

**January 29, 2008**

SUBJECT: Issuance of Subpoena for FBI Evidence Related to Termination of Former Public Safety Officer Randall Gilbert

REPORT IN BRIEF

The Office of the City Attorney requests that the City Council issue a subpoena on behalf of the City's Personnel Board to the FBI for records related to the termination of former Sunnyvale Public Safety Officer Randall Gilbert (Attachment A). This evidence is necessary in order to move forward with Randall Gilbert's Personnel Board hearing.

DISCUSSION

Randall Gilbert is a former Sunnyvale Public Safety Officer who was terminated in 2003 as a result of evidence uncovered during a federal investigation. No criminal charges were filed against Gilbert, but several other individuals were prosecuted by the U.S Attorney's Office. These criminal proceedings were only recently completed with the sentencing of the last defendant in October 2007.

Since 2003, Gilbert's attorneys have taken the position that they cannot proceed with a Personnel Board hearing until they have had an opportunity to review certain FBI evidence that the City used as the basis for Gilbert's termination. This evidence is not in the City's possession and the FBI declined to release the evidence as long as the criminal case was pending. Gilbert filed a petition for writ of mandate with the Superior Court, arguing that his right to due process was violated as a result of the City's failure to make the evidence available. The Superior Court denied the petition, and this ruling was affirmed on appeal in 2005. The Sixth District Court of Appeal found that the City had no obligation to make the evidence available prior to Gilbert's "Skelly" hearing in 2003. However, the Court left open the question whether the City has an obligation to provide the evidence prior to the Personnel Board hearing.

The FBI will only consider releasing the evidence pursuant to a valid subpoena. The Charter only gives the Council authority to issue a subpoena, so Council action is necessary to authorize issuance of a subpoena to the FBI.

Gilbert's Writ Petition

Before his Personnel Board hearing could take place, Officer Gilbert filed a petition for writ of mandate in the Santa Clara County Superior Court, arguing that "as a matter of procedural due process, he was entitled to all documents identified in the Chief's Case prior to his pre-termination hearing on February 20, 2003." (*Gilbert, supra*, 130 Cal.App.4th at 1275.) The Superior Court denied Gilbert's petition and he appealed.

The Court of Appeal affirmed the denial of Gilbert's petition, finding that "the Chief's Case together with the other materials made available to [Gilbert] prior to his pre-termination hearing adequately provided 'an explanation of the employer's evidence' [cit.] and 'notice of the substance of the relevant supporting evidence' [cit.], sufficient to enable appellant to adequately respond at the pre-termination stage." (*Id.* at 1280.)

However, the Court did not decide what evidence the City would have an obligation to provide prior to the Personnel Board hearing. The Court commented that Gilbert "must still be afforded a constitutionally adequate post-termination evidentiary hearing." (*Id.* at 1281.) In Sunnyvale, the required "post-termination evidentiary hearing" is conducted by the Personnel Board.

Subsequent Events

The City Attorney's Office and its outside counsel, Cynthia O'Neill of the law firm of Liebert Cassidy Whitmore, have been in regular contact with the U.S. Attorney's Office in an effort to secure release of the FBI evidence relevant to Randall Gilbert's termination. The FBI would not agree to release any information while the criminal case was still open. The principal defendants in the criminal case ultimately pled guilty and in May and June 2007, received sentences ranging from one to two and a half years in prison. The last remaining defendant was sentenced on October 17, 2007. Gilbert was never charged.

Although the criminal proceedings are now concluded, the U.S Attorney's office and the FBI have thus far remained unwilling to voluntarily release the evidence related to Randall Gilbert.

Unless the City can receive the underlying FBI evidence, Gilbert will bring further legal challenges to the validity of his termination, arguing that he cannot meaningfully contest the City's charges at the Personnel Board. Ultimately, a court might agree with Gilbert's claim about access to the FBI's evidence and order that Gilbert be reinstated due to the failure of the City to provide a meaningful due process hearing before the Personnel Board. The City also needs the evidence to substantiate the grounds for Gilbert's termination. Gilbert's attorneys also support the issuance of the subpoena.

