



THE CITY OF SAN DIEGO

DATE: April 21, 2022
TO: Honorable City Council Members
Honorable Audit Committee Members
FROM: Andy Hanau, City Auditor
SUBJECT: Independent Legal Counsel for the Office of the City Auditor

Summary

We recognize the value that the Office of the City Attorney provides on many of our audits, investigations, and related work. However, a structural conflict exists where under City Charter Section 40, the Office of the City Attorney is the attorney for the City of San Diego, as a municipal corporation. The City Attorney is called upon to provide legal advice to all City departments, including the Office of the City Auditor and City administrative departments, which may be the subject of an audit or investigation by the City Auditor. Further, under the Charter, the City Auditor has authority to audit and investigate all City departments, including the Office of the City Attorney.

To protect the independence of the Office of the City Auditor and best serve the public interest, we proposed a ballot measure in January 2020 for a Charter amendment to provide the Office of the City Auditor and the Audit Committee with access to independent legal counsel, and our proposal has been advanced by both the Audit Committee and the Rules Committee since that time. The current proposal limits the use of independent legal counsel to instances where the City Auditor and Audit Committee find its use to be in the public interest, which is defined by Generally Accepted Government Auditing Standards as *"the collective well-being of the community of people and entities that the auditors serve."*

This proposed ballot measure will be presented to the City Council on April 25, 2022, in order for the Council to authorize the meet and confer process. The full text of the proposed Charter amendment is included in **Attachment A**, and incorporates feedback from various stakeholders. We are targeting the November 2022 ballot, and the deadline for the City Council to place measures on that ballot is August 12, 2022.

The remainder of this memorandum provides further details on our proposed ballot measure.

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The Public Interest

A foundational principle of Generally Accepted Government Auditing Standards (GAGAS) is auditors' commitment to honor the public trust and serve the public interest. Specifically, GAGAS states:

***3.07** The public interest is defined as the collective well-being of the community of people and entities that the auditors serve. Observing integrity, objectivity, and independence in discharging their professional responsibilities helps auditors serve the public interest and honor the public trust. The principle of the public interest is fundamental to the responsibilities of auditors and critical in the government environment.*

***3.08** A distinguishing mark of an auditor is acceptance of responsibility to serve the public interest. This responsibility is critical when auditing in the government environment. GAGAS embodies the concept of accountability for public resources, which is fundamental to serving the public interest.*

The Proposed Charter Amendment Would Advance the Public Interest and Protect the Independence of the Office of the City Auditor

If the Charter amendment is adopted, the Office of the City Auditor will contract independent legal counsel to be used by OCA and the Audit Committee on an as-needed basis. The proposed Charter amendment limits the use of independent legal counsel to certain circumstances.

Specifically, when the City Auditor believes it would be in the public interest to utilize independent legal counsel on an audit, investigation, or other activity of the Office, the City Auditor will make a request to the Audit Committee, which must affirm. As described in more detail below, this is most likely to occur in circumstances where the Office of the City Attorney is a subject of an audit or investigation conducted by the Office of the City Auditor, thus creating a potential conflict that may threaten the independence and objectivity of the Office of the City Auditor's work.

In addition, the Charter amendment provides that the City Council will determine the appropriate funding for independent legal counsel, and may adopt additional implementation rules and procedures via ordinance.

The Ethics Commission and the Commission on Police Practices Have Independent Legal Counsel

Other independent City departments already have independent legal counsel for similar reasons. 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 Office of the City Attorney 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 former 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.

In 2020, voters approved amendments to the City Charter to dissolve the Community Review Board on Police Practices and establish a Commission on Police Practices (Commission). The Commission serves as an investigatory body of the City, operating independently of the Police Department and Mayor. The amendment provides the Commission with its own legal counsel, independent of the City Attorney. The arguments in favor of the measure included the Commission having an independent attorney who does not also represent the Mayor and the Police Department. There was no argument against the measure filed with the City Clerk.

The Office of the City Auditor Should Also Have Access to Independent Legal Counsel

A similar situation currently exists for the Office of the City Auditor. The Office of the City Attorney advises both the City Auditor and the City officials whom the City Auditor is responsible for auditing or investigating. Further, the Office of the City Attorney may be a subject of an audit or investigation conducted by the Office of the City Auditor. 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 client relationship with the City.

The role of the City Attorney's Office may require it to 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 we may be obligated to expose inappropriate or potentially unlawful actions of the City, regardless of how that exposure affects the City's legal liability and reputation. This public transparency is critical to help 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 that included several changes designed to ensure the City Auditor's independence and provided the City Auditor the ability to retain independent legal counsel.¹ 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.

Internationally Recognized Audit Authorities Endorse Independent Legal Counsel for the Office of the City Auditor

Our proposal is supported by the [Institute of Internal Auditors](#) and the [Association of Local Government Auditors](#)—two international authorities on the auditing profession.

