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MEMORANDUM

TO: Honorable Malcolm Heinicke, Chair
Honorable Gwyneth Borden, Vice Chair
Members, SFMTA Board of Directors

FROM: Susan Cleveland-Knowles, SFMTA General Counsel
Katharine Hobin Porter, Chief Labor Attorney

DATE: May 9, 2019

RE: Director of Transportation Selection Process

Under the San Francisco Charter, the San Francisco Municipal Transportation Agency Board of Directors (the "SFMTA Board") appoints a Director of Transportation (the "Director"), who is employed under an individual contract. The current Director's employment contract expires on August 14, 2019, and he has announced that he will step down at the end of his contract term. In light of questions that have been asked or may arise in connection with the process for selecting and appointing a new Director, and entering an employment contract with that individual, we prepared the following summary of the relevant legal requirements and considerations to assist you.

Contract and Compensation Requirements

The Director is the chief executive of the San Francisco Municipal Transportation Agency (the "SFMTA"). The Director serves at the pleasure of the SFMTA Board and has sole control of the Agency's administrative affairs. (Charter §§ 8A.102(c), (f).)

Most City employees are appointed under the City's Civil Service process, unless exempt from that process under the Charter. (See Charter §10.104.) Most City department heads are exempt appointees. (See Charter §10.104(5).) By contrast, the Charter requires that the City employ the SFMTA Director under an individual contract; this is the only instance in which the City must employ an employee by contract. (Charter §8A.102(c)(1).) The Charter authorizes but does not require contracts for two other City employees: the General Manager of the Public Utilities Commission (the "PUC") and the PUC employee appointed to perform the duties of general infrastructure management and oversight of the Capital Improvement Program. (See Charter §8B.126(a), (b).) No other City employees are employed by contract.

Under the Charter, the SFMTA Board must set the Director's compensation at a level comparable to the compensation of the chief executive officers of the public transportation systems in the United States that the SFMTA Board determines, after an independent survey, most closely resemble the SFMTA in size, mission, and complexity. (Charter §8A.102(c)(1).) Also, the Charter provides for the contract to include an incentive compensation plan under which a portion of the Director's compensation is based on achieving service standards adopted by the SFMTA Board. By mutual agreement, the contract for the current Director does not include such a plan.

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In addition to setting compensation, an employment contract should include provisions to effect the appointment, set a term for the appointment, specify that the Director serves at the pleasure of the SFMTA Board, provide for termination of the contract with and without cause, and set the Director's authority and duties. The contract could establish a schedule for performance reviews and set performance expectations based on the Charter service standards and other SFMTA Board priorities. The contract may provide for severance in the event the SFMTA Board terminates the employment contract, without cause. State law sets certain limits on any automatic renewal term and also on any severance provision in public executive contracts. (See Gov't Code §3511.2 and §53260 et seq.) Our Office is prepared to work with the SFMTA Board to negotiate and draft an employment contract consistent with these Charter provisions and applicable state law once the SFMTA Board has selected a new Director.

The Recruitment and Selection Process

The Charter gives the SFMTA Board sole authority to select and appoint the Director. By contrast, for most City department heads, the oversight board or commission recommends at least three qualified candidates for the position to the Mayor, who then appoints the department head. (See Charter §4.101(5).)

There are several options for the SFMTA Board to develop a recruitment and selection process for a new Director. The SFMTA Board may decide to establish an ad hoc search committee to screen qualified candidates and oversee the process, and may appoint members of the SFMTA Board or other stakeholders to the committee. Or, under the SFMTA Board's rules, the Chair may form and appoint a committee on behalf of the SFMTA Board. The SFMTA Board could also authorize one of its members to oversee the recruitment and selection process.

