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REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

PROPOSAL TO TRANSFER SAN DIEGO FAMILY JUSTICE CENTER TO THE YWCA

### **INTRODUCTION**

The San Diego Family Justice Center [FJC] was originally created by an informal partnership in 1998 between Casey Gwinn, the former City Attorney, and David Bejarano, the former San Diego Police Chief. What made the FJC unique was the entire prosecution arm and the law enforcement arm of domestic violence and child abuse were co-located under one roof to assist victims of domestic violence and their children. At that time, the FJC functioned as part of the City Attorney's Office. In 2004, the FJC became a City Department under the City Manager. The management of the FJC should never have been moved from the City Attorney's Office. The Council now has an opportunity to move the FJC back to the City Attorney's Office where it would function best.

In a March 27, 2008 letter, the San Diego County Young Women's Christian Association [YWCA], under the leadership of Executive Director Casey Gwinn, proposed taking over the management of the FJC Department as of July 1, 2008, and ultimately eliminating the FJC Department altogether. The City Attorney's Office was not involved in any of the planning for this proposal. On May 1, 2008, the Mayor issued a memorandum supporting and recommending the adoption of this proposal. The City Attorney's Office received a copy on May 2, 2008 from Casey Gwinn.

Neither the City Attorney's Office, nor the FJC Steering Committee, were consulted in the preparation of the YWCA proposal or its recommended adoption by the Mayor. This proposal did not go through the proper public process. Such actions are improper and inappropriate as they violate SDMC section 22.2203, numerous ordinances governing procurement, state labor laws governing meet and confer obligations, and City Charter provisions governing managed competition. Further the proposal raises substantial and serious concerns relating to the Establishment Clauses of the Federal and State Constitutions.

### **BACKGROUND**

#### **I. Early History of the San Diego Family Justice Center**

After several years of informal coordination between Casey Gwinn, the former City Attorney, and the former Police Chief, on October 10, 2002, the FJC formally opened at 707 Broadway with the assistance of over 24 community partners, creating the most comprehensive facility of its kind in America, and providing services to victims of domestic violence and their children. When the FJC opened, each day over 120 child abuse and domestic violence professionals and volunteers provided services to victims of family violence and sexual assault at the Family Justice Center. In addition, each month the FJC provided services to 600-800 women, men and children.

In October 2003, President George W. Bush announced the President's Family Justice Center Initiative to create family justice centers across America modeled after the San Diego Family Justice Center. Over the next two years, the United States Department of Justice began to fund 15 sites with approximately \$20 million authorized by the national initiative.

In a report dated April 15, 2004, former City Attorney Casey Gwinn recommended expanding the lease to add 12,000 square feet of space on the 2<sup>nd</sup> floor of 707 Broadway to allow for the addition of other community partner organizations. The lease was eventually approved by the City Council in 2004. This expansion created enough space to allow the San Diego Family Justice Center Foundation, of which Casey Gwinn was the founder and board member, to move into the FJC at 707 Broadway.

## **II. Casey Gwinn's Efforts to Maintain Control of the FJC After Leaving Office**

Two years after the founding of the FJC, in a report dated November 2, 2004, Mr. Gwinn proposed that the Mayor and Council establish the FJC as a department under the authority of the City Manager. The new Department would be overseen by a Director that reported directly to the City Manager. There would be no increases in the City budget because the positions would be cut and transferred from the City Attorney's Office budget to the FJC. Among the reasons for the creation of the new department, Mr. Gwinn's report cited concerns that the FJC should continue operating in the same manner "irrespective of the individual priorities of a future Police Chief, Fire Chief, City Attorney, or City Manager." Thus, Mr. Gwinn expressly stated that his intent was to isolate control of the FJC from, among others, the incoming City Attorney.

On November 15, 2004, four days before the city clerk certified the election of the current City Attorney, the Mayor and City Council passed an ordinance establishing a Family Justice Center Department under the San Diego City Manager (Lamont Ewell) to oversee the administration of the Family Justice Center.

