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CITY OF OAKLAND
AGENDA REPORT

FILED
OFFICE OF THE CITY CLERK
OAKLAND

2008 JUN 26 PM 4:27

To: Office of the City Administrator
Attn: Deborah Edgerly
From: Police Department
Date: July 8, 2008

Re: **A Report and Proposed Resolution Authorizing the City Administrator, or Her Designee, to 1) Enter Into A Memorandum of Understanding with the Federal Bureau of Investigations (FBI) and the Silicon Valley Regional Computer Forensics Laboratory (RCFL) to Provide Computer Forensic Investigator Training and Computer Forensics Laboratory Support to the Oakland Police Department (OPD), 2) Accept and Appropriate Overtime Reimbursements up to Fifteen Thousand Dollars (\$15,000) per year From the FBI to the Oakland Police Department, and 3) Accept Title to Property and Equipment Given to OPD by RCFL**

SUMMARY

A report and proposed resolution has been prepared, authorizing the City Administrator or her designee, on behalf of the City of Oakland, to execute a Memorandum of Understanding (MOU) with the Federal Bureau of Investigations (FBI) and the Silicon Valley Regional Computer Forensics Laboratory (RCFL) to provide computer forensic investigator training and computer forensic laboratory services and support to the Oakland Police Department (OPD). This agreement will permit OPD to become a participating agency of the RCFL. As a participating agency, OPD will be required to assign a sworn member to staff the laboratory for not less than two years. In return, OPD receives from RCFL: priority access to digital forensics examinations and advisory services; sophisticated computer forensics technical training provided to the assigned sworn member by the FBI; exposure to the most technologically advanced computer forensic equipment available; and a stake in the management of the RCFL all at no cost to the City. During assignment to RCFL, the sworn OPD member will be deputized as a special deputy US Marshal, enabling him to participate in federal investigations for both training and to provide assistance to other lab member agencies. RCFL has also agreed to provide reimbursement for investigator overtime up to \$15,000 per year and, if funds are available, to transfer title of property and equipment given to OPD during the duration of the MOU.

FISCAL IMPACT

Approval of this resolution will authorize the City Administrator to execute MOUs with the FBI and RCFL to provide computer forensic investigator training and computer forensic laboratory services and support to the Oakland Police Department, accept and appropriate up to \$15,000 per year in overtime expenditures, and accept title to property and equipment given to the Department by RCFL. Said funds shall be deposited into General Fund: 1010, Org:102340, Account: 51214, Program: PS03, and project to be determined.

Item: _____
Public Safety Comte.
July 8, 2008

As a participating agency, there are no hard costs associated with 1.0 sworn FTE being detailed to the RCFL other than the personnel costs. Participating agencies shall bear all personnel costs for any of their personnel detailed to the RCFL, including but not limited to: salaries, retirement, expenses, disability and all other employment-related benefits incident to their employment with their respective agencies.

This resolution will authorize the Department to assign a currently authorized sergeant of police (per 2007-09 Adopted Budget) to the RCFL. The Department intends to assign computer forensic related cases to this sergeant of police while he/she is detailed to the RCFL. The assignment of these cases to the RCFL investigator will relieve the burden on the other criminal investigators who are currently assigned these cases but who do not have access to timely computer forensic examination facilities to complete their investigations. Non-computer related cases that would have been assigned to the sergeant assigned to the RCFL detail will be reallocated among the other investigators in the Criminal Investigation Division. This plan does not require additional overtime or hiring of a replacement to cover the RCFL assigned investigator's current and anticipated case load.

Transportation, both to and from the RCFL and in support of the mission and operational requirements of the RCFL, will be provided in accordance with the policies and procedures of the detailed sworn employing agency and the MOU. The FBI will provide each sworn member detailed to RCFL with a vehicle (including fuel), essential equipment, training, travel expenses, and supplies. The FBI will also reimburse the City for overtime expenses related to investigator training and investigative work up to \$15,000 per year. The estimated costs associated with certifying a single new forensic examiner are estimated at \$50,000 and are entirely funded by the FBI. Finally, if funds are available, the RCFL may transfer title of property and equipment (likely to be computers and software) to the City of Oakland during OPD's participation.

No additional funding is required for this program.

BACKGROUND

The City of Oakland continues to experience an increase in high technology crime. Additionally, the widespread use of digital electronic equipment and media has led to an increasing number of cases in which digital media is presented as evidence, prompting the need for OPD to develop the ability to employ digital forensics on electronic evidence used in the commission of these crimes.

Digital forensics is the application of science and engineering to the recovery of digital evidence in a legally acceptable and court admissible method. Examiners use digital investigation and analysis techniques to identify and examine potential legal evidence by applying their skills on a variety of software programs, different operating systems, varying hard drives sizes, and specific technologies such as personal digital assistants, cell phones, or video cameras. Examiners are also capable of locating deleted, encrypted or damaged file information that may serve as evidence in a criminal investigation.

Item: _____
Public Safety Comte.
July 8, 2008

KEY ISSUES AND IMPACTS

The City of Oakland and OPD has experienced a proliferation of the use of computers and digital devices in virtually all types of criminal activities, including crimes against children, crimes of violence and financial crimes including identity theft, forgery, larceny and fraud. At present, OPD does not have the organizational resources or expertise to conduct thorough and effective computer and digital forensic investigations. By joining in partnership with the RCFL and becoming a participating member OPD will reap the following benefits:

1. Free digital forensic support for OPD criminal investigations;
2. Priority and timely examination of digital forensic evidence for OPD cases;
3. Training, essential equipment, and experience to conduct forensic examinations funded entirely by the FBI;
4. FBI certification to conduct computer and digital media analysis;
5. Follow-on training opportunities for OPD members at no cost to the City; and
6. OPD sworn member detailed to RCFL for a period of 24 months, renewable annually.

The partnership between OPD and the RCFL will greatly benefit the City, providing OPD with the resources and training necessary to build a computer forensics examination program and high technology crimes investigative unit at no cost to the City.

The MOU between the City and RCFL outlines an effective joint effort to provide critical examination of digital evidence in support of criminal investigations. Historically, these partnerships have proven highly beneficial to other participating agencies. Other jurisdictions currently participating in RCFL are San Jose Police Department, Palo Alto Police Department, Newark Police Department, Alameda County Sheriff's Office, San Mateo Sheriff's Office, and Santa Clara County District Attorney's Office.

PROGRAM DESCRIPTION

The RCFL is a federally funded crime laboratory dedicated solely to the examination of computers and other digital evidence. The RCFL program is built on partnerships between the FBI and other law enforcement agencies at the federal, state, and local levels operating within a geographic area. An RCFL is a one-stop, single service forensics laboratory and training center devoted to the examination of digital evidence in support of criminal investigations and to the detection and prevention of terrorist acts. Unlike a traditional crime lab, the RCFL operates as a joint task force. The laboratory has no employees rather all personnel are detailed to work at the RCFL by their respective participating agencies.

RCFL Examiners combine the talents and experience of federal, state, and local law enforcement agencies. Normally, an RCFL consists of 15 people: 12 sworn examiners and 3 support staff members. The RCFL's duties may include:

- Seizing and collecting digital evidence at a crime scene;
- Conducting an impartial examination of submitted computer evidence; and

Item: _____
Public Safety Comte.
July 8, 2008

- Testifying as required.

The purpose of this program is to:

1. Provide timely, professional and technically advanced digital forensic services to the law enforcement agencies in an RCFL's service area;
2. Fully utilize applied science and engineering capabilities to support digital forensic examinations;
3. Increase the confidence of investigators, prosecutors, and judges in the digital forensics examination discipline through standardized training and forensic protocols;
4. Provided responsive and flexible services in support of diverse investigative programs; and
5. Meet legal and administrative requirements of diverse judicial systems.

The FBI currently has 14 RCFLs located across the United States, including the Silicon Valley facility located in Menlo Park, servicing Oakland and the Bay Area. Since its inception in 2005, participation in the RCFL has been voluntary, with active participation coming from the larger Bay Area agencies.

SUSTAINABLE OPPORTUNITIES

Economic: The RCFL program will assist the Department in obtaining valuable training and experience in the area of computer forensics, which is crucial to obtaining and processing evidence in virtually all types of crimes. This enhanced capability will enable OPD's investigative units to provide more timely and efficient examination of computer and electronic evidence. The ability to conduct these investigations "in house" will save City funds that would otherwise have to be expended to purchase the services of a certified computer forensics laboratory for each investigation requiring these services. Additionally, should OPD choose to train its own computer forensics examiner, the cost of such training would have to be fully funded by the City. This partnership with RCFL provides training and certification for an OPD sworn member at no cost to the City.

Environmental: There are no environmental opportunities associated with this report.

Social Equity: Senior citizens and children are among the growing number of victims of crimes perpetrated using computers. Providing OPD with the training and resources to investigate these crimes in an efficient and timely manner ensure the victimization of these vulnerable persons is minimized if not eliminated.

