



**U.S. Department of Justice**

*United States Attorney  
Northern District of California*

*Joseph P. Russoniello  
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December 3, 2009

Dennis J. Herrera  
City Attorney  
City and County of San Francisco  
City Hall, Room 234  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4682

Dear Dennis:

Thank you for your letter of November 10, 2009 enclosing a copy of an ordinance amending the San Francisco City of Refuge Ordinance which will, as I understand it, become effective on December 7, 2009.

Tempting as it might be to revisit here the history of San Francisco's efforts to develop a "Sanctuary City" strategy, nothing would be gained by it. In fact, your office's recent analyses of both that history and the probable serious legal consequences to persons who choose to follow the recently enacted ordinance in derogation of applicable federal laws adequately address the issues.

In specific response to the question you posed in your letter, it probably will come as no surprise to you that I have no authority, discretionary or otherwise, to grant amnesty from federal prosecution to anyone who follows the protocol set out in the referenced ordinance.

In determining whether to prosecute someone for a violation of any federal statute, this office, consistent with well-established practices of the Department of Justice, considers all of the available evidence relevant to the applicable federal statute. We present a case for indictment when there is a reasonable basis for believing that a federal crime has been committed and a conviction can be obtained. Not every case that meets this test is necessarily brought. A number of factors may come into play when we make our prosecutorial decisions, including, as you correctly referenced with respect to so called "medical marijuana" cases, our need to prioritize cases given our limited resources.

In this regard, however, let's be clear on one point. The federal government has determined that illegal aliens, including juveniles, who are either accused of committing serious crimes, including but not limited to selling Schedule I controlled substances, or are gang members, are subject to deportation regardless of whether they are convicted or not. In fact, technically, anyone "out of status" is subject to deportation, though enforcement priority is

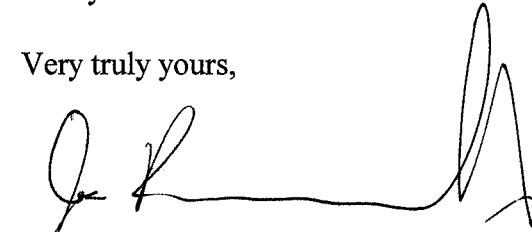
Dennis J. Herrera  
December 3, 2009  
Page 2

directed toward those persons whose arrests evidence probable cause to believe they pose a threat to their communities.

Of the numerous proposals advancing immigration law reform, none that I am aware of provide for or hint at, for that matter, creating a mechanism whereby illegal aliens who have or are engaged in dangerous criminal misconduct will be entitled to adjustment of their status or any other favorable treatment, which is why shielding them from detection by federal authorities now is not only potentially illegal but probably futile.

I trust that you will share this letter with your clients and that they will, if nothing else, at least appreciate that our position is neither arbitrary nor unreasonable.

Very truly yours,



JOSEPH P. RUSSONIELLO  
United States Attorney



DENNIS J. HERRERA  
City Attorney

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November 10, 2009

Joseph P. Russoniello  
United States Attorney  
Northern District of California  
Federal Building  
450 Golden Gate Avenue, 11<sup>th</sup> Floor  
Box 36055  
San Francisco, CA 94102

**Re: City and County of San Francisco Ordinance Amending its City of Refuge Ordinance Regarding Reporting of the Immigration Status of Juveniles**

Dear Joe:

Today, the Board of Supervisors overrode the Mayor's veto of an ordinance amending the San Francisco City of Refuge ordinance (Administrative Code sections 12H.2, 12H.2-1 and 12H.3) to provide that City law enforcement officers and employees have the authority to report information regarding the immigration status of a juvenile to any state or federal agency only after the juvenile court (1) adjudicates the juvenile to be a ward of the court on the ground of felony conduct, (2) makes a finding of probable cause after the District Attorney directly files felony criminal charges against the minor, or (2) determines that the minor is unfit to be tried in juvenile court and the superior court makes a finding of probable cause (the "Amendment"). For your convenience, I attach a copy of the Amendment, which will become effective in 30 days.

If implemented, this Amendment would change the City's current practice of reporting to U.S. Immigration and Customs Enforcement ("ICE") the immigration status of juveniles when they have been booked for conduct that would be a felony if committed by an adult. As stated in Deputy Attorney General David Ogden's October 19, 2009 memorandum regarding investigations and prosecutions in states authorizing medical use of marijuana, "In general, United States Attorneys are vested with 'plenary authority with regard to federal criminal matters' within their districts. USAM 9-2.001," and "[i]n exercising this authority, United States Attorneys are 'invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority.' Id."