In supporting Gwinn's proposal, the Mayor and City Council approved the transfer of three critical positions from the Domestic Violence Unit of the City Attorney's Office to the City Manager's Office (director/assistant city attorney, administrative assistant/city attorney legal secretary, and a grants analyst/city attorney grants analyst) and one position from the Police

Department (operations manager/police manager) before the newly elected City Attorney was sworn into office on December 6, 2004.

The ordinance was adopted on November 29, 2004, which prevented the newly elected City Attorney from reviewing the ordinance and evaluating the needs of the Domestic Violence Unit of the City Attorney's Office. The ordinance also created the FJC Steering Committee. This Committee consists of the Director of the FJC, the City Attorney, the Chief of Police, the San Diego District Attorney, and the current Chair of the Public Safety and Neighborhood Services Committee of the City Council.

The FJC Steering Committee were to meet periodically, but no less than once a quarter to develop and oversee the operational guidelines for the FJC, and to make recommendations to the Mayor and the City Council for development of a Long Range Strategic Plan for development of the FJC, and to make recommendations pertaining to programs, priorities, and the annual budget for the FJC. SDMC § 22.2203.

The City Attorney Report (November 2, 2004) accompanying the ordinance stated that "Other City Attorney's Office classified personnel including victim advocates, and support staff currently assigned to the Family Justice Center could be transferred to the Family Justice Center department in a process to be identified by the City Manager and in consultation with the City Attorney."

Three months later, a working group was tasked to evaluate two new governance approaches, other than being a City Department: (1) a public benefit corporation administered through a community-based governance board, or (2) a joint powers authority between the City of San Diego and the County of San Diego. Thus, unlike the current proposal, a prior proposal to restructure the FJC was discussed through, an open, public process. Ultimately, the 2005 proposals were not adopted. See, Manager's Report dated March 10, 2005.

Originally, Casey Gwinn planned to work part-time for the District Attorney and part-time for the San Diego Family Justice Center Foundation, as reported in a February 25, 2004 Union Tribune article. Subsequently, questions were raised about potential conflicts of interest violations as noted in a later Union Tribune article dated September, 24 2004. The Ethics Commission declined to rule on the state law questions. Ultimately, Casey Gwinn did not work part-time for the Foundation.

Additionally, it is important to note that Casey Gwinn was found to be negligent in the fulfillment of his duties as the City Attorney with regard to financial disclosures. See, Kroll Report, p. 238. Further, the Kroll Report questioned Casey Gwinn's billing practices as City Attorney. See, Kroll Report, appendix Q. The conclusions of the Kroll Report call into question of the wisdom of turning over a City department, once again, to Casey Gwinn.

### **III. The YWCA Proposal**

As the elected City Attorney, Casey Gwinn founded the San Diego Family Justice Center Foundation in July 2003. After leaving the City Attorney's Office, Mr. Gwinn went to work part-time for the San Diego District Attorney's Office and worked on domestic violence issues.

On July 1, 2007 Mr. Gwinn was hired as the Executive Director of the YWCA. He has been actively pursuing the proposal for the YWCA to take over the FJC from the City.

In a letter to Mayor Sanders dated March 27, 2008, the YWCA under Mr. Gwinn's leadership proposed moving the FJC to the YWCA Main Building by March 2010, eliminating the FJC Department, and moving towards the community-based leadership model envisioned in the Regional Family Justice Center Network Plan, as proposed by the District Attorney's Office in June of 2007. Under the proposal, the City would enter into a 10-year lease to house the FJC at the YWCA a cost of approximately \$900,000 each year. This lease would not include space for the City's 11 domestic violence prosecutors and 15 staff that currently occupy one floor of the FJC. However, the lease would include space for the San Diego Police Department's Domestic Violence and Elder Abuse Units.

Until the move to the YWCA Main Building, the YWCA proposes it enter into a management agreement with the City (effective July 1, 2008) for \$125,000 each year. During this two year agreement, the YWCA would oversee and coordinate the work of the FJC with the partner agencies, thereby essentially taking over the function of an existing City Department. An additional use of this City-leased property would be that YWCA clients would also use the FJC for services that would otherwise be provided at the YWCA. This arrangement would permit the YWCA to have a home for its services, during renovation, without having to pay rent. The YWCA claims that this model will save the City more than \$300,000 per year and allow a two year transition process for the relocation of the FJC to the YWCA Main Building.

