



## THE CITY OF SAN DIEGO

DATE: April 30, 2020

TO: Office of the City Clerk

FROM: Kyle Elser, Interim City Auditor  
Office of the City Auditor

SUBJECT: Proposed Amendments to the San Diego Charter Sections 40 and 39.2  
Related to Independent Legal Counsel for the Office of the City Auditor

---

The Office of the City Auditor submits the following proposed amendments to San Diego City Charter (Charter) sections 40 and 39.2 to the Rules Committee for consideration of placement on the November 2020 ballot. We sought and received unanimous support and approval from the Audit Committee at its February 19, 2020 meeting to forward our proposal to the Rules Committee for consideration of placement on the November 2020 ballot. Therefore, we request that this item be considered at the May 13, 2020 Rules Committee meeting in accordance with the City Clerk's revised timeline for ballot measures.

We appreciate the Audit Committee's support on this issue. In addition, our proposal has been endorsed by both the Institute of Internal Auditors as well as the Association of Local Government Auditors, two leading authorities on the auditing profession. Their letters are attached.

This proposed ballot measure would provide the Office of the City Auditor with access to independent legal counsel. Providing our Office with the ability to retain independent legal counsel, when we determine the City Attorney's Office may have a conflict of interest, will best serve the public interest and further ensure the independence of our Office's audits and investigations. The attached memo to the Audit Committee provides additional details on the reasons why we are making this request. Under the proposal, the first sentence of the third paragraph of Charter section 40 would be amended to read as follows:

The City Attorney shall be the chief legal advisor of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties, except in the case of the Ethics Commission and the Office of the City Auditor, which shall have their own legal counsel independent of the City Attorney.



OFFICE OF THE CITY AUDITOR  
600 B STREET, SUITE 1350 • SAN DIEGO, CA 92101  
PHONE 619 533-3165 • FAX 619 533-3036

**TO REPORT FRAUD, WASTE, OR ABUSE, CALL OUR FRAUD HOTLINE: (866) 809-3500**



Proposed Amendments to the San Diego Charter Sections 40 and 39.2

Section 39.2 would be amended to add the following:

The Office of the City Auditor shall be authorized to retain its own legal counsel, independent of the City Attorney, for legal support and guidance in carrying out its responsibilities and duties. If the Auditor retains or employs independent legal counsel, the Office of the City Auditor shall be the client and is entitled to the benefits and privileges thereof.

Of course, the specific language of the Charter amendments is subject to review by the Rules Committee and City Council.

Thank you for your attention to this issue. Please contact me with any questions.

Respectfully submitted,

A handwritten signature in black ink that reads "Kyle Elser". The signature is written in a cursive, flowing style.

Kyle Elser  
Interim City Auditor

CC: Honorable Mayor Kevin Faulconer  
Honorable Members of the City Council  
Honorable City Attorney Mara Elliott  
Honorable Audit Committee Members  
Ruth Martin, Rules Committee Consultant



## THE CITY OF SAN DIEGO

DATE: January 24, 2020  
TO: Honorable Members of the Audit Committee  
FROM: Kyle Elser, Interim City Auditor  
SUBJECT: **Request for Independent Legal Counsel for the Office of the City Auditor**

---

To protect the independence of the Office of the City Auditor and best serve the public interest, we are seeking the Audit Committee's support for our proposal to amend the City Charter language in Section 40 and Section 39.2 to provide the City Auditor with the authority to obtain independent legal counsel. We request the Audit Committee forward our proposal to the Rules Committee for consideration to place a measure on the November 2020 ballot to provide the Office of the City Auditor with access to independent legal counsel.

### **The Ethics Commission Has Independent Legal Counsel**

In 2004, voters approved an amendment to the City Charter to provide the Ethics Commission with its own legal counsel. According to the ballot language, this amendment was necessary because, at the time, the City Attorney's Office was advising both the Ethics Commission, as well as City Officials who were subject to investigation by the Ethics Commission. This created an inherent conflict and threatened the Ethics Commission's independence. The City Attorney supported providing independent legal counsel to the Ethics Commission, and the measure was approved by 77 percent of voters. According to the Executive Director of the Ethics Commission, the ability to obtain independent legal counsel has been essential to the independence of the Ethics Commission, and has also improved its' efficiency and effectiveness because the Commission is able to select attorneys with specific areas of expertise as-needed.