The SFMTA Board or any established committee of its members may decide whether and how to use internal and outside resources to develop qualifications for the Director position, approve a job announcement, and identify and evaluate candidates. The SFMTA Board may consult with, or request assistance from, the SFMTA Human Resources ("HR") Division. But because employees in the HR Division may know potential internal candidates and will likely report to the selected candidate, the SFMTA may wish to use external resources for this process. For example, the SFMTA Board may request assistance from the City's Department of Human Resources ("DHR"). We understand that DHR has recently supported the Health, Fire and Library Commissions on national recruitments for new department heads.

Some City boards and commissions have used an independent search firm specializing in the relevant industry or field, or in executive hiring, to assist in developing appropriate qualifications for the department head and to oversee and manage the recruiting or hiring process. This approach is legally permissible but not required. DHR has a pool of pre-qualified recruiting firms that can assist with the process.

An important initial step in the selection process is to develop a job description and public announcement for the Director position. The Charter does not set specific qualifications or other requirements for the Director. The SFMTA Board could use the prior job description as a starting point. If the Board chooses to work with SFMTA HR or DHR, or a recruiting firm, then those human resources professionals can assist in identifying key minimum and desired

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qualifications for the position, and engage with identified stakeholders for input into those qualifications. The SFMTA Board or any established committee of its members will then need to adopt the final job description and announcement, or delegate that authority to whomever is supporting the recruitment process.

Acting or Interim Director

If there is a gap between the end of the current Director's contract and the start date of the new Director, then the SFMTA will need an Acting or Interim Director.

An Acting Director is an existing SFMTA employee who acts in the absence of the Director. The current Director can designate this individual, and if he does so, he should make that designation in writing. Alternatively, in the absence of such a designation, the "second in command" at SFMTA would, out of necessity and by operation of law, have authority to discharge the powers and duties of the Director, in an acting capacity. (See attached, January 12, 2011 Advice Memorandum, Designation of Assistant Chief Godown to fulfill the duties of Chief of Police.) To avoid potential questions about which employee is "second in command," a preferred course would be for the current Director to designate an Acting Director, at least until such time as the SFMTA Board might appoint an Interim or new Director. Regardless of whether an Acting Director is designated by the outgoing Director or assumes that role by operation of law, the individual would retain that employee's current appointment, and would receive acting assignment pay under the Memorandum of Understanding between SFMTA and the Municipal Executives Association. An employment contract is not required for an Acting Director. When the SFMTA Board appoints a new Director and that person assumes office, the individual who is serving as Acting Director would return to their current appointment.

Alternatively, the SFMTA Board may select and appoint an Interim Director. In this situation, the SFMTA Board would need to meet and take action to appoint the Interim Director, subject to an individual employment contract. The Interim Director would, in effect, be a new Director with all the powers and duties of the Director, but for a shortened term and with the expectation that the SFMTA Board intended to search for an individual to appoint to the Director position for a longer term. In choosing an Interim Director, the SFMTA Board could decide whether that person could also be eligible to be selected as the long-term Director. If the SFMTA Board were prepared to appoint a new Director during the term of the Interim Director's contract, then the SFMTA Board could ask the Interim Director to resign. If that individual declined to do so, then the SFMTA Board would need to take appropriate steps to terminate the contract to appoint the new Director.

Public Meeting Laws

All SFMTA Board and committee meetings—including meetings of any committee created by the SFMTA Board specifically for selecting a new Director—are subject to the Ralph M. Brown Act, Government Code 54950 *et seq.* (the "Brown Act"), and the San Francisco Sunshine Ordinance, San Francisco Administrative Code Chapter 67. All SFMTA Board and committee meetings, whether open or closed session, must be properly and timely noticed. (Administrative Code §67.7, §67.7-1.) And all closed session meetings of the SFMTA Board or a committee must be recorded. (Administrative Code §67.8-1.)