DISABILITY AND SENIOR ACCESS

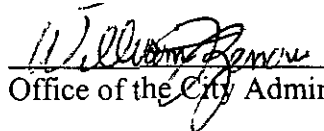
There are no ADA or senior citizen access issues identified in this report.

Item: _____
Public Safety Comte.
July 8, 2008

RECOMMENDATION /ACTION REQUESTED OF THE COUNCIL

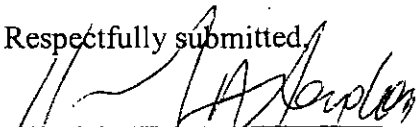
Staff recommends acceptance of this report and approval of the resolution authorizing the City Administrator to 1) enter into a Memorandum of Understanding with the FBI and the RCFL for the purpose of detailing a sworn member of OPD to the Silicon Valley RCFL to receive computer forensic training and laboratory support services for criminal investigations, and 2) receive overtime reimbursements up to \$15,000 per year and, if funds are available, to accept title to property and equipment given to OPD by RCFL.

APPROVED AND FORWARDED TO
THE PUBLIC SAFETY COMMITTEE:


Office of the City Administrator

Attachment: RCFL Memorandum of
Understanding

Respectfully submitted,


FOR Wayne G. Tucker
Chief of Police

Prepared by:
Sergeant Craig Hardison
Criminal Investigation Division

Lieutenant Kenneth W. Parris
Criminal Investigation Division

Item: _____
Public Safety Comte.
July 8, 2008

**The
Regional Computer Forensic Laboratory (RCFL)
Cooperation Agreement/Memorandum of Understanding (MOU)**

Silicon Valley RCFL

An FBI Investigative Technology Division-Affiliated
Regional Computer Forensic Laboratory (RCFL)

I. PARTIES - PARTICIPATING AGENCIES

This "Cooperation Agreement," referred to herein as a "Memorandum of Understanding" (MOU), is entered into pursuant to Section 6305 of Title 31 of the United States Code, by and between the law enforcement "Executive Agencies" of the United States Government and state and local law enforcement executive agencies, "Federal Executive Agency[ies]" (FEA) and "State Executive Agency[ies]" (SEA), respectively - collectively referred to herein as "Participating Agency[ies]" - who are signatories hereto and/or signatories to any amendment or modification hereto, specifically:

A. State Executive Agencies:

1. Alameda County Sheriff's Office
2. Palo Alto Police Department
3. San Jose Police Department
4. San Mateo County Sheriff's Office
5. Santa Clara District Attorney's Office

B. Federal Executive Agencies:

1. Federal Bureau of Investigation (FBI), through its Investigative Technology Division (ITD) and its San Francisco Field Office;

THE PARTICIPATING AGENCIES HEREBY AGREE AS FOLLOWS:

II. PURPOSE/MISSION

The general purpose of this MOU is to delineate the responsibilities of the RCFL participants, maximize inter-agency cooperation, and formalize relationships between the Participating Agencies and employees for the operations, policies, planning, training, public and media relations of the RCFL.

6/26/2008

The mission of the RCFL is to provide the services described below to law enforcement agencies primarily in the United States Judicial District described as the Northern District of California, focusing primarily on Bay Area agencies located in the counties of Alameda, San Francisco, San Mateo, and Santa Clara in the following priority:

- A. to provide forensic examinations of digital media, such as computers, as will be transferred to the RCFL pursuant to consent or a judicial, executive or administrative seizure and/or search order or warrant, which media is believed to contain evidence relevant to the investigation and/or prosecution of a federal, state or local crime or violation of law;
- B. to assist federal, state, and local law enforcement in enforcing federal, state, and local criminal laws relating to computer-related crime through the forensic collection, recovery, processing, preservation, analysis, storage, maintenance and/or presentation of digital evidence (referred to herein collectively as “forensic examination[s]”);
- C. to facilitate and promote the sharing of federal, state and local law enforcement expertise and information about the forensic examination of digital evidence and the investigation and prosecution of computer-related and computer-facilitated crime with law enforcement personnel and prosecutors; and,
- D. to provide training and education for federal, state, and local law enforcement personnel and prosecutors regarding the forensic examination of digital evidence as it relates to the investigation and prosecution of computer-related or technologically-facilitated crime.

III. ORGANIZATIONAL STRUCTURE, SUPERVISION AND CONTROL

A. Organizational Structure/Executive Board

- 1. Law Enforcement/Intergovernmental Entity. The RCFL is an institutionalized, financially self-sustaining, cooperative partnership of federal, state, and local governmental and law enforcement agencies which is intended to operate legally in a manner similar to that of a multi-jurisdictional task force. The RCFL is not intended to, and shall not, be deemed to have any independent legal status.
- 2. Organizational Control: Executive Board / Voting / Votes / Full-time Detailees. Overall organizational control of the RCFL shall be vested

in an Executive Board which shall be comprised of the Chief Executive Officer (CEO) from each of the State Executive Agencies (SEAs) and Official in Charge (OIC) of each of the Federal Executive Agencies (FEAs) which are signatories to this MOU, or their non-RCFL-detailed executive level supervisory subordinate designee designated in writing, which, at the time of any action of the Executive Board, have personnel actively detailed to the RCFL. Personnel of a Participating Agency shall be considered actively detailed to the RCFL only if one hundred percent (100%) of the hours of employment (excluding reasonable amounts of mandatory training and/or duties required by the agency) of such employee(s) are allocated to work at the RCFL, EXCEPT THAT:

- a. the Director may accept one or more additional Participating Agency employees detailed for the purposes of conducting forensic examinations by an otherwise voting Participating Agency if at least fifty percent (50%) of the hours of employment of such additional individuals are allocated to work at the RCFL, PROVIDED HOWEVER, that the detail of such an individual employee shall not, in the absence of a full-time detailee by the same employing Participating Agency, entitle such Agency to a vote upon any Executive Board matter;
- b. except as noted in (c.) below with regard to a Prosecuting Agency, each voting Participating Agency shall have only one vote regardless of the total number of individuals employees detailed to the RCFL. Any CEO of any SEA, and any OIC of any FEA may delegate or designate any one of their executive level supervisory subordinates who are not currently detailed to the RCFL to serve on their behalf as a substitute and vote at Executive Board meetings. In addition, any CEO of any SEA, and any OIC of any FEA may authorize in any manner established by the Executive Board or the Chair in the absence of any action by the Executive Board any other participating SEA or FEA to exercise its vote by proxy, EXCEPT THAT no SEA or FEA may delegate their vote to another SEA or participating FEA, and no FEA may delegate their vote to a participating SEA. Delegation/designation to a non-RCFL executive level supervisory subordinate shall be effectuated by actual notice from the CEO or OIC to the Chair of the Executive Board;
- c. a Prosecuting Agency seeking to become a Participating Agency may, upon a unanimous approving vote of the Executive Board, be

deemed to have personnel actively detailed to the RCFL for purposes of voting on the Executive Board if the Prosecuting Agency designates in writing one (1) or more of their full-time prosecutors to act as counsel to and assist the RCFL and to be subject to call after hours by the RCFL. HOWEVER, the Prosecuting Agencies which become Participating Agencies pursuant to this paragraph shall collectively have one vote regarding RCFL matters, unless otherwise unanimously approved by the Executive Board. The Prosecuting Agencies shall designate from amongst themselves the agency to cast their one vote. In the event a consensus cannot be reached as to the voting Prosecuting Agency, the Executive Board shall select the Prosecuting Agency to perform this duty;

- d. upon a vote of the total membership of the Executive Board at a meeting scheduled and noticed for that purpose, an otherwise non-voting, non-prosecuting Participating Agency which has made or promises to make a substantial and continuing non-personnel contribution to the RCFL, as determined by the Executive Board, may be authorized to vote at all Executive Board meetings, at specified Executive Board meetings, or upon such issues as the executive Board may subscribe.
3. Appendix or Initial Commitment of Resources. An initial commitment of resources and/or personnel to the RCFL by the Participating Agencies is attached hereto as an APPENDIX.
 4. Addition of Subsequent Participating Agencies/Executive Board Vote and Amendment Required. A federal, state or local law enforcement agency may, upon a three-fourths (3/4) approving vote of the total membership of the Executive Board at a meeting scheduled and noticed for that purpose, detail personnel, to the RCFL on a full-time basis and thereby become a Participating Agency effective upon the execution by the CEO or OIC thereof of an amendment to this MOU consenting and agreeing to the terms and conditions hereof.
 5. Meetings/Chair/Duties/Authority of the Executive Board. The Executive Board shall:
 - a. Vote Required for Actions. Unless otherwise specifically provided herein, take or endorse no action except upon majority vote of a quorum of its members, convened upon prior notice to all

Participating Agencies of not less than twenty-four (24) hours. A majority of the total Executive Board members then in office shall constitute a quorum for the transaction of business, unless a vote by a number greater than a majority is required for a vote by this MOU or by any directive of the Executive Board adopted by a vote of three-quarters of the Executive Board's total membership.

