials. The Draft Policy further states "Nothing in this policy should be construed as prohibiting a City or County employee from reporting information to the federal agency charged with enforcement of federal immigration law if required by federal or State law, regulation or court decision."

As you know, we have met with the Asian Law Caucus and other legal civil rights organizations to discuss the Ordinance, and we are scheduled to meet with them again soon to discuss their proposed Draft Policy.

Discussion

The plain language of the Ordinance assigns responsibility for implementation of the policy to the San Francisco Juvenile Probation Department:

> **Section 3. Implementation**
> The San Francisco Juvenile Probation Department shall, within 60 days of the effective date of this Ordinance, modify its policies and practices to comply with the provisions of this Ordinance to the extent permitted by state and federal law.

1. Role of the City Attorney's Office

Because the implementation provisions of the Ordinance are qualified by the phrase "to the extent permitted by state and federal law" and because in your question you emphasize the effect of our approval of the Ordinance as to form, we begin by discussing the role of the City Attorney's Office.

The San Francisco Charter vests in the City Attorney the authority and the duty to act as the independent legal advisor to the City, making the City Attorney accountable directly to the people rather than to City officials. (See public opinion at http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=81).
More specifically, section 6.102 (4) of the Charter requires the City Attorney, "[u]pon request,

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[to] provide advice or written opinion to any officer, department head or board, commission or other unit of government of the City and County."

We discharge this duty by giving our honest, best and consistent assessment of the law, including significant legal issues, consequences and options, to the City's policymakers so that they can make an informed decision about how to proceed. The framers of the 1931 Charter, upon which the City's current Charter is based, thought it was critical to have an elected City Attorney so that the City Attorney could give objective legal advice to the City's Mayor and Board of Supervisors. They viewed an independent City Attorney as part of a careful system delineating the powers of City government, to help safeguard against the sort of corruption that had plagued the City at the turn of the 20th century. (Francis Keesling, The Charter of 1931, 1933, at p. 43.)

The Charter duty to provide objective legal advice to the City's policymakers is also consistent with the provisions of state law and codes of professional conduct, and guided by the American Bar Association Model Rules of Professional Conduct, upon which courts often rely in determining the ethical obligations of those admitted to the practice of law. As you are aware, among these are the following:

- It is the duty of an attorney "[t]o counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just." (California Business and Professions Code § 6068(c).)

- It is the duty of an attorney "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (California Business and Professions Code, § 6068(d).)

- A member of the bar "shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal." (California Rule of Professional Conduct, § 3-210.)

- A member of the bar "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." (California Rule of Professional Conduct, §3-110(A).)

- "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." (American Bar Association Model Rule 1.4(b).)

- "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." (American Bar Association Model Rule 2.1.)

In explaining the last model rule, the ABA states in its published commentary:

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> A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client. (American Bar Association Comment on Model Rule 2.1, Comment 1.)

In recent years we have witnessed troubling examples of the dangers posed by members of the legal profession who abandon their ethical responsibilities by tailoring legal advice to advocate for a policy agenda, instead of presenting a candid and thorough analysis of a policy's significant legal risks and implications. During 2002 and 2003, for example, Bush Administration lawyers wrote a legal memorandum on torture *as advocacy* rather than *candid and balanced legal advice*. This dereliction of their ethical duty earned a forceful rebuke in an open letter from nearly 130 influential American lawyers and law professors, including twelve former federal judges, which was widely published in August 2004. Here, their conclusion on the ethical responsibility of lawyers – and "especially lawyers in government service" – is relevant:

> The lawyers who prepared and approved these memoranda have failed to meet their professional obligations. A lawyer has a duty both to ask his or her client what the client wants to do and assist the client in accomplishing his or her lawful objectives. But the lawyer has a simultaneous duty, as an officer of the court and as a citizen, to uphold the law. Enforcement of all of our laws depends on lawyers telling clients not only what they can do but also what they cannot do. This duty binds all lawyers and especially lawyers in government service. (Lawyers' Statement on Bush Administration's Torture Memos, August 4, 2004)

This statement illustrates the wisdom of the framers of the City's Charter in ensuring that the City Attorney is an independent legal advisor, not a policymaker. By placing the City Attorney outside the direct control of the executive or legislative branches to render advice that is advocacy, the Charter promotes the role of the City Attorney in giving candid and consistent legal counsel, irrespective of how worthy the policy objective may be.