### **The Office of the City Auditor Should Also Have Independent Legal Counsel**

A similar situation currently exists for the Office of the City Auditor. The City Attorney advises both the City Auditor and the City Officials whom the City Auditor is responsible for auditing or investigating. Therefore, we believe that providing our office with the authority to obtain independent legal counsel is necessary to prevent potential perceived or actual conflicts of interest that arise due to the City Attorney's



OFFICE OF THE CITY AUDITOR  
600 B STREET, SUITE 1350 • SAN DIEGO, CA 92101  
PHONE (619) 533-3165 • FAX (619) 533-3036

**TO REPORT FRAUD, WASTE, OR ABUSE, CALL OUR FRAUD HOTLINE (866) 809-3500**



client relationship with the City.

It is understood that the City Attorney's Office may focus on the City's reputational and legal risks. However, according to Government Auditing Standards, the Office of the City Auditor has a responsibility and an obligation to serve the public interest, and this responsibility is critical when auditing in the government environment. Specifically, our audit reports are required to be public except in very limited circumstances, and often expose inefficient, inappropriate, and potentially unlawful actions of the City, which may affect the City's legal liability and reputation. Regardless, it is important for the public to be aware of these issues, to ensure accountability and promote positive organizational changes.

### **Other Government Audit Agencies Have Access to Independent Legal Counsel**

There is precedence for independent legal counsel for an audit agency within a municipality. For example, voters in Portland, Oregon passed a ballot measure in 2017, which amongst several changes designed to ensure the City Auditor's independence, provided the City Auditor the ability to retain independent legal counsel.<sup>1</sup> When placing the measure on the ballot, the Portland City Council resolved that "WHEREAS, best practices and professional standards call for the City Auditor's Office to be structurally independent from the agencies that are subject to the Auditor's oversight . . . [this] City Charter amendment protects the Auditor's independence by allowing the Auditor to seek advice from independent legal counsel and making the Auditor responsible for staffing decisions and procurements." The amendment was approved by 86 percent of voters. The California State Auditor also has access to independent legal counsel.

### **Estimated Cost for Independent Legal Counsel**

The City of San Diego Ethics Commission retains its own legal counsel, independent of the City Attorney, for legal support and carrying out its responsibilities and duties. The Commission's legal support budget is \$180,000, with an average expenditure of \$60,000 per year<sup>2</sup>. While it is difficult to project, we estimate our expenditures for legal

---

<sup>1</sup> The Portland City Charter amendment includes the following language: "The Auditor may obtain legal advice and representation from the City Attorney or may retain or employ independent legal counsel. If the Auditor retains or employs independent legal counsel, the Office of the Auditor shall be the client and is entitled to the benefits and privileges thereof."

<sup>2</sup> The Executive Director of the Ethics Commission noted that the Commission's budget for legal expenses is higher than its' typical average costs because legal costs can vary significantly from year to year, and it is important to have a sufficient budget to cover potential needs that arise. There have been years when the Commission utilized its' entire legal services budget. We anticipate similar fluctuating legal services needs for the Office of the City Auditor.

services will be comparable to the Ethics Commission's, based on the number of times we would have benefited from independent legal counsel in the past.

### **Audits and Investigations Often Require Legal Advice and Conflicts Have Occurred**

The vast majority of the City Auditor's work is performing audits and investigations of Mayoral Departments, and this work frequently requires legal advice on issues such as interpretations of laws, regulations, and policies. Once audit work is completed, there can be disagreements between OCA and management on the findings, conclusions and recommendations contained in audit and investigative reports. Often these disagreements are based on interpretations of how laws, policies, and regulations should be applied. This puts the City Attorney's Office in the position of representing both sides of the issue at once.

There are also instances when the scope of an audit or investigation includes a review of contracts, memorandums, agreements, Council Policies and other documents prepared and/or approved by the City Attorney's Office. In these cases, it may be difficult to get an objective opinion from the City Attorney's Office when their documents are under scrutiny by our office.

While we recognize the value provided by the City Attorney's Office on much of our audit work, there are also instances when there is disagreement on the legal ramifications of how audit findings are expressed in public reports. It is extremely important that we receive independent legal advice on how we can best communicate our audit findings to the public, creating accountability to address the issues we identify. According to the Institute of Internal Auditors, violations of laws obviously expose an organization to potential loss, but a greater liability exists when the organization has knowledge of a problem and fails to act promptly to correct it. This can expose the organization to additional claims of negligence.

### **Proposed Change to City Charter Sections 40 and 39.2**

Based on the ballot measure language used to provide the Ethics Commission with access to independent legal counsel in 2004, we believe the following or similar language could be used to change the City Charter to provide the Office of the City Auditor with access to independent legal counsel.