- b. Minimum Bi-Annual Meetings Required. Meet initially at the San Francisco FBI Field Office or other determined place in the Metropolitan area within thirty (30) days or contemporaneously with the completed execution of this MOU. Thereafter, the Executive Board shall meet not less than bi-annually at a place to be set by the Executive Board, or by authority of the Chair of the Executive Board. Meetings (and minutes or records thereof) of the Executive Board, to the maximum extent permitted by law, shall be non-public, confidential meetings/records of law enforcement agencies relating to law enforcement investigations. Attendance shall be open only to the Director, or in his/her absence his/her designee, members of the Executive Board or their respective executive level supervisory subordinate designees and such other persons as the Chair or the Executive Board shall explicitly authorize. At the discretion of the Chair, Executive Board members may attend any meeting via tele-conferencing.

- c. Chair of Executive Board. Select at its first meeting and authorize from amongst its members a Chair and Assistant Chair to serve for a term of one year or such longer term as the Executive Board authorizes. For coordination purposes and to facilitate the establishment of the RCFL, the initial Chair of the Executive Board shall be an FBI employee. The Chair shall, in addition to duties authorized by the Executive Board, be responsible for scheduling, noticing and coordinating meetings of the RCFL Executive Board, and maintaining minutes of their meetings. A majority of the Executive Board members may, in a writing signed by them and noticed to all members, convene a meeting of the Executive Board. In the absence of the Chair at a properly noticed meeting of the Executive Board, the Assistant Chair shall serve as the Chair pro tem for that meeting. In the absence of the Chair or an Assistant Chair at any meeting of the Executive Board properly convened under this MOU, the Executive Board may select from amongst its members a Chair Pro Tem who shall perform all the functions of the Chair for that meeting alone and shall inform the Chair and

6/26/2008

provide any records relating to matters addressed during such a meeting. The Chair, or in the Chair's absence, the Assistant Chair, shall be responsible for providing any secretarial assistance required in performing their duties.

- d. Laboratory Director. Appoint and authorize a Director, whose duties, in addition to those described by this MOU or any amendment, may be set by the Executive Board.

- e. General Treasurer Agency and Special Purpose Administration Agencies. Appoint and authorize from amongst its State Executive Agency (SEA) members, one Agency which shall, with its consent and to the extent necessary to effectuate the mission and purpose of the RCFL, act as the General Treasurer Agency for the RCFL by:
 - (1) executing applications, certifications of, and otherwise administering financial grants on behalf of and/or in support of the RCFL as may be available to State Executive Agencies from the Federal Government or other entities;
 - (2) soliciting, accepting, inventorying and receiving property to be held in the name of that General Treasurer Agency for the collective benefit of the RCFL Participating Agencies during the period of the RCFL's existence, and thereafter to equitably distribute or dispose of said property pursuant to the directives of the then Executive Board, or, in the absence of any such directive, following the dissolution of the RCFL, pursuant to such principles as the General Treasurer Agency deems equitable;
 - (3) engaging in such other activities relating to the financial operations of the RCFL as the Executive Board may authorize;
 - (4) in addition to the appointment of one of its SEAs to act as General Treasurer Agency, the Executive Board may also select and authorize any other SEA amongst its members to act as a Special Purpose Administrative Agency when circumstances so require and when the then selected General Treasurer Agency is either unwilling or unable to perform the specific required functions; and,

6/26/2008

(5) assisting with an annual audit of all accounts, funds, and property utilized by the RCFL, to be conducted by a Participating Agency and/or Agencies, other than the General Treasurer Agency, as designated by the Executive Board.

f. Review of Policies, Procedures, Practices and/or Rules. At the request of the Director, review and, if the Executive Board deems appropriate, approve such policies, procedures, practices and/or rules affecting the day-to-day operations of the RCFL as the Director shall propose. Failure of the Executive Board to review, approve or disapprove within ninety (90) days any such policy, procedure, practice and/or rule as proposed and noticed to the members by the Director (either directly or through the Chair) shall constitute an approval of such policy, procedure, practice or rule and may, thereafter, only be reviewed upon thirty (30) days prior notice to the Director. Any policy, procedure, practice and/or rule as proposed by the Director shall be presumed to have immediate effect during the pendency of any Executive Board review or review period unless otherwise stated by the Director or mandated by vote of the Executive Board. Nothing in this provision shall prevent the Executive Board from *sua sponte* reviewing any policy, procedure, practice and/or rule proposed by the Director regardless of whether the Director has referred such a review to the Executive Board, EXCEPT THAT, any such Executive Board initiated review shall require that prior notice of attendance be provided to the Director regarding the meeting of the Executive Board scheduled and noticed for that purpose.

g. Organizational Structure Amendments Requiring Special Vote. Amendments to Sections II. (Purpose/Mission) or III. (Organization, Structure, Supervision and Control) of this MOU may be made ONLY upon a unanimous vote of its members then in office, EXCEPT THAT, no amendment shall be made affecting the terms and conditions of the "affiliate" status with the FBI Investigative Technology Division without the express written approval of the Assistant Director of the FBI Investigative Technology Division or his/her designee or successor in assignment.

B. Daily Operational Control. The daily operational control, management, supervision of and responsibility for operations of the RCFL shall be vested in the Laboratory

“Director” of the RCFL. The Director shall be a full-time employee assigned to the RCFL and shall be a sworn law enforcement official who is highly experienced by education, practice and/or study in computer sciences (including practical computer forensics, computer-crime investigations, and computer network engineering or architecture), engineering, or information technologies. The term of office of the Director shall be two (2) years to commence upon appointment by a majority vote of the Executive Board. For coordination purposes and to facilitate the establishment of the RCFL, the initial Director shall be an FBI employee.

- C. The Director shall be responsible for the following duties and may delegate such as appropriate to his/her designee, and shall be responsible for the day-to-day operations of the RCFL:
1. proposing, implementing and enforcing such policies, procedures, practices and/or rules (subject to approval by the Executive Board) as may be necessary or reasonably calculated to effectuate the purposes and mission of the RCFL, including:
 - a. assigning cases to RCFL detailees which are submitted to the RCFL;
 - b. assigning duties and responsibilities to detailees relating to the forensic examination of digital evidence or administrative and/or educational duties;
 - c. prioritizing the assignment of cases in conformity with this MOU and directives of the Executive Board;
 - d. establishing minimum qualification standards for prospective personnel offered for detail to the RCFL;
 - e. establishing ethical and conflict of interest guidelines for detailees and operations of the RCFL which shall supplement and augment the ethical and conflict of interest guidelines or rules established by each Participating Agency with respect to their individual detailees;
 - f. establishing standard forms and reports for use by the RCFL;
 - g. collecting, recording and submitting quarterly reports to the Executive Board regarding non-case specific data reflecting the operations and activities of the RCFL;
 - h. coordinating and controlling contacts with and responding to inquiries from members of the mass media in consultation with the appropriate Participating Agencies, or submitting law enforcement agency, if the inquiry is case specific;
 - i. establishing or adopting guidelines/protocol for the forensic examination of digital evidence by the RCFL after conferring, as

6/26/2008

- appropriate, with personnel detailed to the RCFL, representatives of the FBI Investigative Technology Division, members of the Executive Board, and, in the discretion of the Director, such other relevant agencies, departments or institutions;
- j. purchasing in coordination with the General Treasurer Agency, and on behalf of the RCFL with available funds of the RCFL such property, equipment, supplies or materials as are necessary for operations;
 - k. maintaining in coordination with the General Treasurer Agency, an annual inventory of all property used, held by or on behalf of the RCFL, which inventory is to be submitted annually to the Executive Board; and,
 - l. performing such other functions and duties as are reasonably related to the successful operation of the RCFL as may be subscribed and authorized by the Executive Board.
2. Terms of Offices. The term of office of the Director may be renewed without limit by the Executive Board. The Director shall serve until the earlier of: A) expiration of the term; B) his or her resignation; or, C) removal from office by vote of a majority of the total membership of the Executive Board at a meeting of the Executive Board scheduled and noticed for that purpose. The Director may only serve contingent upon continued consent of the CEO or OIC of their employing Participating Agency and shall resign when such consent is withdrawn. Barring extraordinary circumstances, the CEO or OIC of the employing Participating Agency shall not withdraw such consent except upon prior written notice of not less than thirty (30) days to each of the member agencies of the Executive Board.

IV. FBI INVESTIGATIVE TECHNOLOGY DIVISION AFFILIATE STATUS.

- A. In General. Because it is in the interests of the FBI and the United States to promote and facilitate the creation, development and propagation of uniform, scientifically-sound policies, procedures, practices, protocols, guidelines and techniques relating to the forensic examination of digital evidence, the FBI supports the mission of the RCFL as stated herein. Subject to the written consent of the Assistant Director for the FBI Investigative Technology Division and the conditions described below, the RCFL shall be an "Affiliate" of the Investigative Technology Division Federal Bureau of Investigation of the Department of Justice, and may hold itself out as such. The Participating Agencies understand and agree that "affiliate" status will not require or authorize strict adherence to the full panoply of rules, regulations, policies or practices as are applicable to the whole of

6/26/2008

the FBI Investigative Technology Division itself. Indeed, the Participating Agencies understand and agree that, in order for an RCFL to be successful, it must preserve some degree of flexibility and adaptability to adequately address the new, evolving and somewhat unpredictable investigative needs of the multi-jurisdictional agencies it is intended to serve in the computer crime and digital evidence arenas.