Mayor Sanders has been in discussion with the YWCA on the proposal for the last six months, without consultation with the FJC Steering Committee, as required by ordinance, and without consultation by the two largest community partners of the FJC, the City Attorney's Office and the San Diego Police Department. The Mayor in a May 1, 2008 memo recommends accepting this proposal by the YWCA, while proposing a limited presence by the City Attorney's Office in the new facility.

## **DISCUSSION**

### **I. Public Policy Concerns**

#### **A. Lack of Transparency**

That this proposal was created and discussed is disturbing at the least, and contrary to law at the worst. The FJC Steering Committee was neither informed nor consulted about this proposal, as required by SDMC section 22.2203. At no time was the March 27, 2008 proposal

for the YWCA to take over leadership and management of the FJC ever presented or discussed to the FJC Steering Committee. Instead this proposal was developed by the YWCA in consultation with the District Attorney's Office, and then embraced by the Mayor's Office – all outside of the eyes of the public. The FJC Steering Committee was set to meet on April 30, 2008, which meeting was canceled on April 29, 2008 without a stated reason.

**B. Contrary to Purpose of the FJC**

The purpose of the SDFJC was to create a “one stop shop” for victims of domestic violence and their children, where they could meet with law enforcement officials to report the abuse, who would in turn would work closely with the deputy city attorneys that prosecute these crimes. Having both law enforcement and the prosecutors under one roof is what makes the SDFJC unique from all other social providers who assist victims of crime. In addition to law enforcement and prosecution, victims are also able to meet with social service providers to receive assistance in obtaining a restraining order against their abuser, to receive medical assistance for themselves and their children, to receive special services provided for military families, to receive therapy for themselves and their children from Children's Hospital, to receive special services based on a victim's particular need, such as elderly victims, from Adult Protective Services to name a few.

The YWCA proposal, however, would eliminate this primary innovation. It would provide for, at most, woefully inadequate space for domestic violence prosecutors. It “does not anticipate a large presence from the City Attorney's Office.” Thus, the alleged purpose of maintaining the integrated provision of services would be lost.

**C. No Clear Savings to Citizens of San Diego**

The YWCA's claim of savings does not take into account the fact that the transfer of the FJC to the YWCA will require the City to lease new space to house the domestic violence prosecutors and support staff who will be displaced. Currently the FJC houses at least 26 City Attorney employees on the 5th floor of the FJC. The cost of relocating these employees, including rent for approximately 9,000 square feet of office space at a future facility, needs to be subtracted from the claimed cost savings.

In addition, it appears from the Regional Family Justice Center Network Plan, as proposed by the District Attorney's Office in June of 2007, that the eventual intent of the YWCA and the County is that the County should eventually run the downtown FJC, although the City would still be funding the operation through a combined lease/management contract in the amount of \$900,000 annually. There is no clear explanation as to why the City would continue to pay for space for a City department that will no longer exist. Nor is there any analysis of whether other space might be available at a more competitive price, or even through grant funding or donations that might result in little or no cost to the City.

## **II. Legal Issues Relating to the Proposed Management Agreement**

### **A. The Proposed Agreement Conflicts with the City Charter**

The proposal by the YWCA is at best vague in its terms. However it plainly envisions a transfer of supervision of a City Department to a non-profit organization. This raises many legal considerations, foremost among them is the fact that such transfer conflicts with provisions of the City Charter and would be void.

The Family Justice Center was created as a City Department by San Diego Municipal Code section 22.2201. As with other City Departments, the Mayor now appoints the Department Director. SDMC § 22.2202; San Diego Charter § 29. The City Council by a two-thirds vote could abolish this Department. San Diego Charter § 26. However, the Charter does not give either the Mayor or the City Council the authority to transfer supervision of this City Department to a private body.

