CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY

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MEMORANDUM

TO: Mayor Gavin Newsom
Members, San Francisco Board of Supervisors

FROM: Dennis J. Herrera
City Attorney

DATE: August 20, 2009

RE: Disclosure of Attorney-Client Privileged Advice from the City Attorney's Office

This morning the San Francisco Chronicle reported that it has obtained a copy of a confidential memorandum from this Office regarding pending legislation under consideration by the Board of Supervisors (the "Board"). The memorandum was prominently labeled as "privileged and confidential," reflecting the fact that it was a confidential attorney-client privileged document. I do not know whether the recipient of the memo authorized the disclosure. I am taking this opportunity to remind you of the laws and policies governing the City Attorney's written legal advice on legislative proposals and the public disclosure of that advice.

Summary

The San Francisco Charter vests in the City Attorney the authority and the duty to act as the City's independent legal advisor. One of the City Attorney's specific responsibilities under the Charter is to approve as to form all ordinances before they are enacted by the Board of Supervisors. As a matter of long-standing policy and practice, the City Attorney's Office approves as to form all proposed ordinances that are in proper form and the substance of which is not patently unconstitutional or otherwise clearly illegal; that is, where the City would have a legally cognizable argument to support adoption of the legislation. In the interests of transparency and accountability, we try to make our legal advice public. But when a particular proposed ordinance presents significant legal issues or could subject the City to costly litigation, this Office usually provides confidential, consistent written advice to the Board and the Mayor as part of the process of their consideration of the legislation.

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. One of the City Attorney's most important duties is to ensure that the Board or Mayor have full knowledge of the legal risks of those kinds of actions. In our confidential cautionary memoranda, we discuss the significant legal risks accompanying a piece of legislation, and we try to identify possible options to avoid or reduce those risks and still achieve the intended policy objectives or as close to those objectives as feasible.

Those confidential memoranda, like other confidential advice from this Office, are protected by the attorney-client privilege. Only the City, acting through the particular officer or board to whom the memorandum is addressed, may waive the privilege. But as we explain further below, because the disclosure of confidential advice can have serious legal and financial consequences for the City and could violate the principle of comity that underpins the legislative process, officials should always consult with this Office before waiving the privilege.

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Discussion

A. The San Francisco City Attorney's Role In Providing Legal Advice To The City

The San Francisco Charter provides that the City Attorney is the sole legal advisor and representative of the City, including all of its officers, departments, boards and commissions. (Charter § 6.102.) The City needs to speak with one legal voice for three reasons:

- to focus debate on policy issues that are important to the people of San Francisco as a whole, rather than internal differences of opinion about legal questions,
- to avoid confusion among City commissions and departments debating conflicting legal interpretations, and
- to avoid unnecessary litigation costs and potential misinterpretations of City law.

The client of the City Attorney is the City and not individual elected officials, members of boards or commissions or even departments. Differences of opinion often arise among City officials over courses of action or policies proposed for the City. Those policy decisions sometimes involve legal questions, and the Charter specifies one elected City Attorney to perform the function of addressing such questions. The City Attorney is not a policy maker. The City Attorney gives consistent, objective legal advice to all City officials and agencies, often in confidence to preserve the ability of the City Attorney to defend in court a decision by those officials.

Confidentiality serves two purposes. It ensures that the policy makers understand the full consequences of the decisions they may be taking without injecting the City Attorney's opinion into the policy debate. Confidentiality also preserves the ability of the City Attorney to defend the City's official decisions, especially where the policy makers exercise their prerogative to decline to choose the legally safest course of action. Officials can choose to follow or not follow the advice of the City Attorney, and the City Attorney is duty bound to vigorously defend the policy decision of the officials, except where the action is unquestionably unconstitutional or illegal.