B. Conditions of Affiliation. As a continued condition to the FBI Investigative Technology Division "Affiliate" status, the RCFL will:

1. adhere to such minimum quality assurance standards of the FBI Investigative Technology Division as may be designated for application to RCFLs by the Assistant Director of the FBI Investigative Technology Division;
2. propose, implement and enforce such policies, procedures, practices and/or rules as are consistent with recognized "good practices" relating to the forensic examination of digital evidence which are consistent with the minimum quality assurance standards designated for application to RCFLs;
3. provide timely notice to and consult, as appropriate, with the Assistant Director, or his/her designee, on any proposed policies, procedures, practices and/or rules relating to the forensic examination of digital evidence;
4. collect, record and quarterly report to the FBI Investigative Technology Division such non-case specific data reflecting the activities and operations of the RCFL in such format or manner as the FBI Investigative Technology Division shall designate, PROVIDED THAT:
 - a. the FBI shall agree to make such data and reports available at any time to any Participating Agency;
 - b. FBI personnel assigned to the RCFL shall administratively assist in the generation of such reports; and,
 - c. the provision of such reports or data to the FBI shall not, in and of itself, constitute a referral of or a transfer of investigative control to the FBI;
5. seek appropriate scientific and educational accreditations and certifications of the RCFL and its detailed personnel as may be requested by the Assistant Director of the FBI Investigative Technology Division; and,

6/26/2008

6. attend and successfully complete all FBI Investigative Technology Division sponsored and financed training as may be offered to the RCFL unless otherwise exempted by the Director with the concurrence of the Assistant Director of the FBI Investigative Technology Division or his/her designee.

C. Effect of Affiliation.

1. FEA Personnel Generally Shall Not be Deemed SEA Personnel. Except as expressly authorized in a separate writing, FEA personnel, including FBI personnel, detailed or assigned to the RCFL shall not be deemed employees of any SEA for any purpose merely by virtue of their assignment to the RCFL.

2. Status of FBI Personnel. All FBI personnel, and all Participating Agency personnel formally detailed to the FBI pursuant to 5 U.S.C. §3374 and thereafter assigned to an FBI Investigative Technology Division Affiliated RCFL, shall thereby be deemed to be authorized by the Investigative Technology Division pursuant to 28 C.F.R. §0.85 and other pertinent authorities to assist the state and federal Executive Agencies and any state and local law enforcement agency seeking assistance from such RCFL with the forensic examination of digital evidence regardless of whether such evidence was relevant to a state or a federal crime, PROVIDED HOWEVER, that nothing in this section shall be construed as authorizing any FBI employee or personnel, pursuant to their detail/assignment to the RCFL to:
 - a. act as an applicant for any state or non-federal search warrant, except that such personnel may provide information under oath which is incorporated into the application of a state or other authorized officer;
 - b. act as executing officer of any state or non-federal search warrant, EXCEPT THAT, under this section, FBI personnel (and personnel detailed to the FBI pursuant to 5 U.S.C. §3374) may assist through the forensic examination of digital evidence in the execution of a state search warrant or its equivalent under the laws of another nation as authorized by the RCFL Director at the request and direction of a state or foreign law enforcement officer authorized by the laws of a state or other nation to execute such warrants and make such requests; and,
 - c. arrest any person for violation of state law or non-federal law, EXCEPT as may be expressly authorized by any provision of law or pursuant to any lawful cross-designation as a state law enforcement

6/26/2008

officer as approved by the FBI in conformity with this MOU and FBI policy.

3. SEA Personnel Generally Shall Not be Deemed FEA Personnel. Except as expressly authorized in a separate writing pursuant to 5 U.S.C. §3374, SEA personnel detailed to the RCFL shall not be deemed employees of the FBI or the United States of America for any purpose merely by virtue of their detail to the RCFL.
4. Status of State Executive Agency Personnel. In limited circumstances and subject to the successful completion of additional documentation and agreements (including non-disclosure agreements), background investigation inquiries and security clearances as may be deemed appropriate in the discretion of the FBI, Participating Agency personnel accepted for detail to the RCFL in accordance with this MOU may, upon written request of their CEO and the consent of such personnel and the Director of the FBI or his/her designee, qualify and be accepted as personnel "detailed" directly to the FBI pursuant to 5 U.S.C. §3374 for the limited purposes of fulfilling the mission of the RCFL as stated herein. Thereafter, he/she shall be entitled to all of the rights, privileges and immunities accorded by law , EXCEPT THAT, such a detail shall be presumed to be without reimbursement by the FBI to the SEA or detailee for the salary or contribution to the detailee's employee benefits system unless otherwise expressly agreed to in writing.
5. Transfer of Title to Equipment. Subject to available funding and applicable legal authority, the FBI Investigative Technology Division may, in its discretion, transfer title to the RCFL through its General Treasurer Agency of such property (including software and equipment, such as computers) or to any Participating Agency as may be appropriate. Title to property shall not be deemed transferred unless expressly stated in writing by an authorized representative of the FBI Investigative Technology Division. Title to property provided by the FBI Field Office Division shall NOT transfer to the RCFL or any other Participating Agency, unless specifically stated in writing and as authorized by law and in accordance with all FBI procedures, policies and directives relating to the disposition of property.
6. Training Opportunities. Pursuant to 42 U.S.C. §3772(a) and 28 C.F.R. §0.85 and other legal authority, the FBI Investigative Technology Division may, in its discretion and subject to available funding, offer, at FBI expense, such training and educational opportunities as may be appropriate.

6/26/2008

7. CART Intranet. Subject to available funding, equipment and security requirements, the FBI Investigative Technology Division may, in its discretion, provide access to the FBI/CART Intranet for purposes of facilitating:
- a. forensic examinations discussions amongst all FBI CART-trained forensic examiners nationwide, including other RCFL participants;
 - b. the transmission and provision of applicable software and software updates for forensic examinations and operations;
 - c. the transmission and/or maintenance of records of examinations and operations; and,
 - d. such other purposes as the Assistant Director of the FBI Investigative Technology Division or his/her designee may authorize.

D. Termination of Affiliation. FBI Investigative Technology Division Affiliate Status will continue in effect for a minimum period of two (2) years from the effective date of this MOU unless otherwise expressly extended or terminated. The Assistant Director of the FBI Investigative Technology Division may terminate the "affiliate" status at any time in his/her unfettered discretion, upon thirty (30) days written notice to the RCFL Director or the Chair of the Executive Board. The RCFL may, upon a three-fourths vote of the total membership of the Executive Board noticed, scheduled and convened for that expressed purpose, terminate the "affiliate status" effective upon thirty (30) days prior written notice to the Assistant Director of the FBI Investigative Technology Division.

E. Nothing in this MOU shall be construed as a commitment or obligation of the FBI Investigative Technology Division to provide any quantum of equipment, training or resources to the RCFL. Termination of "affiliate" status shall terminate and render void all "effects" of such status as explicitly referenced or implied herein unless otherwise noted by the Assistant Director in his/her notice of termination.

V. NON-DISCLOSURE OF INFORMATION/MASS MEDIA POLICY

A. Restrictions on Public Comments. Except as required in testimony or otherwise required by law, or as part of an authorized training, academic or educational assembly, Participating Agencies and their detailees shall not publicly comment on or disclose information to non-Participating Agencies or persons relating to:

6/26/2008

1. specific cases or matters which have been or may be submitted to the RCFL, except, when authorized by the submitting agency, to confirm the fact of a submission or request for assistance, or as otherwise required by law of the jurisdiction of the submitting agency; and,
 2. the particular methods used to collect, recover, process, analyze, store, maintain and/or present digital evidence, except as otherwise required by the federal laws of the United States of America.
- B. Media Inquiries Referred to the Director. All mass media inquiries are to be referred to the RCFL Director. The Director or his/her designee may comment to the media upon the general operation of the RCFL and the participation of the member agencies and departments after consultation with the appropriate Participating Agency(ies). Where the inquiry is case specific, comments, if any, will be left to the discretion of the submitting law enforcement agency. In the case of the public release of information by a Department of Justice employee or information relating to a case or matter investigated or prosecuted by the Department of Justice, the release of such information shall comply with the requirements of 28 C.F.R. §50.2.