The Mayor has authority to outsource the services of City Departments to private contractors pursuant to Charter section 117(c) and its implementing ordinances. However this is the *exclusive* method for such outsourcing of City services. To the extent this proposal involves the outsourcing of city services to a non profit corporation it does not seem to comply with the requirements of section 117(c). Accordingly, incorporating this budgetary suggestion into the appropriations ordinance would make the ordinance conflict with Charter section 117(c). Such an ordinance or agreement that conflicts with a City Charter provision would be void. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal.4th 161, 171 (1994); *Hubbard v. City of San Diego*, 55 Cal.App.3d 380, 387-388 (1976).

Charter section 11.1 limits the City Council from delegating its authority to a private person in the same manner California Constitution Article XI, Section 11a limits the state legislature. Article XI, Section 11a provides that “The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions.” To the extent that the Council agrees that a private party supervise a City Department funded with public moneys, it may be violating those provisions. Such an unconstitutional delegation of power may occur when a legislative body provides an administrative *agency* with unrestricted authority to make fundamental policy decisions. *See discussion, Hess Collection Winery v. California Agricultural Labor Relations Board*, 140 Cal.App.4th 1584, 1604-1605 (2006). Delegating unlimited authority to a private institution that is not even an administrative agency may well be a violation of this constitutional and charter provision.

Moreover, the Charter provides that it is the Mayor’s duty as City Manager to supervise the administration of the affairs of the city, including City Departments. Charter §§ 28, 29. Section 28 gives the Mayor the responsibility to assume the duties of department heads. It does

not give him the authority to delegate his administrative supervisory powers, or those of one of his Department heads, to a private party. The Mayor is the public official given the discretion by the City Charter to supervise City Departments in accordance with City policies established by the City Council. A City Council “cannot relieve a charter officer of the city from the duties devolving upon him by the charter.” *Dadmun v. City of San Diego*, 9 Cal.App. 549, 551 (1908). Any action that would transfer supervision of a City Department from the Mayor to a private company would be unauthorized and void. *Ibid*; also *Hubbard*, 55 Cal.App.3d at 387-388.

#### **B. Requirement to Meet and Confer with Recognized Labor Unions**

The Family Justice Center (FJC) proposal of the Mayor as reflected in his May 1, 2008 memorandum states at paragraph 3: “The first part of the proposal calls for the YWCA to assume responsibility for the management of the FJC effective July 1, 2008.” He proposes to eliminate the current City staff at the FJC and contract with the YWCA to manage it, claiming a labor cost savings in using YWCA staff instead of City staff. There are currently five full time City positions at the FJC that are represented by a collective bargaining unit, the Municipal Employees Association.

The proposal of the Mayor, if enacted at this time, would violate Government Code sections 3500 et.seq. commonly referred to as the Meyers-Milias Brown Act. Section 3505 of the Act requires the City to meet and confer with its bargaining units over wages, hours, and working conditions. A proposal by a public agency to contract out the work of its bargaining unit employees is a mandatory subject of bargaining. *Lucia Mar Unified School District* (2001) PERB Decision No. 1440.

The City can not contract out the work of the MEA bargaining unit members in the FJC or eliminate their positions, without first negotiating with MEA. *Building Material and Construction Teamsters Union, Local 216 v. Farrell, as Controller* (1986) 41 Cal.3d. 651. The negotiations must involve both the decision to contract out work, and the impact of the decision on any affected bargaining unit employees. MEA is permitted to offer alternative proposals, including, but not limited to, the City not contracting out the work of its bargaining unit members. *Rialto Police Benefit Association v. City Rialto* (2007) 155 Cal.App.4<sup>th</sup> 1295, Fourth Appellate District. (City’s decision to contract with the county sheriff for law enforcement services rather than continue to provide those services through its own police department required the city to negotiate the decision and effects with its police union. Decision by city to contract out the service set aside.)