A long-standing provision of the Charter also requires the City Attorney to approve as to form all ordinances before they are enacted by the Board. (S.F. Charter, § 6.102(6).) As we have explained, the established practice of this Office is to approve legislation as to form, even if we have serious legal concerns, by accompanying the ordinance with confidential advice to the Board and the Mayor about the legal risks. Rarely has this Office refused to approve legislation as to form; if there is a legally tenable argument to sustain the legislation in court, then we approve the legislation as to form and advise the policymakers of the legal risk so that they can make an informed decision about how to proceed.

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2. Duties to Implement Laws

In general, the Board of Supervisors has the power under the Charter to adopt legislation, such as the Ordinance, that establishes City policy. That authority extends to setting administrative policies for individual executive branch departments except with regard to specific personnel and contract decisions that are not relevant here. (S.F. Charter, § 2.114). Once the Board legislation goes into effect, the executive branch must implement it in accordance with its terms. The Mayor also has a duty to enforce all laws relating to the City and County. (S.F. Charter, § 3.100.)

Here, the Ordinance contains express qualifying language in regard to its direction to the Department to take action to implement the new policy; it requires such action only "*to the extent permitted by state and federal law*." That clause, which is not typical of most City ordinances, places in the Department the responsibility to make a reasonable judgment in light of our candid assessment of current state and federal law about how to implement the Ordinance.

While you cite the California Supreme Court's decision in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055 [95 P.3d 459, 17 Cal.Rptr.3d 225] as precedent for the proposition that the Department must immediately change its practices to conform to the Ordinance and the Mayor must cause the Department to do so, your reliance on *Lockyer* is misplaced. This situation is fundamentally different from the situation in that case.

In *Lockyer*, the Supreme Court held that a public official charged with the ministerial duty of enforcing a state statute may not choose to ignore that statute because of his belief that it is unconstitutional unless a court has held it to be unconstitutional. First, *Lockyer* is distinguishable because it dealt with a municipal official making a decision about the constitutionality of a superior state law, i.e., a law that is a level above that level of government in which the official was acting. Second, unlike the state statute at issue in *Lockyer* the Ordinance expressly requires the Department to determine whether and how to revise its policies and practices consistent with state and federal law.

But more fundamentally, to the extent that the Ordinance presents any comparison to *Lockyer*, the comparison could be contrary to the one you point to. While the holding in *Lockyer* does not extend to this situation for the reasons discussed above, arguments could be made by analogy about the limits of local authority. Here, immediate implementation of the Ordinance's policy could place in issue the authority of a local official to ignore the express language of a federal statute based on a legal argument that the U.S. Constitution precludes application of that statute to local government, where no court has held the federal statute's application to local government to be unconstitutional. Just because a local government, relying on a legally tenable constitutional argument, has duly adopted a policy that seemingly conflicts with the federal government's policy does not necessarily mean the local officials are free as a matter of law to conclude that the federal statute is unconstitutional and proceed to implement and enforce that policy.

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3. Roles of the Mayor and Juvenile Probation Department and Commission in Implementing the Ordinance

The Mayor is the chief executive officer of the City, responsible under the Charter for the general administration and oversight of executive branch departments. (S.F. Charter, §3.100).

The Juvenile Probation Department (the "Department") is part of the executive branch. (S.F. Charter, § 7.102.) The Department is overseen by a commission (the "Commission"), whose members the Mayor appoints. (S.F. Charter, § 7.102.) The Commission has the authority to set policies consistent with Board legislation. (S.F. Charter, § 4.102.) The Mayor appoints the head of the Department from a list of three or more qualified candidates submitted by the Commission. (S.F. Charter, § 3.100(18).) The Commission may remove the head of the Department on its own initiative, or the Mayor may recommend that the Commission remove the Department head. (S.F. Charter, § 4.102(5).) (Also, see page 34 of the public opinion summarizing legal requirements for Mayoral appointments to boards, commissions and certain other entities, at http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=86.) The head of the department is responsible for the administration and management of the department. (S.F. Charter, § 4.126.)