VI. ISSUES RELATING TO PERSONNEL DETAILED TO THE RCFL

- A. No RCFL Employees. The RCFL is not a separate legal entity capable of maintaining an employer-employee relationship and, as such, all personnel detailed to the RCFL shall NOT be considered employees of the RCFL for any purpose.
1. Responsibility for conduct of each RCFL detailee, both personally and professionally, which is not at the direction of the Director or Administrator pursuant to this MOU, shall remain with their respective agency head and each Participating Agency shall be responsible for the actions of their respective employees.
 2. Each RCFL detailee will continue to report to his or her respective agency head for administrative matters unrelated to the case-specific assignments of the RCFL which are not otherwise specifically described in this MOU.
 3. Performance appraisals of personnel detailed to the RCFL shall not be conducted by the Director or Administrator on behalf of that employee's Participating Agency unless the Director or Administrator is otherwise a

6/26/2008

detailee of the same Participating Agency as the personnel under performance review, EXCEPT THAT, the Director or Administrator may, at the request of an appropriate rating official, provide written comments for possible use by that official regarding performance related issues/appraisals.

- B. SEA Detailees Shall Voluntarily Consent to RCFL Detail. SEA personnel may not be detailed to the RCFL unless they voluntarily consent prior to the detail. Upon detail to the RCFL, SEA detailees (excluding prosecution detailees) shall be provided a copy of this MOU and any amendments or modifications by the Director. The Director shall maintain a record of the provision of each MOU to each detailee. It shall be the duty of all detailees to promptly notify the Director in writing within seven (7) days of provision of the MOU if such detailee did not voluntarily consent to the detail, in which case, the detailee shall return to his/her Participating Agency.
- C. RCFL Detailees to Perform RCFL Mission-related Duties. At the request of the Director, all personnel detailed by Participating Agencies to the RCFL shall, in conformity with this MOU and any directive of the Executive Board, perform all acts reasonably related to the forensic examination of digital evidence or such other duties as are reasonably related to the fulfillment of the mission of the RCFL.
- D. Duration of RCFL Detail/ Compensation by Participating Agencies.
1. Except for personnel detailed to perform purely administrative non-forensic examination functions, and subject to the voting provisions of the MOU, each Participating Agency shall detail to the RCFL the full-time services of at least one (1) of its respective personnel (acceptable for detail by the RCFL) to assist in forensic examinations for a period of at least two (2) years, renewable annually thereafter.
 2. Participating agencies shall bear all personnel costs for any personnel detailed to the RCFL including but not limited to salaries, retirement, expenses, disability and all other employment-related benefits incident to their employment with their respective agencies. Transportation, both to and from the RCFL and in support of the mission and operational requirements of the RCFL, will be the responsibility of and provided in accordance with the policies and procedures of the detailee's employing agency and this MOU. With respect to vehicles, each participating agency agrees to assume liability for their employees as more fully described in Section 8, infra. Each detailee will be provided a cell phone and/or pager by the detailee's Participation Agency to ensure communication capabilities

6/26/2008

with the RCFL.

3. Subject to funding availability, any Participating Agency may, in its discretion, pay travel costs for out-of-state travel of RCFL detailees, should the Participating Agency deem such travel necessary, PROVIDED THAT, the fact of such a payment in any one instance or number of instances shall not create or support any duty or obligation to make future payments unless otherwise agreed to in writing.
 4. Compensation for "overtime," "holiday pay," etc. shall be the responsibility of each Participating Agency with respect to their detailed employee(s). It shall be the joint responsibility of each Participating Agency and its detailed employee to regularly and timely inform the Director of available overtime, scheduled vacation, annual leave or sick leave. Participating agencies may, in their discretion, delegate to the Director limited authorization to schedule their detailed employee for overtime or holiday pay or other applicable compensation as may be necessary to effectuate the purpose and mission of the RCFL. The Director shall coordinate with the Participating Agencies, if and when alternate funding is available (e.g. grants, HIDTA, OCDEF, etc.), for the payment or reimbursement of overtime or special compensation.
- E. Deputations. SEA sworn law enforcement detailees, subject to a background inquiry and appropriate security clearance procedures, may be federally deputized, for the limited purpose of providing direct support to the RCFL with the FBI or other FEA facilitating the securing of the required deputation authorization. These deputations may remain in effect throughout the tenure of each individual's detail to the RCFL, as limited by the terms of the deputation or until termination of the relationship between the FBI or other FEA and the RCFL or the termination or dissolution of the RCFL itself, whichever comes first. Administrative and personnel policies imposed by the Participating Agencies will not be voided by deputation of their respective personnel.
1. Sworn law enforcement detailees include those state and local law enforcement officers authorized by law to enforce criminal statutes and judicial sanctions, including investigative, arrest and/or detention authority, and who are authorized to carry a firearm and exercise appropriate force, to include deadly force, in effecting their assigned duties.
- F. Grievances, Complaints, Discipline.
1. Employee Rights Unaffected by Detail to RCFL/Remedies with

Detailing Agencies. Because FEA detailed personnel are not employees of the RCFL or of any of the SEAs, and, similarly, because SEA detailed personnel are not employees of the RCFL or of any of the FEAs, the substantive and procedural rights of such personnel regarding employment-related grievances or discipline are governed solely by the contracts, rules and regulations existing between the detailed personnel and their respective agencies. Detail to the RCFL is a voluntary act by personnel and their agencies and creates no legally enforceable rights in such personnel to the continuation of the detail to the RCFL. There shall be NO disciplinary or grievance procedure, policy or process within the RCFL which will vest any rights in any detailed personnel, and all Participating Agencies and their detailees agree that no alleged procedure, policy, process or practice shall be relied upon or be binding upon the parties to this agreement, or their detailed personnel.

2. Application of SEA/FEA Grievance Procedures. Any RCFL detailees with complaints, suggestions, comments or concerns regarding the policies, procedures, practices or decisions of the Director or the Executive Board are strongly encouraged to informally discuss such matters with the Director, or in lieu thereof, the Chair of the Executive Board. Thereafter, RCFL detailees who are unsatisfied with RCFL policies, procedures, practices or decisions may refer the matter to their employing agency for processing pursuant to that agency's grievance procedure, the sole remedy of which shall be the discontinuance of their detail to the RCFL and their return to their respective agency.
 - a. In the event that RCFL detailed personnel refer a matter to their employing agency for appropriate grievance processing, the CEO or OIC of that agency (or his/her designee), shall, to the maximum extent possible, inform the Director of the nature and circumstances of the grievance and the agency's grievance procedure as permitted or authorized by that participating agency's regulations, policies, practices, employee related contractual agreements or consent of the complainant. The CEO or OIC shall order the temporary return of the grieving detailee to their agency during the pendency of the grievance procedure unless otherwise agreed to by the Director or the Executive Board. The CEO or OIC or their designee shall, at the conclusion of the grievance procedure, inform the Director of the grievance findings, and/or recommendation, if any. The Director and the Executive Board are NOT bound by any such final or intermediary decision of any SEA or FEA grievance procedure and are NOT required to implement any final or intermediary grievance

6/26/2008

recommendation. However, the Director or the Executive Board may, in their discretion, consider incorporating or adopting all or part of any agency's grievance recommendation. All Participating Agencies shall insure that discontinuance of a detail to the RCFL incident to a detailee-initiated grievance procedure SHALL NOT be considered or interpreted as discipline or otherwise negatively affecting or reflecting upon that person's performance while detailed to the RCFL.

3. Reports of Detailee Misconduct by Director/Chair to Participating Agencies for Possible Discipline. In any instance in which a detailee, in the judgment of the Director or the Executive Board upon majority vote, may have engaged in misconduct or failure to fulfill the mission or purpose of the RCFL as requested, the Director or the Chair at the behest of the Executive Board, shall notify the CEO or OIC of the detailee's employing agency in writing of the details of the alleged misconduct or failure. The notification shall carry no greater weight or effect than any other complaint by another law enforcement agency. The CEO or OIC shall then take such steps, as the CEO or OIC deems appropriate in conformity with the statutory or contractual obligations, policies, procedures and/or practices of that agency. The CEO or OIC shall order the temporary return of the detailee to their employing agency during the pendency of that agency's disciplinary or review process unless otherwise agreed to by the Director or the Executive Board. At the conclusion of the disciplinary procedure of the employing agency, the CEO or OIC shall notify the Director or Chair of the agency's findings, decisions, and/or actions, if any. The Director or the Executive Board may, in their independent judgment, accept the findings, decisions and/or action of the detailing agency or, upon vote of the Executive Board, elect to terminate the detail and return the detailee to the employing agency. In the event that conduct is found by the employing agency to not constitute misconduct or any violation requiring any action, but the Executive Board none-the-less elects to discontinue the detail to the RCFL, the discontinuance of the detail SHALL NOT be considered or interpreted as discipline or otherwise negatively affecting or reflecting upon that person's performance while detailed to the RCFL. The Executive Board is not bound by any final or intermediary disciplinary decision of an employing agency, EXCEPT that, the Director and the Executive Board is bound by and shall honor any agency decision or ruling suspending from employment or otherwise suspending the law enforcement powers of any employee.