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In connection with the process for selecting and appointing a new Director, as a general rule, the SFMTA Board must meet in open session to discuss and act on matters related to the overall selection process and determining minimum and desired qualifications for the position. The Brown Act authorizes legislative bodies such as the SFMTA Board to meet in closed session “to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee” (Gov’t Code §54957(b)(a); *see also* S.F. Admin. Code §67.10(b).) This provision authorizes the SFMTA Board or a committee to meet in closed session to review resumes and background material for particular candidates, prepare interview questions, interview candidates, deliberate and act on the selection of a candidate, and to consider the terms of employment for the Director. Those terms of employment include the terms of an employment contract, except that the Brown Act excludes from this closed session authorization any discussion or action on the compensation of the Director: “Closed sessions held pursuant to this subdivision shall not include discussion or action on proposed compensation except for a reduction of compensation that results from the imposition of discipline.” (Gov’t Code §54957(b)(4).) These closed session requirements would also apply for selecting, appointing, and approving a contract for an Interim Director.

If in closed session the SFMTA Board selects a candidate to whom it decides to extend an offer, then the SFMTA Board is not required to immediately announce the selection in public. But if it does, it should not announce the selected candidate by name or other identifying information if the SFMTA Board has treated candidates’ names confidentially during the process. Generally affording confidentiality to candidates is the practice to protect the privacy of those individuals and prevent potential complications at their current employment; the SFMTA Board should make clear at the outset whether it will afford confidentiality to applicants.

At the first SFMTA Board meeting after a candidate accepts the position, the SFMTA Board must report in open session the closed session roll call vote for the selected candidate and post written notice of that action by the next business day. The SFMTA Board is not required to disclose the identity of unsuccessful applicants. (*Gillespie v. San Francisco Public Library Commission*, 67 Cal.App. 4th 1168, 1173-77 (1998).) Again, if the SFMTA Board has treated the candidates’ names confidentially, then the SFMTA Board should not disclose the identity of those unsuccessful candidates. Please refer to the most recent City Attorney’s “Good Government Guide – An Overview of the Laws Governing the Conduct of Public Officials,” at pages 165-68, for a more in-depth discussion of these closed session requirements. The Good Government Guide is available on the City Attorney’s website (<http://www.sfcityattorney.org/good-government/good-government-guide>).

When the SFMTA Board is prepared to approve a contract for the new or Interim Director, specific Brown Act requirements will apply. Effective January 1, 2017, Government Code Section 54953(c)(3) requires an oral report summarizing proposed compensation before final action on that compensation. “Prior to taking final action, the legislative body shall orally report a summary of a recommendation for a final action on the salaries, salary schedules, or compensation paid in the form of fringe benefits of a local agency executive, as defined in subdivision (d) of Section 3511.1, during the open meeting in which the final action is to be taken. ...” (Gov’t Code §54953(c)(3).) The Brown Act also prohibits legislative bodies from

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acting on compensation at a special meeting, because taking such action at a special meeting potentially could limit public awareness of the action. (*See* Gov't Code §54956(b).) The term "compensation" encompasses salary, including salary scale or range; incentive or bonus compensation, such as the structure of any bonus plan or any approved bonus; any severance provision; and fringe benefits.

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The SFMTA Board is embarking on an important process. As legal issues arise, our Office stands ready to provide advice to assist you. Please call us directly should you have any questions.

SCK and KHP

Encl. January 12, 2011 Advice Memorandum, Designation of Assistant Chief Godown to fulfill the duties of Chief of Police

cc: Sean Elsbernd, Chief of Staff to Mayor London Breed
Derek Kim, Acting Director of Human Resources, SFMTA
Micki Callahan, Human Resources Director, Department of Human Resources
Roberta Boomer, Secretary to the SFMTA Board
Jesse Capin Smith, Chief Assistant City Attorney
Brad Russi, Deputy City Attorney



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MEMORANDUM

TO: San Francisco Police Commission
 CC: Assistant Chief Jeffrey Godown
 FROM: Katharine Hobin Porter, Deputy City Attorney *KHP*
 DATE: January 12, 2011
 RE: Designation of Assistant Chief Godown to fulfill the duties of Chief of Police

Several members of the Police Commission have asked whether former Chief of Police George Gascón had the authority, while Chief of Police, to designate Assistant Chief Jeffrey Godown to discharge the powers and duties of the Chief of Police once Chief Gascón resigned.