B. Written Legal Advice From The City Attorney's Office

One of the enumerated duties of the City Attorney under Section 6.102 of the San Francisco Charter is "upon request, to provide advice or written opinion to any officer, department head or board, commission or other unit of government of the City and County." Fulfilling this responsibility, the City Attorney regularly issues written advice to City employees and officers. When several officials separately request advice about the same legislative or policy issue, the City Attorney provides substantively the same written advice to each of them.

To maximize transparency and to inform the residents of the City, I have made it the policy of the City Attorney's Office to make our written opinions publicly accessible whenever it is appropriate to do so. But there are instances where we must provide that advice on a confidential basis to help protect the City's legal interests. The City Attorney decides on a case-by-case basis which opinions may be published, usually in consultation with the City official requesting the opinion. In making that decision, we consider a number of factors, including whether a public opinion would expose the City to increased risk of legal liability. Where a

potential City adversary could use a public written memorandum against the City in court, the City Attorney usually will provide the advice confidentially.

Whenever this Office issues a confidential memorandum containing privileged information, the Office labels it as such, usually by noting that the document is "Privileged & Confidential" in the header section of every page.

C. The City Attorney's Approval And Advice Regarding Legislation

Under the Charter, the City Attorney must "approve as to form . . . prior to enactment" all ordinances of the Board. (*See* Charter § 6.102(6).) The Board's Rules of Order additionally contemplate the City Attorney's approval as to form "prior to consideration by the Board or a Board committee" of any ordinance. (*See* Board of Supervisors Rule of Order 2.3.) Approval as to form imports more than a determination that the legislation is in the proper format. When the City Attorney provides no accompanying legal advice, approval as to form indicates that the legislation does not present significant legal questions and consequences that the decision makers need to know about.

The existence of legal issues usually does not mean that the City Attorney will decline to approve the ordinance as to form. The City Attorney approves legislation as to form when the ordinance is in proper form and is not patently unlawful. The City Attorney's Office demonstrates its approval of the form of an ordinance by signing the last page of the ordinance. In determining whether to approve a proposed ordinance as to form, the City Attorney exercises independent judgment about whether there is any legally defensible argument to support the legislation. By long-standing policy and practice, only when a measure is patently unconstitutional or otherwise clearly illegal on its face does the Office refuse to approve a measure as to form.

When proposed legislation is not clearly illegal but presents significant legal issues or likely will result in litigation, then this Office will approve the legislation as to form but also will provide advice regarding the legal risks associated with the legislation, usually in the form of a confidential memorandum. 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. One of the City Attorney's most important duties is to ensure that the Board or Mayor have full knowledge of the legal risks of those kinds of actions. In our cautionary memoranda, we discuss the significant legal risks accompanying a piece of legislation, as well as possible options to reduce those risks without sacrificing the City's policy goals.

When issuing cautionary advice about legislation, this Office generally takes the following four steps:

(1) When the Office delivers legislation, approved as to form, that warrants a cautionary memorandum before the legislation is introduced, the Office also delivers the written memorandum to the sponsor (or sponsors) of the legislation or informs the sponsor(s) in writing that the Office is preparing a cautionary memorandum.

(2) Once the legislation has been introduced and before a committee of the Board considers the proposed legislation, the Office delivers the same substantive advice (after taking into account any applicable amendments to the legislation) to each member of the Board committee.

(3) Once the committee has considered the proposed legislation and forwarded it to the full Board, the Office provides the same substantive advice (again taking into account any applicable amendments to the legislation) to each of the Board members.

(4) Immediately after the Board passes the ordinance on its second reading, the Office provides same substantive advice to the Mayor. If the Mayor specifically asks this Office for legal advice about proposed legislation earlier in the process, then we respond to the request at that time rather than waiting until the Board finally passes the legislation.

We generally follow this sequence so that the policy makers have the same substantive advice on a need–to-know basis and to avoid the potential confusion of having to issue multiple confidential memoranda to the entire Board and the Mayor even though the proposed legislation may be amended during the process in ways that change our legal advice.