- G. Assignment of Cases/Exclusivity of Forensic Services during Detail. Generally,

6/26/2008

cases shall be assigned to RCFL detailees at the discretion of the Director, as delegated to his/her designee, without regard to the identity of the detailee's employing agency or the identity of the submitting agency, except that specific cases or categories of cases requiring specific security clearance or lawful authority (e.g., secret state or federal grand jury investigations requiring expressed court authorized disclosure, Foreign Intelligence Surveillance Act (FISA) or other national security matters) may be specifically assigned by the Director based upon such other criteria. Cases will, in general, be assigned on the basis of case priority, as set forth herein, and the experience and workload of a detailee. Except as authorized by the Director, Participating Agencies will neither task nor permit their RCFL detailees to conduct forensic examinations of digital evidence outside of the auspices of the RCFL.

- H. On-Line, Undercover Investigations /Non-Forensic Investigative Activity Prohibited. Except as expressly authorized on a case-by- case basis by the Director as a necessary incident to the forensic examination of digital evidence submitted to the RCFL, no RCFL detailed personnel shall engage in any on-line undercover investigation during the period of their detail to the RCFL or from RCFL forensic examination space or storage. The RCFL space shall not be utilized as an "On-line Undercover Facility," and no active investigative activity, on-line or otherwise, shall be conducted from RCFL space, except as expressly authorized by the Director after taking appropriate measures to ensure the integrity of the examinations conducted by the RCFL. Forensic examinations shall not be considered investigative activity.
- I. Ethical Considerations/Conflicts of Interest. Personnel detailed to the RCFL to conduct forensic examinations of digital evidence may not engage in any activity which, either in appearance or in fact, conflicts with their duties at the RCFL or reasonably impeaches the independence of their work for the RCFL. Except upon the express approval of the Director, or as authorized by a policy approved by the Executive Board, no detailee shall conduct forensic examinations of digital evidence or digital material independent from the RCFL or act as a consultant regarding the same either for free or for profit or remuneration beyond the salary paid by their employing agency during the period of their detail to the RCFL. This prohibition shall not apply to the teaching of forensic procedures or practices to law enforcement personnel at gatherings officially sponsored and funded by a federal, state or local agency. RCFL detailees shall not endorse any hardware, software or other product on behalf of the RCFL. RCFL detailees shall continue to be subject to the standards of conduct, professional accreditation requirements, pre-publication-review obligations and similar rules, policies, and

directives affecting their individual conduct as imposed by their employing agencies. No RCFL detailee may be assigned to conduct a forensic examination upon any digital evidence in a case in which that detailee served as the lead investigator, case agent or search warrant executing officer/agent. Subject to the approval of the Executive Board as required by this MOU for all other policies and procedures of the RCFL, the Director may issue such supplemental policies, procedures and guidelines relating to the ethical conduct of personnel detailed to the RCFL as may be appropriate.

J. Gifts by Non-Governmental Entities for the Benefit of the DOJ FEA Participating Agencies Prohibited. Neither the RCFL, any Participating Agency, nor any detailee to the RCFL may solicit or accept any tangible or intangible property or services without just compensation in exchange therefor or monies for the benefit of any Department of Justice Participating Agency or detailees/assignees of such a DOJ Agency from any non-Participating Agency or non-governmental entity or person, EXCEPT THAT:

1. nothing in this provision shall prohibit the solicitation, temporary or incidental acceptance of information or software from any person as may be necessitated by the need to conduct a forensic examination of digital evidence in a case-specific matter (e.g. disclosure by manufacturer of proprietary decryption software or instructions imbedded in a seized hard drive);
2. nothing in this provision shall prohibit the solicitation or acceptance of any technical training offered to all law enforcement which is not promotional in nature and may be solicited or accepted in accordance with applicable rules, regulations and laws;
3. nothing in this provision shall prohibit any SEA, acting in accordance with their applicable rules, regulations and laws from soliciting or accepting on behalf of any SEA any property, monies or services for the benefit of their SEA, or fellow SEAs, regardless of whether such property, monies or services shall be used by personnel detailed to the RCFL, PROVIDED HOWEVER, that:
 - a. title to property so solicited and/or accepted shall NOT pass to an FEA Participating Agency or the General Treasury Agency so long as a DOJ Agency is a Participating Agency in the RCFL; and,
 - b. the origin of property so solicited and/or accepted during the existence of the RCFL shall be disclosed to the Director if it is used by the RCFL generally or is made available to all detailees;

6/26/2008

4. nothing in this provision shall prohibit the acceptance or solicitation of any gift by any DOJ FEA in accordance with 28 U.S.C. §524(d)(1) and applicable DOJ orders, or any amendments thereto or other lawful authority;
5. nothing in this provision shall prohibit the acceptance or solicitation by the FBI of any non-service gifts:
 - a. pursuant to the prior approval of the Property Procurement and Management Section (PPMS) Chief of the FBI Finance Division and the FBI designated Agency Ethics Official (e.g. OGC Deputy General Counsel) as may be required pursuant to MAOP, Part I, 1-13.2.4, or any amendment thereto;
 - b. which are valued at under \$150; and,
 - c. which will be transferred upon execution by the donor of a "Gift Donation Form;" and,
 - d. all DOJ FEAs and their detailees/assignees shall, at all times, comply with 5 C.F.R. 2635.201 et. seq. as well as any rules and regulations of their respective agencies.

VII. FINANCIAL AND CIVIL LIABILITIES IN GENERAL

- A. RCFL Detailees Federally Deputized. The Participating Agencies and their detailees acknowledge that financial and civil liability for the acts and omissions of each detailee remains vested with the detailee's employing agency, EXCEPT FOR, those employees formally detailed to a FEA pursuant to 5 U.S.C. §3374 or those sworn law enforcement officers who have been deputized by an FEA and are acting beyond their duties and responsibilities associated with the RCFL and under the guidance and direction of a FEA in investigating violations of federal law.
- B. Congress has provided that the exclusive remedy for the negligent or wrongful act or omission of an employee of the United States government, acting within the scope of his employment, shall be an action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), §§ 2671-2680.
- C. For the limited purpose of defending claims arising out of an RCFL in which the FBI is a Participating Agency, state or local law enforcement officers who have been federally deputized, or state and local personnel who have been formally detailed to the FBI or any other FEA pursuant to 5 U.S.C. §3374, and who are acting within the course and scope of their official duties, details, and assignments pursuant to this MOU, may be considered, an "employee" of the United States

6/26/2008

government as defined in 28 U.S.C. § 2671. See 5 U.S.C. § 3374(c)(2).

- D. Under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), 28 U.S.C. § 2679(b)(1), the Attorney General or his/her designee may certify that an individual defendant acted within the scope of his employment at the time of the incident giving rise to the suit. Id., 28 U.S.C. § 2679(d)(2). The United States can then be substituted for the employee as the sole defendant with respect to any tort claims. 28 U.S.C. § 2679(d)(2). If the United States is substituted as a defendant, the individual employee is thereby protected from suits in his/her official capacity.
- E. If the Attorney General declines to certify that an employee was acting within the scope of employment, "the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his/her office or employment." 28 U.S.C. § 2679(d)(3).
- F. Liability for any negligent or willful acts of any RCFL detailees undertaken outside the terms of this MOU will be the sole responsibility of the respective employee and their employing agency.
- G. Liability for violations of federal constitutional law rests with the individual Federal agent or officer, or employee pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) or pursuant to 42 U.S.C. § 1983 for State and local officers or cross-deputized Federal officers.
- H. If a federally deputized officer is found to be liable for a constitutional tort, he/she may request indemnification from DOJ to satisfy an adverse judgment rendered against the employee in his/her individual capacity. 28 C.F.R. § 50.15(c)(4). The criteria for payment are substantially similar to those used to determine whether a Federal employee is entitled to DOJ representation under 28 C.F.R. § 50.15(a).
- I. Both state and federal officers enjoy qualified immunity from suit for constitutional torts "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800 (1982).
- J. Federally deputized officers and state and local personnel formally detailed to the FBI pursuant to 5 U.S.C. § 3374, may request representation by the U.S. Department of Justice for civil suits against them in their individual capacities for actions taken within the scope of employment. 28 C.F.R. §§ 50.15, 50.16.
- K. An "employee" may be provided representation "when the actions for which

representation is requested reasonably appear to have been performed within the scope of the employee's employment and the Attorney General or his/her designee determines that providing representation would otherwise be in the interest of the United States." 28 C.F.R. § 50.15(a).

- L. A state and local employee formally detailed to the FBI pursuant to 5 U.S.C. §3374 and duly federally deputized officer's written request for representation should be directed to the Attorney General and, in the case of officers federally deputized through the FBI, provided to the Chief Division Counsel (CDC) of the FBI division participating in the RCFL. In the case of State and local personnel formally detailed to the FBI and officers federally deputized through the FBI, the CDC will then forward the representation request to the FBI's Office of the General Counsel (OGC) together with a Letterhead memorandum concerning the factual basis for the lawsuit. FBI/OGC will then forward the request to the Civil Division of DOJ together with an agency recommendation concerning scope of employment and Department representation. 28 C.F.R. § 50.15(a)(3).
- M. The Participating Agencies agree to notify each other or the Executive Board at a meeting of the Executive Board of any claim or law suit arising out of an activity conducted pursuant to this MOU. Nothing in this paragraph shall prevent any Agency made a party to or affected by any claim or law suit from conducting an independent administrative review of any matter giving rise to the claim or lawsuit. All Participating Agencies agree to cooperate fully with one another in the event of an administrative review or official investigation arising from alleged negligence or misconduct arising out of activity conducted pursuant to this MOU. Nothing in this paragraph shall be construed as supplanting any applicable statute, rule, or regulation.