Because of the Board of Supervisor's adoption of the Amendment, and in view of your earlier assertions that certain City officials may have violated federal criminal laws regarding their past handling of certain juvenile arrestees and your seemingly broad interpretation of the harboring statute, I ask that the U.S. Attorney's Office provide an assurance that if the City

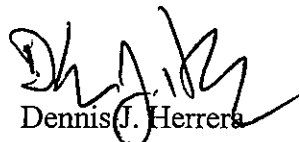
Letter to Mr. Russoniello

Page 2

November 10, 2009

proceeds to implement this Amendment in accordance with its terms, City law enforcement officers and employees will not be prosecuted for violating federal criminal laws. I would appreciate your timely response to this letter, preferably by December 7, 2009. If the U.S. Attorney's Office does not provide us with an adequate assurance that it will not prosecute City officials or employees who would implement the Amendment, my Office may be compelled to explore with City policymakers other options regarding the implementation and enforcement of the Amendment, including the possibility of filing a declaratory relief action in federal court.

Sincerely,



Dennis J. Herrera  
City Attorney

cc: Mayor Gavin Newsom  
Board of Supervisors  
Juvenile Probation Commission  
Chief Juvenile Probation Officer William Sifferman  
Ted Cassman, Arguedes, Cassman & Headley

1 [Confidentiality of juveniles' immigration status.]

2  
3 **Ordinance amending the San Francisco Administrative Code by amending Sections**  
4 **12H.2, 12H.2-1, and 12H.3 to allow City law enforcement officers and employees to**  
5 **report information regarding the immigration status of a juvenile to any state or federal**  
6 **agency when the juvenile has been adjudicated to be a ward of the court on the ground**  
7 **of felony conduct, the court makes a finding of probable cause after the District**  
8 **Attorney directly files felony criminal charges against the minor, or the juvenile court**  
9 **determines that the minor is unfit to be tried in juvenile court and the superior court**  
10 **makes a finding of probable cause; and to update references to the federal agency**  
11 **responsible for enforcing federal immigration laws.**

12 NOTE: Additions are single-underline italics Times New Roman;  
13 deletions are ~~strike-through italics Times New Roman~~.  
14 Board amendment additions are double-underlined;  
15 Board amendment deletions are ~~strikethrough-normal~~.

16 Be it ordained by the People of the City and County of San Francisco:

17 Section 1. Findings

18 A. San Francisco's City of Refuge Ordinance currently states that law enforcement  
19 personnel may report to federal immigration authorities any individual who is in custody after  
20 being booked for a felony and is suspected of violating the civil provisions of the federal  
21 immigration laws. The Ordinance does not distinguish between adults and juveniles.

22 B. Although the focus of the adult criminal justice system is on punishment, the  
23 juvenile justice system focuses on rehabilitation, guidance, treatment, stability and family  
24 reunification. Juvenile courts and other agencies charged with enforcing the laws governing  
25 juvenile delinquency are required by California law to consider the best interests of the child  
when making any decision relating to a juvenile who comes into contact with the juvenile

1 justice system. In furtherance of the goals of the juvenile justice system, California law also  
2 requires that those who have access to juvenile court records maintain the confidentiality of  
3 those records to avoid stigmatizing juveniles and to promote the rehabilitation of young  
4 offenders. Juvenile court records include records and information maintained and gathered  
5 by police, probation, and dependency agencies. State law prohibits state and local officials  
6 from releasing these records without a court order, except under specific and limited  
7 circumstances.

8 C. The City and County of San Francisco recognizes the importance of maintaining  
9 the confidentiality of juvenile court records to the effective functioning of the juvenile justice  
10 system, and it is the policy of the City and County to maintain that confidentiality to the full  
11 extent required and permitted by state and federal law.

12 D. One of the primary concerns of the juvenile justice system is preserving and  
13 strengthening a juvenile's family ties, and his or her ties to the community. The juvenile courts  
14 and Juvenile Probation Department rely on assistance from juveniles' families and community  
15 agencies to ensure that juveniles who come into contact with the juvenile justice system  
16 receive the guidance, treatment and rehabilitation they need. The family's and the  
17 community's trust in the Juvenile Probation Department, and their belief that the Juvenile  
18 Probation Department's primary focus and concern are the juvenile's best interest, are critical  
19 to the ability of the Juvenile Probation Department to gather the information it needs to assist  
20 the juvenile and his or her family. If juveniles, their families, or members of the community are  
21 afraid to provide information to the Juvenile Probation Department, they will be unwilling to  
22 cooperate with the Department. This lack of cooperation could undermine the effective  
23 functioning of San Francisco's juvenile justice system.

24 E. San Francisco has a large immigrant population that includes many individuals  
25 who are in the country legally, as well as individuals who lack legal immigrant status.