Here, as we have emphasized, the Ordinance expressly assigns the responsibility for implementation to the Department. Accordingly, while the Mayor may tell the Department and the Commission what he wants them to do and hold them accountable for their failure to follow his direction, the responsibility for implementing the Ordinance falls on the Department. The Commission may let the Department head decide whether to change or how to change the Department's policies, the Commission may decide to give instructions to the head of the Department about whether to change or how to change those policies, or the Commission may itself modify any Department policies.

4. Department's Discretion to Adopt Policies

The express language of the Ordinance places administrative decision-making authority about how to implement the Ordinance in the Juvenile Probation Department. Most laws cannot possibly address all the details of enforcement and therefore set basic standards that guide executive action. Also, in establishing a separation of powers, the Charter does not allow the Board of Supervisors to give itself executive power. (S.F. Charter, § 2.114.) Thus, the Board must effect City policy through legislation that directs the executive branch.

Now that the Ordinance has become effective, the Department must review its policies and practices consistent with the Ordinance. While the exercise of that judgment turns on evaluating objective legal advice, the decision is ultimately the Department's. But, according to the plain text of the Ordinance, the Department does not have to make any changes that it reasonably determines would violate state or federal law. In so doing, the Department should consider our legal advice. We are prepared to discharge our Charter and ethical duty by giving to the Department the same advice we gave to the Mayor and the Board and by defending the Ordinance.

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You have specifically asked whether the Department could implement the Ordinance by adopting the Draft Policy proposed by the Asian Law Caucus. The Draft Policy prioritizes functions based on scarce local resources and effectively adopts a "don't ask don't tell policy." That Draft Policy also contains an exception that states nothing in the policy should be construed as prohibiting a City employee from reporting information to the federal agency charged with enforcement of federal immigration law if required by federal or state law, regulation or court decision.

The Department could decide to adopt the Draft Policy under the Ordinance, but it does not have to if it were to determine that the Draft Policy conflicts with state and federal law. Moreover, as we stated in our earlier cautionary memorandum, and particularly in light of the ongoing explicit threat of criminal prosecution by the federal authorities, even if the Department were to decide to adopt the Draft Policy we have advised and will continue to advise the Department that it may not take any adverse employment action against an employee who provides information to immigration authorities about a juvenile, until federal authorities change their position or the courts clarify federal law. Whether it makes sense for the Department to change its policies and practices in view of this caution, and any advice outside criminal counsel may give to Department officials, is a judgment for the Department to make.

We are prepared to assist the Department or the Commission in reviewing the Draft Policy or other policies it may wish to consider under the Ordinance.

Conclusion

The Ordinance places responsibility in the Department to implement its provisions to the extent allowed by law. The Department must do so exercising its reasonable judgment, after taking into account the City Attorney's objective assessment of the law.

Here, as we advised in the confidential cautionary memorandum – now public – that we provided to the Mayor and the Board during the legislative process, the law in this area is not settled. In particular, we advised that the Ninth Circuit Court of Appeals and the United States Supreme Court have not addressed whether federal law preempts sanctuary city ordinances such as San Francisco's. Nor have the federal courts addressed the question in the context of juveniles, whom state law affords special confidentiality and other rights. While approving the Ordinance as to form, we have given our best assessment of the significant legal risks associated with the Ordinance.

Now that the Ordinance is effective, we are prepared to defend the Ordinance, consistent with our Charter and professional responsibilities. And we are ready to provide legal advice to the Department as it considers any changes to its policies and practices and to defend any steps the Department takes to implement the Ordinance where there is a legally tenable argument to sustain those steps.

Because specific City officials in the Department may be the targets of a federal grand jury investigation relating to the immigration status of youth in the juvenile justice system, we have obtained outside criminal counsel for them. Given their potential jeopardy under federal

criminal laws, and in light of the U.S. Attorney's inability to offer assurances to them of immunity from prosecution, outside criminal counsel may advise them to continue to follow the Department's current policy and report information to ICE about juveniles who are booked for felonies, rather than adopt the changes established under the Ordinance. As mentioned above, until the federal courts clarify the law, we will continue to advise City officials that the City may not penalize its employees for reporting this information to ICE. Even though we disagree with the U.S. Attorney's novel interpretation of the criminal harboring laws, to advise otherwise would be to place these employees at further risk of criminal prosecution.