By definition, a cautionary memorandum discusses issues that could place the City at legal risk or expose the City's legal strategies in future litigation. For that reason, as a general practice, the City Attorney provides such advice confidentially. A City official who receives such confidential advice may not waive it without following appropriate procedures, as discussed below.

D. Waiver Of Attorney-Client Privilege By Disclosing Confidential Advice From The City Attorney

A City official who receives confidential advice from this Office may not waive it unless authorized to do so. Under the California Evidence Code, non-public advice that the City Attorney provides to City officials acting in their official capacities is confidential and privileged. (*See* Cal. Evid. Code §§ 952, 954; Cal. R. Prof. Conduct 3-100.) The attorney-client privilege may be waived only by the *holder* of the privilege. (*See* Cal. Evid. Code § 912.) When the holder of the privilege is an entity like the City, the privilege belongs to the entity rather than to any individual officer or employee. (*See People ex rel. Lockyer v. Superior Court*, 83 Cal. App. 4th 387, 398 (2000); *Ward v. Superior Court*, 70 Cal. App. 3d 23, 35 (1977); Cal. R. Prof. Conduct 3-600 [attorney's client is "the organization itself, acting through its highest authorized officer, employee, body or constituent overseeing the particular engagement"].) Accordingly, privilege may be waived only by *the City*, acting through the body or office to whom the City Attorney directs the attorney-client communication.

Under these principles, when the City Attorney provides confidential written advice directly to an individual Board member or to the Mayor, that individual recipient may waive the privilege on behalf of the City. No other person, including the official's aides and staff members, may waive the privilege without authorization from the memorandum's recipient. And when the City Attorney provides confidential written advice to the full Board or one of its committees, only the body to whom the City Attorney directs the communication – and not its individual members – holds the privilege to maintain the confidentiality of the information.

Because of the sensitivity of legal advice provided in confidential memoranda, the City Attorney strongly recommends that any City official or body considering disclosing a memorandum first confer with the City Attorney's Office. As discussed above, the City Attorney usually provides confidential written advice only after determining that public disclosure of the

advice would harm the City or expose it to potentially costly legal risks. This Office welcomes confidential discussions of the risks and potential benefits of disclosure, but we take seriously the consequences, both in terms of City policy and the financial costs of unnecessary litigation. Therefore City officials should not waive the privilege by disclosing confidential memoranda from this Office without conferring with us first.

Moreover, when this Office has provided a confidential cautionary memorandum regarding proposed legislation to several City officials – such as the Board and the Mayor – principles of comity instruct that those officials should exercise particular caution before waiving the privilege. Both the Mayor and the Board play necessary institutional roles in the adoption of local legislation, and each should respect and protect the ability of the other to consider confidential advice provided by this Office during the legislative process. City officials who seek our legal advice usually expect that the advice will remain confidential, and that expectation encourages candid discussions regarding the legal vulnerabilities of legislation. One branch of City government's waiver of attorney-client privilege may discourage City officials from seeking legal advice from the City Attorney, to the detriment of the City.

E. Potential Legal Penalties For Unauthorized Disclosure Of Confidential Materials

We do not know whether the recipient of this Office's confidential memorandum authorized the disclosure described in this morning's Chronicle article. Unauthorized disclosure of confidential communications can lead to significant penalties for individual who discloses the information. Local ethics laws prohibit City officers and employees from "willfully or knowingly disclos[ing] any confidential or privileged information, unless authorized or required by law to do so," or from using confidential or privileged information to advance the private interests of themselves or others. (S.F. Campaign & Gov'tal Conduct ["C&GC"] Code § 3.228.) The Statement of Incompatible Activities for each City department also prohibits officers and employees from selling "non-public materials that were prepared on City time" or using City resources. Violations of these laws carry potential administrative, civil and criminal penalties, and may subject an official to removal for official misconduct. (*See* C&GC Code § 3.242; S.F. Charter § 15.105(e).)