This proposal, if approved by the voters, would amend Charter Section 40, regarding the City Attorney, to provide that the City Attorney is the chief legal advisor for all City departments and offices, except in the case of the Ethics Commission "and the Office of the City Auditor", which shall each have "their"

own legal counsel independent of the City Attorney. This proposal would also amend Charter Section 39.2 to provide that "The Office of the City Auditor shall be authorized to retain its own legal counsel, independent of the City Attorney, for legal support and guidance in carrying out its responsibilities and duties."

## **Conclusion**

For the reasons stated above, we request that the Audit Committee forward our proposal to the Rules Committee to consider placing a measure on the November 2020 ballot to amend the City Charter language in Section 40 and Section 39.2 to provide the City Auditor with the authority to obtain independent legal counsel. These changes to the City Charter will help to protect the independence of the Office of the City Auditor and best serve the public interest.

Respectfully submitted,



---

Kyle Elser  
Interim City Auditor

cc: Honorable Mayor Kevin Faulconer  
Honorable Members of the City Council  
Honorable City Attorney Mara Elliott  
Andrea Tevlin, Independent Budget Analyst

**Sent via email**

February 17, 2020

TO: Honorable Members of the Audit Committee  
Honorable Mayor Kevin Faulconer  
Honorable Members of the City Council  
Honorable City Attorney Mara Elliott  
Andrea Tevlin, Independent Budget Analyst

The Institute of Internal Auditors (IIA) was recently advised of a proposal being submitted by the Office of the City Auditor (OCA) requesting an amendment to the City Charter that would provide the City Auditor with the authority to obtain independent legal counsel. Our understanding is that, currently, the City Attorney provides advice and counsel to **both** the City Auditor and City Officials. Public sector auditors have unique challenges given the natural pressures that arise when working for and around elected officials, auditing the use of public funds, and having their work available for public review. To fulfill their service to the public, public sector auditors must perform audits in a completely objective manner, free from potential interference or influence and bias. This includes reporting findings objectively, even if those findings may have negative outcomes for elected officials.

An independent audit function, as articulated in the widely accepted *International Standards for the Professional Practice of Internal Auditing*, enhances accountability to taxpayers and helps to ensure that public funds are properly spent. Standard 1100: Independence and Objectivity, states: Internal audit “must be independent and the internal auditor must be objective in performing their work.” It’s important to note that, if structured and staffed appropriately, an independent audit department can proactively prevent problems by evaluating controls through regular reviews.

To ensure the City's internal audit function remains independent, objective, and operates in conformance with the professional *Standards*, The IIA recommends the following:

**Internal Audit Must Be Supported by, but not Subordinate to, the City Council and City Management.**

The City Council must embrace the importance of independence and objectivity in the city's internal audit function so that it can provide informed recommendations on how to effectively achieve objectives, ensure mitigation of related risks, and safeguard taxpayer dollars. It is vital that the City Council drive a culture in which all city employees understand the importance and value of the internal audit function.

**To Be Effective, Internal Audit Must Be Independent.**

To explain the Standard 1100 cited above, internal audit must not be restricted by an individual or function that, in any way, may threaten its ability to carry out its responsibilities in an unbiased manner. To achieve this independence, the OCA must have direct and unrestricted access to both city management and other city officials. The City Auditor must also be free to perform its duties without any undue influence of city management, appointed or elected. Such detrimental influence can appear in many forms, including inappropriate administrative or functional reporting relationships, budgetary constraints, and decision-making around personnel issues (e.g., hiring/firing and compensation).

**Internal Audit Must Be Objective.**

Objectivity is required by the *Standards*, ensuring internal auditors' work is of high quality and is not compromised. This demands that internal auditors do not subordinate their judgment on audit matters to others. The IIA believes that providing the OCA with the authority to obtain independent legal counsel when deemed necessary would help prevent potential, perceived or actual conflicts of interest that may arise due to the City Attorney's client relationship with the City. Furthermore, the majority of the OCA's audit reports are required to be made public, potentially exposing actions of the City that could impact the city's legal liability and reputation. That's why it is vital that the OCA have the ability to obtain independent legal counsel to ensure unfettered accountability to the public. In my past positions as Inspector General for the Tennessee Valley Authority and Deputy Inspector General of the U.S. Postal Service, independent legal counsel was a critical component for ensuring audit reports and recommendations were free of any conflicts of interest, real or perceived. There is also precedence for city auditors to obtain independent legal counsel when necessary. In 2017, voters in Portland, Oregon, passed a measure providing this authority to the City Auditor's office.

**Internal Audit Must Function in Full Conformance with Professional Standards.**

Professional *Standards* for the practice of internal auditing, contained in the *International Professional Practices Framework* (IPPF) or Red Book, are implemented and embraced by organizations in the United States and across the globe. This includes adoption by the Basel Committee on Banking Supervision (BCBS), the U.S. Federal Reserve, federal, state and local government entities, and publicly traded and privately held organizations of all sizes. Conformance to the *Standards* strengthens the delivery of internal audit services,

which in turn helps improve governance, manage risks, and implement controls to more effectively achieve established organizational goals.