VIII. EQUIPMENT, VEHICLES AND OFFICE SPACE

- A. Vehicles. RCFL detailees shall be subject to call as necessary to fulfill the mission of the RCFL. Therefore, each participating agency, in accordance with their own policies and procedures shall ensure that each detailee is provided necessary transportation and/or reimbursement for official travel to carry out and perform the mission and duties of the RCFL. Travel and per diem in support of providing testimony will be the responsibility of the requesting party in accordance with applicable federal/state laws or rules regarding responding to subpoenas, court orders, etc.
- B. On a case-by-case basis, the FBI may authorize SEA detailed personnel of the RCFL to use (operate or be transported in) available vehicles owned or leased by

6/26/2008

the FBI when necessary and in direct support and connection with official business of the RCFL.

- C. When authorized, RCFL detailees using FBI vehicles agree to operate the vehicles in accordance with all applicable FBI rules and regulations as outlined in the FBI Manual of Administrative Operations and Procedures (MAOP), Part I, Section 3.1.
- D. FBI vehicles, including Government-owned, rented, and leased vehicles, are to be used for official business only.
- E. The Participating Agencies agree that FBI vehicles will only be used in direct support of the RCFL and to transport individuals detailed to the RCFL.
- F. The Participating Agencies agree to be responsible for any damage incurred to their agency vehicles or FBI vehicles caused by any act or omission on the part of their respective employees, third parties, and Participating Agencies agree to assume financial responsibility for property damage to or caused by said vehicles. In this regard, Participating Agencies shall be self-insured or carry sufficient liability insurance that meets or exceeds that required by appropriate state and federal law.
- G. Computers, Equipment, Forfeitures, Property and Monies. Equipment and other tangible property, excluding monies, provided by Participating Agencies, will remain the property of each agency and will be retrieved by that agency within ninety (90) days, upon the termination of that agency's relationship with the RCFL unless otherwise agreed to in writing. Equipment and other tangible property not so retrieved shall be deemed property transferred to the General Treasurer Agency for the collective benefit of the RCFL Participating Agencies. Unless otherwise directed by the Executive Board, the following tangible property and monies shall be transferred to or titled in the name of the General Treasurer Agency for the collective benefit of the RCFL Participating Agencies:
 - 1. tangible and intangible property and/or monies forfeited to any Participating Agency primarily as result of services rendered by the RCFL;
 - 2. tangible and intangible property and/or monies obtained through a grant by or for the RCFL; and,
 - 3. tangible and intangible property and/or monies expressly donated to or for the RCFL. Upon the dissolution or termination of the RCFL the General Treasurer Agency shall equitably distribute or dispose of said property pursuant to the directives of the then Executive Board, or, in the absence of

6/26/2008

any such prior specific or general directive, following dissolution or termination, pursuant to such principles as the General Treasurer Agency deems equitable. Property damaged or destroyed which was utilized by the RCFL in connection with its operations and is in the custody and control and used at the direction of the RCFL will be the financial responsibility of the agency which provided/contributed said property if title to such property was retained.

- H. Intellectual Property. Except as expressly authorized by the Executive Board, all intellectual property rights and interests generated in whole or in part by the RCFL or its detailees, or otherwise generated in whole or in part through the use of equipment or property granted, purchased, donated, forfeited or abandoned to or for the benefit of the RCFL shall transfer to or be titled in the name of the General Treasurer Agency for the collective benefit of the RCFL Participating Agencies and shall be controlled by the Executive Board, EXCEPT THAT, intellectual property rights in educational text, journals, or treatises of detailees shall NOT, in the absence of a specific directive by the Executive Board, inure to the benefit of the RCFL, but be governed by policy of the detailee's Participating Agency, if any. Any past or present Except as authorized by the Director or by any action or policy of the Executive Board, no detailee shall publicly disseminating disseminate to the public at large (during the existence of the RCFL) any text, journal, treatise or other material relating to the forensic examination or analysis of digital evidence which discusses or discloses any policy, practice, or procedure of the RCFL which has not clearly been identified as authorized for public dissemination, or has otherwise not been made public. Nor shall not any detailee disclose their past or present affiliation with the RCFL except upon approval of the Director in accordance with 5 C.F.R. §2635.807(b) in a manner reasonably satisfactory to the Director. Upon the termination or dissolution of the RCFL, any residual intangible property rights held by or for the RCFL shall be equitably disposed by the General Treasurer Agency in a manner similar to that provided herein for disposition of tangible property.
- I. Operational Supplies. Digital media and other supplies necessary to operate the RCFL, shall be provided to the RCFL by Participating Agencies and/or be purchased through available funds by the Director or his/her designee. In the absence of necessary media or supplies, it is agreed that an agency submitting digital media for forensic examination or otherwise requesting the assistance of the RCFL shall be required to provide the necessary media or supplies in kind or submit funds necessary for purchase of the same.
- J. Records. The Executive Board shall, by majority vote, direct that one of the

6/26/2008

Participating Agencies be deemed owner and custodian of the records of the RCFL and, in the absence of such a directive by the Executive Board, such records shall be deemed the property of the General Treasurer Agency, EXCEPT THAT:

1. during the period of any FBI Investigative Technology Division Affiliate status, the RCFL may also collect, record and report quarterly to the FBI Investigative Technology Division such non-case specific data reflecting the activities and operations of the RCFL in such format or manner as the FBI Investigative Technology Division shall designate, PROVIDED THAT:

- a. the FBI shall agree to make such data and reports available at any time to any Participating Agency;
- b. FBI personnel assigned to the RCFL shall administratively assist in the generation of such reports; and,
- c. the provision of such reports or data to the FBI shall not, in and of itself, constitute a referral of or a transfer of investigative control to the FBI;
- d. case-specific investigative reports and records relating to the forensic examination of digital evidence submitted by a submitting agency shall be the joint property of the RCFL and the submitting agency, subject to such restrictions and under such conditions as the Director shall subscribe; and,
- e. general records relating to the duties of personnel detailed to the RCFL shall be the joint property of the Participating Agency which detailed such personnel and the RCFL and may be requested by the CEO or OIC of any such agency at any time. The Executive Board may transfer title to all records under this paragraph from one Participating Agency to another by a majority vote at a meeting convened and noticed for that purpose.

IX. PRIORITIZATION OF RCFL CASES

- A. Subject to amendment by majority vote of the Executive Board, cases and or evidence submitted to the RCFL will be prioritized as set forth below for processing and examination based upon the following criteria, regardless of the identity of the agency submitting them:
 1. Matters involving or affecting national security;
 2. Imminent credible threat of serious bodily injury or death to persons known or unknown, including examinations of evidence necessary to further the investigation of an at-large or unknown suspect who poses an

- imminent threat of serious bodily injury or death to persons known or unknown;
3. Potential threat of serious bodily injury or death to person(s);
 4. Imminent credible risk of loss of or destruction to property of significant value;
 5. Immediate pending court date, or non-extendable, outcome-determinative legal deadline;
 6. Potential risk of loss of or destruction to property, or exam needed to further the investigation; and
 7. No credible potential threat of bodily injury or death to person(s) and/or loss or destruction of property.

X. EFFECTIVE DATE/DURATION/TERMINATION

- A. This MOU shall become effective by and between each Participating Agency upon execution by all their respective representatives.
- B. This MOU may be executed in one or more counterparts, including by facsimile, each of which shall together constitute one and the same instrument.
- C. The term of this MOU is for the duration of the RCFL operations, EXCEPT THAT, provisions affecting specified Participating Agencies shall have no effect after withdrawal from or termination of participation by that agency in the RCFL.
- D. Any Participating Agency may terminate its relationship with the RCFL and Participating Agencies at least 30 days prior to withdrawal. Notice of termination of a Participating Agency shall attached to this MOU and be maintained by the Director and the Chair.