1 Determination of immigration status can be complex, and many juveniles are uncertain of their  
2 own status. Consequently, there is a significant risk that the Juvenile Probation Department  
3 could make erroneous referrals to the U.S. Department of Homeland Security, Immigration  
4 and Customs Enforcement (ICE) of juveniles who are lawful residents of the United States,  
5 and that those referrals may result in the erroneous detention of juveniles in federal  
6 immigration detention facilities far from their homes. Juveniles and their family members may  
7 be deterred from providing information to law enforcement personnel because a juvenile may  
8 be mistakenly reported to federal immigration authorities. The consequences of reporting and  
9 detention -- removal of the juvenile from his or her family and community -- may also deter  
10 school officials and other members of the community from contacting the police when they  
11 suspect that a juvenile has committed a crime.

12 F. For these reasons, San Francisco law enforcement personnel should follow a  
13 different procedure for children than for adults. Welfare & Institutions Code section 202  
14 provides that the purpose of the juvenile court is "to provide for the protection and safety of  
15 the public and each minor." In determining the appropriate point for reporting information  
16 concerning a juvenile's immigration status, the City and County strikes a balance between  
17 these two policy goals.

18 G. The mere fact that a juvenile has been detained upon suspicion of committing a felony  
19 is insufficient to justify reporting in the interests of public safety. But that balance shifts when:  
20 (1) the court declares the minor to be a ward of the court on the ground that he or she  
21 engaged in felony conduct; (2) the court makes a finding of probable cause after the District  
22 Attorney directly files felony criminal charges against the minor in adult criminal court; or (3)  
23 the juvenile court determines that the minor is unfit to be tried in juvenile court, the minor is  
24 certified to adult criminal court, and the superior court makes a finding of probable cause.  
25

1 Therefore, balancing the interest in public safety with the interest in protecting minors can best  
2 be achieved if law enforcement officers are permitted to disclose information to state and  
3 federal agencies about the immigration status of a detained juvenile when: (1) the San  
4 Francisco District Attorney files a petition in the juvenile court alleging that the minor is a  
5 person within the description of Section 602(a) of the California Welfare and Institutions Code  
6 and the juvenile court sustains a felony charge based upon the petition; (2) the San Francisco  
7 Superior Court makes a finding of probable cause after the District Attorney directly files  
8 felony criminal charges against the minor in adult criminal court; or (3) the San Francisco  
9 Superior Court determines that the minor is unfit to be tried in juvenile court, the minor is  
10 certified to adult criminal court, and the Superior Court makes a finding of probable cause in  
11 adult criminal court.

12  
13 Section 2. The San Francisco Administrative Code is hereby amended by amending  
14 Sections 12H.2, 12H.2-1, and 12H.3 to read as follows:

15 **SEC. 12H.2. USE OF CITY FUNDS PROHIBITED.**

16 No department, agency, commission, officer or employee of the City and County of San  
17 Francisco shall use any City funds or resources to assist in the enforcement of federal  
18 immigration law or to gather or disseminate information regarding the immigration status of  
19 individuals in the City and County of San Francisco unless such assistance is required by  
20 federal or State statute, regulation or court decision. The prohibition set forth in this Chapter  
21 shall include, but shall not be limited to:

22 (a) Assisting or cooperating, in one's official capacity, with any ~~Immigration and~~  
23 ~~Naturalization Service (INS)~~ investigation, detention, or arrest procedures, public or clandestine,  
24 conducted by the federal agency charged with enforcement of the federal immigration law and relating  
25 to alleged violations of the civil provisions of the federal immigration law.



1 (b) Assisting or cooperating, in one's official capacity, with any investigation,  
2 surveillance or gathering of information conducted by foreign governments, except for  
3 cooperation related to an alleged violation of City and County, State or federal criminal laws.

4 (c) Requesting information about, or disseminating information regarding, the  
5 immigration status of any individual, or conditioning the provision of services or benefits by the  
6 City and County of San Francisco upon immigration status, except as required by federal or  
7 State statute or regulation, City and County public assistance criteria, or court decision.

8 (d) Including on any application, questionnaire or interview form used in relation to  
9 benefits, services or opportunities provided by the City and County of San Francisco any  
10 question regarding immigration status other than those required by federal or State statute,  
11 regulation or court decision. Any such questions existing or being used by the City and County  
12 at the time this Chapter is adopted shall be deleted within sixty days of the adoption of this  
13 Chapter.