The IIA is dedicated to supporting professional and ethical practices across the public and private sectors. We strongly encourage the City of San Diego and its Audit Committee to reaffirm the City Auditor's obligation "to advance open and accountable government through accurate, independent, and objective audits that seek to improve the economy, efficiency, and effectiveness of City government," by approving the proposal to provide the City Auditor with the authority to obtain independent legal counsel. Only this will best serve the citizens of the city.

We welcome the opportunity to provide additional guidance and other information to assist the Audit Committee as it deliberates this issue. Please contact Kathy Anderson, The IIA's Managing Director of North American Government & Stakeholder Relations, at [kathy.anderson@theiia.org](mailto:kathy.anderson@theiia.org) or 407-937-1291 if you have any questions or would like to discuss further.

Sincerely,

A handwritten signature in black ink that reads "Richard F. Chambers". The signature is written in a cursive, flowing style.

Richard F. Chambers, CIA, QIAL, CGAP, CCSA, CRMA  
President and Chief Executive Officer



## Association of Local Government Auditors

April 20, 2020

### OFFICERS

*President*  
**Pam Weipert**  
Compliance Officer  
Oakland County, MI

*President Elect*  
**Larry Stafford**  
Audit Services Manager  
Clark County, WA

*Secretary*  
**Chris Horton**  
County Auditor  
Arlington, VA

*Treasurer*  
**Justin Anderson**  
Senior Management Auditor  
King County, WA

*Past President*  
**Kristine Adams-Wannberg**  
Senior Management Auditor  
Portland, OR

### BOARD MEMBERS AT LARGE

**Lisa Callas**  
Audit Coordinator  
Edmonton, AB

**Andrew Keegan**  
Assistant City Auditor  
Austin, TX

**Lisa Monteiro**  
Senior Management Auditor  
Anaheim, CA

**Carolyn Smith**  
Chief Audit Executive  
Columbus City Schools, OH

### MEMBER SERVICES

449 Lewis Hargett Circle  
Suite 290  
Lexington, KY 40503  
Phone: (859) 276-0686  
Fax: (859) 278-0507  
[www.algaonline.org](http://www.algaonline.org)

Councilmember Georgette Gomez Chair, Rules Committee  
City of San Diego  
202 C St.  
San Diego, CA 92101

Dear Chair Gomez and Rules Committee Members,

The Association of Local Government Auditors (ALGA) has been following the San Diego City Auditor's efforts to strengthen the independence of the office and we support the proposed charter amendment to allow the city auditor to obtain independent legal advice. ALGA is a professional organization representing over 300 government audit organizations across the United States and Canada that is committed to supporting independent auditing within local governments.


The aim of the San Diego City Auditor's proposed ballot initiative is to reduce threats to independence and objectivity by allowing the City Auditor to seek independent legal advice to prevent potential perceived or actual conflicts of interest that arise due to the City Attorney's client relationship with the City.

Independence is critical because auditors may be called upon to issue reports that critique the effectiveness or efficiency of management's programs. The San Diego City Auditor's Office has a City Charter mandate to perform work in accordance with *Government Auditing Standards* which establishes standards of independence and objectivity, and requires the public issuance of reports. The City Attorney's role as chief legal advisor to all City departments may present instances where protecting the City's reputation and addressing potential liability may conflict with providing independent and objective advice to the City Auditor for a report that may be released publicly. Allowing the City Auditor to obtain independent legal counsel would help to avoid these potential conflicts and enhance independence, objectivity, transparency, and timeliness of reports.

The proposed charter amendment would provide the City Auditor greater independence in obtaining legal advice that would assure both you and the public that audit reports are objective, fair and complete. ALGA supports the use of the charter amendment process to enhance the independence of your City Auditor and we encourage you to forward the proposed charter amendment to the Rules Committee for consideration.

Please do not hesitate to contact us if you have questions or would like additional resources. You can reach Kevin Christensen, one of our California committee members, at (916) 808-4743 or email address [KMChristensen@cityofsacramento.org](mailto:KMChristensen@cityofsacramento.org) or you can contact me at (816) 513-3303 or [douglas.jones@kcmo.org](mailto:douglas.jones@kcmo.org).

Sincerely,

  
Douglas Jones, CGAP, CIA, CRMA  
City Auditor, Kansas City, Missouri  
Chair, ALGA Advocacy Committee

cc: Pam Weipert, ALGA President