The City must go through the same negotiation process with MEA over this issue as it does over any other negotiable issue. That is, (a) reasonable notification must be given MEA of the proposal to contract out work and eliminate the positions, (b) negotiation with MEA over the proposal itself to contract out work as well as the effects of the proposal, (c) reach agreement with MEA or, if impasse is reached, follow the City’s impasse procedures by holding an impasse meeting, and subsequently an impasse hearing before the City Council. During the process, the

City must provide with information sufficient for it to intelligently negotiate. No vote can take place on the Mayor's proposal to contract out this work and eliminate these positions, until the negotiation process, and if necessary, the impasse process, is complete.

Contracting out work without allowing the affected labor union to bargain over both the proposed decision and its effects is an unfair labor practice, not tolerated by the Public Employment Relations Board. Voting on the Mayor's proposal, before the completion of the negotiation process would likewise show the Council had prematurely made a decision prior to required input by MEA and possible alteration of the Mayor's proposal in negotiations. *Oxnard Harbor District* (2004) PERB Decision No. 1580-M; *Riverside County* (2003) PERB Decision No. 1577-M. This too would be an unfair labor practice.

The remedy for the City imposing this proposal prior to the completion of negotiations would be to return to the status quo ante, i.e., reinstating all the city employees released, with full back pay and benefits from the date they were let go, reinstating the City run program with city staff managing it, and returning to the negotiation table to do what should have been done initially, negotiate with MEA over the proposal. *Oakland Unified School District* (2005) PERB Decision No. 1770 (Refusal to negotiate contracting out police coverage of schools to City of Oakland and layoff of school police officers. School district ordered to reinstate school police officers with back pay and benefits, despite district paying Oakland \$1,000,000 per year to patrol the agency's schools.)

The City would be required to do this, despite having spent City funds each year in paying the YWCA to perform these services. In essence, the City would be required to pay twice, once to the YWCA and again to reinstate all the employees that were previously performing those functions, with full back pay and benefits.

At the present time, matters of family violence which may be misdemeanors are referred to the City Attorney's office, which provides staff as a part of the FCJ. Those employees are bargaining unit employees of the MEA and DCCA unions. If the Mayor's proposal would affect the assignment of work currently handled by bargaining unit employees of the City Attorney's office, by reducing or eliminating the work currently performed by these bargaining unit employees, it would again be a violation of the City's duty under Government Code section 3505 to fail to negotiate the transfer of work out of the bargaining units, prior to implementing such action.

If the proposal shifts work currently handled by the City Attorney's office to the District Attorney's office, this would be contracting out of work, and a shift in work out of the current bargaining units, and could not occur without a violation under the Meyers-Milias Brown Act until and unless negotiations were held with the respective unions, and an agreement was reached, or impasse procedures (including a vote by the City Council), completed.

### **C. Contracting with a Faith Based Organization to Perform City Services**

The Young Women's Christian Association [YWCA] mission is "nourished by its roots in the Christian faith..."<sup>1</sup> Because the organization is faith-based, potential issues regarding the Establishment Clause must be resolved before the YWCA could be authorized to manage the Family Justice Center.

## 1. U.S. Establishment Clause

The First Amendment of the United States Constitution states in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."<sup>2</sup> This portion of the First Amendment has commonly been referred to as the "Establishment Clause." While the Supreme Court has noted that "[t]he language of the Religion Clauses of the First Amendment is at best opaque,"<sup>3</sup> the analysis has been distilled to three cumulative tests, based on the three main evils the Establishment Clause was intended to provide protection from: "sponsorship, financial support, and active involvement of the sovereign in religious activity."<sup>4</sup>

The three tests are: 1) the statute must have a secular purpose, 2) its principal or primary effect must be one that neither advances nor inhibits religion, and 3) the statute must not foster an excessive government entanglement with religion.<sup>5</sup> In *Lemon*, the Supreme Court held that two separate state programs violated the Establishment Clause. The State of Rhode Island provided salary supplements to teachers of secular subjects in non-public schools and the State of Pennsylvania provided for reimbursement to non-public schools for teachers' salaries, textbooks, and instructional materials. The large majority of students in both states who attended non-public schools attended parochial schools affiliated with the Roman Catholic Church.

The court found that the "cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion."<sup>6</sup> In order to make this determination, the court examined "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."<sup>7</sup> The court warned against "programs," "whose very nature is to entangle the state in details of administration."<sup>8</sup>

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<sup>1</sup> [www.ywca.org](http://www.ywca.org) visited 5/5/2008.