Therefore, in order to proceed with the Personnel Board hearing, the City Attorney is requesting that the City Council issue a subpoena pursuant to its power under Section 613 of the City Charter and California Government Code sections 37104-37109, as well as the powers of the Personnel Board to administer oaths and hear appeals under Sections 1006 and 1008 of the City Charter.

FISCAL IMPACT

If the FBI complies with the subpoena, the fiscal impact will consist of copy charges and fees, which are expected to be minor.

ALTERNATIVES

1. Issue the subpoena in the form attached as Attachment A.
2. Do not issue the subpoena.

RECOMMENDATION

Staff recommends that the subpoena be issued.

Approved by:

David E. Kahn
City Attorney

Attachments

Attachment A – Subpoena

CYNTHIA O'NEILL (SBN# 132334)
LIEBERT CASSIDY WHITMORE
153 Townsend Street, Suite 520
San Francisco, CA 94107
Tel: (415) 512-3000
Fax: (415) 856-0306

ATTACHMENT A

DAVID E. KAHN, City Attorney (SBN# 98128)
KATHRYN A. BERRY, Senior Assistant City Attorney (SBN# 99325)
REBECCA L. MOON, Assistant City Attorney (SBN# 167981)
ROBERT L. BOCO, Assistant City Attorney (SBN# 197032)
CITY OF SUNNYVALE
456 West Olive Avenue
Sunnyvale, CA 94086
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BEFORE THE PERSONNEL BOARD OF THE CITY OF SUNNYVALE

In re:

RANDALL GILBERT DISCIPLINARY APPEAL

SUBPOENA DUCES TECUM

FROM: The City Council of the City of Sunnyvale and its Personnel Board

TO: Custodian of Records for the Federal Bureau of Investigation

1. YOU ARE HEREBY COMMANDED TO ATTEND AND TO TESTIFY in the above-referenced matter at the _____, 2008 meeting of the Personnel Board of the City of Sunnyvale, which is to be held at: City Hall City Council Chambers, 456 West Olive Avenue, Sunnyvale, California, at the hour of 6 o'clock, p.m., unless your appearance is excused as indicated by Item 2 below or you make an agreement with the person named in Item 3 below.

2. You are not required to appear in person if you produce (i) the records described below and (ii) a completed declaration of the custodian of records in compliance with Evidence Code sections 1560, 1561, 1562, and 1271. Place a copy of the records in an envelope (or other wrapper). Enclose the original declaration of the custodian of records. Seal the envelope. Mail to the following address: Cynthia O'Neill, Liebert Cassidy Whitmore, 153 Townsend Street, Suite 520, San Francisco, CA 94107.

DESCRIPTION OF RECORDS:

**All documents, writings, or videos in any format regarding Randall Gilbert,
suspect number SDPS# 10, FBI File number 281E-SF-127726**

3. If you have any questions about the time or date you are to appear, or if you want to be certain that your appearance is required, contact the following person before the date on which you are to appear:

Cynthia O'Neill, Liebert Cassidy Whitmore (415) 512-3000

4. You are entitled to witness fees and mileage actually traveled both ways, as provided by law, if you request them at the time of service. You may request them before your scheduled appearance from the person named in Item 3.

5. A copy of the Declaration of Cynthia O'Neill that shows good cause for the production of the things described in this subpoena and that sets forth their materiality to the issues involved in the case is attached.

**DISOBEDIENCE TO THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT
IN THE MANNER AND FORM PRESCRIBED BY LAW**

WITNESS my hand this _____ day of January, 2008.

CITY OF SUNNYVALE
CITY COUNCIL

By _____
Mayor

ATTEST:

Gail Borkowski, City Clerk
(SEAL)