XI. MODIFICATIONS AND AMENDMENTS

- A. This MOU may be modified or amended at any time by written consent of each Participating Agency, except that modifications relating to the "Affiliate" status of the RCFL shall require written authorization of the Assistant Director of FBI Investigative Technology Division.
- B. Modifications/amendments to this MOU shall have no force and effect until such modifications/amendments are reduced to writing and signed by all authorized representatives from each Participating Agency.
- C. Miscellaneous:

1. Headings Irrelevant. The paragraph headings and numbering in this MOU are inserted for convenience only and shall not affect the meaning or interpretation of the terms of this MOU.
2. Succession of FBI Division Authority. All rights, obligations, duties, notices or other procedural references to the Investigative Technology Division may transfer and inure to any other Division of the FBI, without amendment to this MOU, upon written notice to the Chairperson of the Executive Board by the Director, Deputy Director or Assistant Director of the Investigative Technology Division of the FBI.
3. No Third Party Rights. Nothing in this MOU is intended to confer or does confer any rights, duties or obligations on any person other than the Participating Agencies and, to such limited extent as explicitly noted, their personnel detailed or assigned to the RCFL.
4. Settlement of Disagreements/ Disputes. Disagreements and disputes between the Participating Agencies arising under or relating to this MOU shall be resolved only by consultation by and between the affected Agencies or, in the case of a disagreement or dispute affecting all Participating Agencies, through the Executive Board and will not be referred to a state court, federal court, or to any other person or entity for settlement.
5. No Superseding Standard of Care, Duty or Conduct. Nothing in the MOU or any policy, procedure, practice, protocol or guideline resulting therefrom is intended to alter or affect or does alter or affect any standard of care, standard of conduct, lawful authority to search, seizure or arrest as may be otherwise authorized by the Constitution of the United States, any federal or state law or international treaty or its equivalent, or any policy or procedure of the FBI or any FEA or SEA.¹
6. Severability. If any portion of this MOU is declared invalid by a court of competent jurisdiction, this MOU shall be construed as if such portion had never existed, unless such construction would constitute a substantial deviation from the intent of the Participating Agencies as reflected in this MOU.
7. Funding/ Acquisitions/ Contracting. Acquisitions and purchasing

¹FBI Agents are to continue to consider as controlling the FBI policy guidelines contained in Section 3-4.3, "Non-Federal Crimes," of the Legal Handbook for Special Agents.

commitments by FEAs with their own federal funding which are in support of the RCFL will be made in accordance with applicable federal rules and regulations. No such acquisitions may be made without proper authorization from the appropriate federal contracting official.

8. Binding Effect. This MOU shall inure to the benefit of, and shall be binding upon, the Participating Agencies, and their respective successors.

IN WITNESS WHEREOF, the below enumerated Participating Agencies, by and through their respective Chief Executive Officer and Official in Charge, hereby execute this agreement.

Charles C. Plummer
Sheriff
Alameda County Sheriff's Office

Date

Lynne Johnson
Chief of Police
Palo Alto Police Department

Date

Robert L. Davis
Chief of Police
San Jose Police Department

Date

Don Horsley
Sheriff
San Mateo County Sheriff's Office

Date

George W. Kennedy
District Attorney
Santa Clara District Attorney's Office

Date

Mark J. Mershon
Special Agent in Charge (SAC)
San Francisco Division
Federal Bureau of Investigation

Date

Kerry E. Haynes
Assistant Director – Investigative Technology Division
Federal Bureau of Investigation

Date

Office of the Chief Contracting Officer
Federal Bureau of Investigation

Date

APPENDIX – AGENCY COMMITMENT OF RESOURCES

Federal Bureau of Investigation – San Francisco Division shall provide, at a minimum, the following personnel resources:

RCFL Director: FBI Supervisory Special Agent
Four (4) Computer Forensic Examiners (Special Agent and/or Professional Support Employees at the discretion of FBI Executive Management)

Alameda County Sheriff's Office shall provide, at a minimum, the following personnel resources:

One (1) Computer Forensic Examiner

Palo Alto Police Department shall provide, at a minimum, the following personnel resources:

One (1) Computer Forensic Examiner

San Jose Police Department shall provide, at a minimum, the following personnel resources:

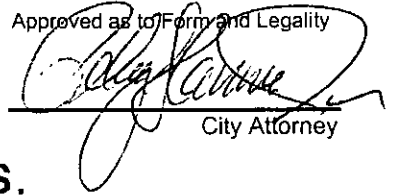
One (1) Computer Forensic Examiner

San Mateo County Sheriff's Office shall provide, at a minimum, the following personnel resources:

One (1) Computer Forensic Examiner

Santa Clara District Attorney's Office shall provide, at a minimum, the following personnel resources:

One (1) Computer Forensic Examiner



City Attorney

FILED
OFFICE OF THE CITY CLERK
OAKLAND
2008 JUN 26 PM 4:27

OAKLAND CITY COUNCIL

RESOLUTION No. _____ C.M.S.

RESOLUTION AUTHORIZING THE CITY ADMINISTRATOR TO, 1) ENTER INTO A MEMORANDUM OF UNDERSTANDING WITH THE FEDERAL BUREAU OF INVESTIGATION (FBI) AND THE SILICON VALLEY REGIONAL COMPUTER FORENSICS LABORATORY (RCFL) TO PROVIDE COMPUTER FORENSIC INVESTIGATOR TRAINING AND COMPUTER FORENSICS LABORATORY SUPPORT TO THE OAKLAND POLICE DEPARTMENT (OPD), AND 2) RECEIVE OVERTIME REIMBURSEMENTS UP TO FIFTEEN THOUSAND DOLLARS (\$15,000) PER YEAR AND ACCEPT TITLE TO PROPERTY AND EQUIPMENT GIVEN TO OPD BY RCFL

WHEREAS, the Oakland Police Department (hereinafter "OPD") wishes to become a participating member of the Silicon Valley Regional Computer Forensics Laboratory (hereinafter "RCFL") and assign a sworn member of OPD to the RCFL to be trained as a computer forensics investigator; and

WHEREAS, an RCFL is a collaboration between the Federal Bureau of Investigation (FBI) and other law enforcement agencies operating within the San Francisco Bay Area; and

WHEREAS, organizations entering into a Memorandum of Understanding with the FBI become participating agencies in the RCFL; and

WHEREAS, a participating agency assigns a staff member to RCFL and in return the agency receives training and certification in computer forensics investigation for its assigned member, access to the laboratories digital forensics examination and advisory services, exposure to the most technologically advanced computer forensics equipment available, broad experience in a variety of digital forensics cases, and a stake in the management of the RCFL; and

WHEREAS, the assignment of these cases to the RCFL investigator will relieve the burden on the other criminal investigators who are currently assigned these cases but do not have access to timely computer forensic examination facilities to complete their investigations; and

WHEREAS, the widespread use of electronic digital equipment has led to an increasing number of violent and white collar crime cases in which digital media is presented as evidence; and

WHEREAS, the training and experience gained at the RCFL will be instrumental in providing the necessary resources required for OPD to establish in the future its own forensic computer examination program; and

WHEREAS, the only costs to the City associated with participation in this program are the personnel costs associated with a sworn member being detailed to the RCFL; and

WHEREAS, The FBI will provide each sworn member detailed to RCFL with a vehicle (including fuel), essential equipment, training, travel expenses, and supplies in accordance with the policies and procedures of the detailed sworn employing agency and the MOU; and

WHEREAS, subject to available funding, the RCFL may transfer title to property and/or equipment, most likely in the form of computers and software, to the City; and

WHEREAS, the RCFL has agreed to reimburse the City up to \$15,000 annually for overtime incurred by the sworn member who is detailed to the RCFL; and

WHEREAS, Oakland City Charter section 504(l) reserves to the Council the authority to enter into contracts with another public entity; and

WHEREAS, Oakland City Charter section 504(l) empowers the City Administrator to “represent the City in its intergovernmental relations” and to negotiate contracts, which includes Memorandums of Understanding, with other government entities subject to approval by the Council; now, therefore, be it

RESOLVED: That, pursuant to Oakland City Charter section 504(l), the City Council authorizes the City Administrator to enter into a Memorandum of Understanding with the Federal Bureau of Investigations and RCFL to provide computer forensic investigator training and computer forensic laboratory services and support to the Oakland Police Department; and be it

FURTHER RESOLVED: That the City Administrator is authorized to assign one of the Police Department’s Criminal Investigators to RCFL detail; and be it

FUTHER RESOLVED: That non-computer related cases that would have been assigned to the sergeant assigned to the RCFL detail will be reallocated among the other investigators in the Criminal Investigation Division; and be it

FURTHER RESOLVED: That the City Administrator is hereby authorized to accept property and/or equipment on behalf of the City, in the event that RCFL wishes to transfer such property and/or equipment to the City; and be it

FURTHER RESOLVED: That the City Administrator is hereby authorized to receive up to \$15,000 per year from the RCFL as reimbursement for overtime incurred by the sworn member who is detailed to the RCFL and appropriate said funds to into General Fund: 1010, Org:102340, Account: 51214, Program: PS03, and project to be determined; and be it

FURTHER RESOLVED: That the City Administrator is hereby authorized to modify, extend, or amend any necessary agreement or other documents entered into in furtherance of this resolution, provided that no additional funds shall be allocated without prior Council approval; and be it

FURTHER RESOLVED: That all Memorandums of Understanding authorized hereunder shall be approved by the City Attorney for form and legality prior to execution and placed on file in the Office of the City Clerk.

IN COUNCIL, OAKLAND, CALIFORNIA, _____, 20_____

PASSED BY THE FOLLOWING VOTE:

AYES- BROOKS, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID, and PRESIDENT DE LA FUENTE

NOES-

ABSENT-

ABSTENTION-

ATTEST _____
LaTonda Simmons
City Clerk and Clerk of the Council,
City of Oakland, California