<sup>2</sup> US Constitution, 1<sup>st</sup> Amendment.

<sup>3</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)

<sup>4</sup> *Id.*, citing *Walz v. Tax Commission*, 397 U.S. 664, 668; 90 S.Ct. 1409, 1411; 25 L.Ed. 697 (1970).

<sup>5</sup> *Lemon*, 612-613.

<sup>6</sup> *Lemon*, 613.

<sup>7</sup> *Lemon*, 615.

<sup>8</sup> *Lemon*, 615; citing Justice Harlan's concurring opinion in *Walz v. Tax Commission*, 397 U.S. 664, 668; 90 S.Ct. 1409, 1411; 25 L.Ed. 697 (1970).

In the particular facts presented in the *Lemon* case, the court noted the physical proximity of the schools to the churches, the religious symbols present, the integration of the schools to the religious mission of the Catholic Church, and in the case of Pennsylvania, the direct financial aid to the schools. Although the court did not make any findings that religious values inevitably or necessarily intruded into the content of the secular subjects, the need by the government for careful controls and surveillance itself was “excessive and enduring entanglement between state and church.”<sup>9</sup>

Later, in *Larkin*, the Supreme Court applied the third *Lemon* test to invalidate a Massachusetts statute that allowed churches and schools to veto liquor license granted to any establishment within 500 feet of the church or school.<sup>10</sup> The Court held that even this minimal governmental authority violated the establishment clause.

## 2. State of California Constitutional Concerns

The Constitution of the State of California addresses the relationship between the state and religion in several places:

Article I, section 4: The free exercise of religion and enjoyment of religion without discrimination or preference are guaranteed. The Legislature is prohibited from making a law respecting the establishment of religion.

Article XVI, section 5: “Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever....” However, aid granted pursuant to Article XVI, section 3 is allowed.<sup>11</sup>

Article IX, section 8: Prohibits the appropriation of public money for any sectarian or denominational school not under the exclusive control of the officers of the public schools.

California courts have interpreted Article I, section 4 as being more protective of the principle of separation of church and state than the federal guarantee.<sup>12</sup>

There has been no proposal submitted regarding the management of the FJC by the YWCA, such that the concerns regarding the Establishment Clause, particularly “excessive

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<sup>9</sup> *Lemon*, 619.

<sup>10</sup> *Larkin v. Grendel’s Den*, 459 U.S. 116 (1982).

<sup>11</sup> Ca. Const. Art. XVI, §3 allows support for hospital, orphans, children of disabled, aged, blind, needy, and physically handicapped persons.

<sup>12</sup> *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978).

entanglement”, could be reviewed. A management proposal should be submitted for review for determination as to whether the concerns expressed by the courts could be addressed.

**D. Compliance with the City’s Contracting Policies**

The proposal also raises significant legal questions regarding the method by which the contractual relationship between the City and the YWCA has been negotiated. Contracts for City services must be procured through a competitive process governed by Chapter 2, Article 2, Division 32 of the San Diego Municipal Code. Under the provisions of Division 32 and related sections of the Municipal Code, services must be procured on a competitive basis unless an exception to this requirement applies. SDMC §§22.3202; 22.3211. It is not at all clear that, in view of the entirety of the proposal, any exception applies. While section 22.3222 permits special treatment of contracts with non-profit organizations, this exception only applies where the contract will not exceed \$500,000 per year. It appears that this requirement would only be met in the first year of the proposed relationship between the City and the YWCA, when the only cost to the City would be a management fee of \$125,000. In all subsequent years, the management fee would be combined with a rent obligation at the YMCA’s own facility, which would be renovated. The total obligation of the City, then, for both rent and management costs, would be \$900,000. Thus, it appears that this exception to competitive bidding would not be applicable beyond the first year of a proposed long-term arrangement.