The Charter does not address the management of departments when a department head position become vacant precipitously and before a successor department head assumes office. But the common law recognizes a rule of necessity applicable in that situation, based on the need to maintain continuity of governmental operations and to ensure that governmental agencies are continuously able to discharge their responsibilities. State law codifies this common law rule of necessity, and provides that a deputy to a public officer may exercise the full powers of his or her principal. *See e.g.*, California Gov't Code §§7, 1194, and 24100 (set forth at the end of this memorandum). For similar reasons, under the rule of necessity a public officer may hold over after the expiration of his or her term, when no successor is appointed or chosen and when no law bars hold over service. "Absent provisions to the contrary, the public interest requires that public offices should be filled at all times without interruption. Under this policy, an elected or appointed officer may remain in office after the expiration of its term until a successor qualifies, whether or not this is provided for by the statute creating the office." McQuillan, *The Law of Municipal Corporations* (2010) §12:105. In a conflict of interest context, Courts have applied the rule of necessity to permit a public official or body to make or participate in a governmental decision, despite having a conflict that would otherwise prohibit participation, where the official or body is legally required to make or participate in the decision. *See Affordable Housing Alliance v. Feinstein* (1986) 179 Cal.App.3d 484, 488-492 (under the rule of necessity, the mayor could take action on an ordinance despite having a financial interest in the subject matter of the ordinance); *see also Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 520 ("The common law developed the rule of necessity to prevent the vital processes of government from being halted or impeded by officials who have conflicts of interest in the matters before them.").

Based on the rule of necessity, this Office's longstanding and consistent advice has been that in the absence of a Charter provision designating a succession process in the event an office becomes vacant, the authority vested in the department head devolves to the second in command whom the department head has designated to run the department when the department head is absent or unavailable to perform the duties of the office, including through resignation, disability or death.

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At the Police Department, there are three Assistant Chiefs and therefore three second-in-command personnel. But the Charter does not specify who is in charge in the event the Chief is absent or unavailable. We are informed that before leaving office, Chief Gascón designated Assistant Chief Godown from among the three Assistant Chiefs, to be in charge of the department once Chief Gascón resigned as Chief of Police. Former Chief Gascón has not appointed Assistant Chief Godown as his successor, but rather has simply identified Assistant Chief Godown as the second-in-command to discharge the powers and duties of the Chief of Police pending selection of a new Chief under the Charter process. In this capacity, Assistant Chief Godown may exercise all powers and perform all duties of the Chief of Police. However, Assistant Chief Godown retains his civil service rank of Assistant Chief during this period.

Chief Gascón's designation will stand until the Mayor appoints a new Chief of Police who has been nominated by the Police Commission. If the Commission wishes to install an interim Chief rather than relying on Chief Gascón's designation of Assistant Chief Godown, it may submit nominees to the Mayor for appointment as Chief while the Commission conducts a more comprehensive search process. The Mayor and Commission may consider this appointee as an interim Chief. But that appointee would have all the powers of the Chief of Police. When the Mayor was prepared to appoint a new Chief, the Mayor or the Commission could ask the interim Chief to resign. If the interim Chief declined to do so, the Commission or Mayor would have to remove that person in order to appoint a new Chief of Police.

Government Code Sections**Section 7. Public officers; exercise of powers and duties by deputies and others**

Whenever a power is granted to, or a duty is imposed upon, a public officer, the power may be exercised or the duty may be performed by a deputy of the officer or by a person authorized, pursuant to law, by the officer, unless this code expressly provides otherwise.

Section 1194. Powers and duties

When not otherwise provided for, each deputy possesses the powers and may perform the duties attached by law to the office of his principal.

Section 24100. Deputy included in principal's name

Whenever the official name of any principal officer is used in any law conferring power or imposing duties or liabilities, it includes deputies.

K.H.P.