14 **SEC. 12H.2-1. CHAPTER PROVISIONS INAPPLICABLE TO PERSONS**  
15 **CONVICTED OF CERTAIN CRIMES.**

16 Nothing in this Chapter shall prohibit, or be construed as prohibiting, a law enforcement officer  
17 from identifying and reporting any *person adult* pursuant to State or federal law or regulation  
18 who is in custody after being booked for the alleged commission of a felony and is suspected  
19 of violating the civil provisions of the immigration laws. *In addition, nothing in this Chapter shall*  
20 *prohibit, or be construed as prohibiting, a law enforcement officer from identifying and reporting any*  
21 *juvenile who is suspected of violating the civil provisions of the immigration laws if: (1) the San*  
22 *Francisco District Attorney files a petition in the juvenile court alleging that the minor is a person*  
23 *within the description of Section 602(a) of the California Welfare and Institutions Code and the*  
24 *juvenile court sustains a felony charge based upon the petition; (2) the San Francisco Superior Court*  
25 *makes a finding of probable cause after the District Attorney directly files felony criminal charges*

1 against the minor in adult criminal court; or (3) the San Francisco Superior Court determines that the  
2 minor is unfit to be tried in juvenile court, the minor is certified to adult criminal court, and the  
3 Superior Court makes a finding of probable cause in adult criminal court.

4 ~~In addition,~~ Nothing in this Chapter shall preclude any City and County department,  
5 agency, commission, officer or employee from (a) reporting information to the federal agency  
6 charged with enforcement of the federal immigration law INS regarding an individual who has been  
7 booked at any county jail facility, and who has previously been convicted of a felony  
8 committed in violation of the laws of the State of California, which is still considered a felony  
9 under ~~S~~state law; (b) cooperating with a ~~n~~ INS request from the federal agency charged with  
10 enforcement of the federal immigration law for information regarding an individual who has been  
11 convicted of a felony committed in violation of the laws of the State of California, which is still  
12 considered a felony under state law; or (c) reporting information as required by federal or state  
13 statute, regulation or court decision, regarding an individual who has been convicted of a  
14 felony committed in violation of the laws of the State of California, which is still considered a  
15 felony under state law. For purposes of this Section, an individual has been "convicted" of a  
16 felony when: (a) there has been a conviction by a court of competent jurisdiction; and (b) all  
17 direct appeal rights have been exhausted or waived; or (c) the appeal period has lapsed.

18 However, *no* officer, employee or law enforcement agency of the City and County of  
19 San Francisco shall stop, question, arrest or detain any individual solely because of the  
20 individual's national origin or immigration status. In addition, in deciding whether to report an  
21 individual to the federal agency charged with enforcement of the federal immigration law INS under  
22 the circumstances described in this Section, an officer, employee or law enforcement agency  
23 of the City and County of San Francisco shall not discriminate among individuals on the basis  
24 of their ability to speak English or perceived or actual national origin.

1 This Section shall not apply in cases where an individual is arrested and/or convicted  
2 for failing to obey a lawful order of a police officer during a public assembly or for failing to  
3 disperse after a police officer has declared an assembly to be unlawful and has ordered  
4 dispersal.

5 Nothing herein shall be construed or implemented so as to discourage any person,  
6 regardless of immigration status, from reporting criminal activity to law enforcement agencies.

7 **SEC. 12H.3. CLERK OF BOARD TO TRANSMIT COPIES OF THIS CHAPTER;**  
8 **INFORMING CITY EMPLOYEES.**

9 The Clerk of the Board of Supervisors shall send copies of this Chapter, including any  
10 future amendments thereto that may be made, to every department, agency and commission  
11 of the City and County of San Francisco, to California's United States Senators, and to the  
12 California Congressional delegation, the Commissioner of the INS federal agency charged with  
13 enforcement of the federal immigration law, the United States Attorney General, and the  
14 Secretary of State and the President of the United States. Each appointing officer of the City  
15 and County of San Francisco shall inform all employees under her or his jurisdiction of the  
16 prohibitions in this ordinance, the duty of all of her or his employees to comply with the  
17 prohibitions in this ordinance, and that employees who fail to comply with the prohibitions of  
18 the ordinance shall be subject to appropriate disciplinary action. Each city and county  
19 employee shall be given a written directive with instructions for implementing the provisions of  
20 this Chapter.

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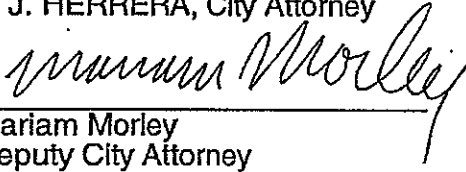
Supervisors Campos, Avalos, Chiu, Dufty, Mar, Maxwell, Mirkarimi, Daly  
BOARD OF SUPERVISORS

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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.

APPROVED AS TO FORM:  
DENNIS J. HERRERA, City Attorney

By:   
Mariam Morley  
Deputy City Attorney