While it might be suggested that breaking out the contract for the first year from those for subsequent years would allow the City to enter into the FY 2009 contract under SDMC section 22.3222 while searching for a separate justification for later years, this is specifically forbidden by SDMC section 22.3204. Likewise, it might be suggested that the dollar limit of SDMC section 22.3222 could be circumvented by separating the lease and management aspects of the proposal, since leases are not subject to Division 32 and the management fee, taken alone, is less than \$500,000. However, since it is apparent that the management and lease aspects of the proposal are intended to be integrated, we doubt that this would be permissible under section 22.3204, if the purpose were to avoid the limitation of SDMC section 22.3222.

Although City contracts are commonly entered on a “sole source” basis under sections 22.3037 and 22.3212(e) (where competitive procurement would be “unavailing, or would not produce an advantage, or would be undesirable, impractical, or impossible,” we are not aware of any legitimate sole source justification in this case. To the contrary, it appears that City staff has been actively engaged in discussions with YWCA officials for at least six months. During that time, if the City staff believed that operation of the FJC could be more effectively managed in the private sector, it presumably could have developed a Request for Proposals and invited various organizations to compete for the right to serve. We have seen no explanation for why this was not done.

Finally, we note that the proposed lease of future renovated YWCA space would be for ten years. If the proposal as we understand it goes forward, the YWCA’s management contract

would be inextricably intertwined with that lease, and thus would effectively be a ten year agreement even if it were nominally to contain a lesser term. Thus, we advise that, to the extent that the other issues addressed herein may be surmountable, City Council approval of all aspects of the proposed agreement be by Ordinance in compliance with section 99 of the City Charter, which imposes special noticing requirements and also required a two-thirds vote of the Council.

#### **E. Contracts with Service Providers**

It is unclear whether the YWCA will be contracting directly with the service providers that currently have agreements with the City. If it is contemplated that the YWCA enter into agreements with these or other service providers, several legal issues must be addressed in order to protect the City from liability. Those issues include the following:

- Liability - which party bears the risk for negligence and intention misconduct, who will be indemnified or held harmless
- Maintenance of appropriate licenses by professionals
- Inclusion of all standard city requirements, such as the ADA provisions and conflict of interest
- City's obligations to provide workspace, computer use, etc, and the City's right to inspect the premises occupied by a provider
- Ownership of data and records; responsibility for responding to subpoenas and other legal processes for those records
- Confidentiality of records, waivers, sharing of information
- Scope of Work-limiting the work of the providers to the needs of the Family Justice Center
- Subcontractors - when they are and are not allowed
- Volunteers and interns - who is responsible and liable for the service provider volunteers

Other legal issues that are not yet resolved are whether the service provider agreements are of the type of contract that have to be competitively bid, or can the director enter in to the agreements without competition or a sole source finding. To the extent there are other agencies that do not provide direct services to victims, is the City's inclusion of those agencies as agencies to whom free rent and equipment nonetheless appropriate? Should the City make other findings with respect to those agencies to make it clear there is no gift of public funds?

#### **F. Liability Issues**

FJC would still be a City Department but not run by City employees. While the City Attorney's Office and the San Diego Police Department were the main committed partners in launching and operating the FJC, it is the City that is the legal entity behind all actions of the FJC. The City, for example, funded the original site lease; signed the extended five year lease; signed all contractors for construction, parking, and utilities; applied for and received grants; and signed partnership agreements with more than twenty community partner agencies to provide victim services on site. An analysis is necessary to determine how the YWCA's proposal affects the City's liability.

### CONCLUSION

The FJC should be brought back to the City Attorney's Office where it belongs. The City Attorney strongly recommends that the Mayor and City Council take the time to review these issues to allow time for public participation in the process before moving forward. If there is a problem with the leadership of a City department, the solution is for the Mayor to find another department director. The solution most certainly is not for the City to absolve itself from leading the department and to outsource the leadership of that Department to a non-profit, faith-based organization.

If the Mayor and his management team are unable to carry out the mission of the nationally recognized San Diego Family Justice Center, then the solution is to return the leadership of the FJC to its origins – where it was thriving – under the leadership of the City Attorney's Office.

Respectfully submitted,

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FAMILY JUSTICE CENTER