The memo provided by the Association of Local Government Auditors states:

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

¹ 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."

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 memo provided by the Institute of Internal Auditors states:

The IIA believes that providing the [Office of the City Auditor] 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 Office of the City Auditor'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 Office of the City Auditor] have the ability to obtain independent legal counsel to ensure unfettered accountability to the public.

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 and 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.

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 the Office of the City Auditor 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 Office of the City Attorney 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 Office of the City Attorney. In these cases, it may be difficult to get

an objective opinion from the Office of the City Attorney when their documents and work are under scrutiny by our office, such as was the case during our recent audit of the City's Major Building Acquisition Process, including the 101 Ash Street building.

While we recognize the value provided by the Office of the City Attorney 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.

In the nearly 13 years since the Office of the City Auditor was created, there have been a series of audits and investigations where we believe we, and by extension, the Audit Committee, City Council, and the public, would have benefitted from our having access to independent legal counsel. To provide several recent examples:

- During our 2021 [Major Building Acquisition Process audit](#), which included the purchase of the 101 Ash Street building, we had to solely rely on the Office of the City Attorney for legal advice, despite the Office of the City Attorney's involvement in the 101 Ash Street transaction and other major building acquisitions.
- In our 2020 audit of the City's management of public liabilities, which cost the City approximately \$25 million per year, [the Office of the City Attorney opined that we could not have access to certain Office of the City Attorney records](#) that were needed to evaluate whether the City was correcting issues that had caused a liability, such as a damaged sidewalk. This denial came despite City Charter Section 39.2, which states, "The City Auditor must have access to, and authority to examine any and all records, documents, systems and files of the City and other property of any City department, office, or agency."
- And, in 2019, we conducted a [Hotline Investigation of Abuse Related to the Improper Award of a Multi-Million Dollar Contract](#). This report identified legal issues and City policy violations with the award of the contract. We had to solely rely on the Office of the City Attorney for legal advice during this investigation despite the fact that the contract had been approved by the Office of the City Attorney at the time of the award.

These cases demonstrate that the public interest would be best served by our having access to independent legal counsel to ensure the legal advice we receive and use for our reports and investigations is objective; that we are able to access the information we need

and have independent legal advice to determine what we should have access to per our City Charter authority; and that decisionmakers such as the City Council and Audit Committee also receive complete and objective legal advice relating to our audits and investigations.

Plans to Continue the Meet and Confer Process

In anticipation of the need to continue to meet and confer over this issue, the City negotiated to include language in the applicable Memoranda of Understanding (MOUs) effective July 1, 2021 through June 30, 2023 to facilitate negotiation.

Specifically, the MOU with the Deputy City Attorneys Association (DCAA) states:

Nothing in this MOU is intended to prohibit the City from continuing to meet and confer with DCAA during the term of this MOU, on mandatory subjects of bargaining, in accordance with the Meyers-Milias-Brown Act, related to any City Council proposal to amend the San Diego City Charter to authorize independent legal counsel for the Office of the City Auditor or to employ independent legal counsel for the Office of the City Auditor by Council action, if legally permitted.

Similarly, the MOU with the San Diego Municipal Employees Association (MEA) states:

Independent Legal Counsel for City Auditor. Nothing in this MOU is intended to prohibit the City from continuing to meet and confer with MEA during the term of this MOU, on mandatory subjects of bargaining, in accordance with the Meyers-Milias-Brown Act, related to any City Council proposal to amend the San Diego City Charter to authorize independent legal counsel for the Office of the City Auditor or to employ independent legal counsel for the Office of the City Auditor by Council action, if legally permitted.

After the City entered into these agreements, in July 2021, the City Administration informed us that the Human Resources Department would not have the staff resources to continue meet and confer on our ballot measure until January 2022 due to ongoing negotiations regarding Proposition B, return to work, and employee COVID-19 vaccination requirements.

In January 2022, the City Administration notified the Office of the City Auditor that it is ready to resume the meet and confer process with MEA and DCAA for our independent legal ballot measure proposal.

Conclusion

For the reasons stated above, we request that the City Council authorize the meet and confer process for this proposed ballot measure.

Please contact me with any questions on this proposal.

Respectfully submitted,



Andy Hanau
City Auditor

cc:

Honorable Mayor Todd Gloria

Honorable City Attorney Mara Elliott

Elizabeth Maland, City Clerk

Jay Goldstone, Chief Operating Officer

Erik Hanson, Supervising Human Resources Officer, Human Resources Department

Charles Modica, Independent Budget Analyst

ATTACHMENT A

Proposed Charter Amendment Language

The proposed Charter amendment would create a new section as follows:

SECTION 40.2: Independent Legal Counsel for the Office of the City Auditor and Audit

Committee

The Office of the City Auditor, acting through the City Auditor and on the conditions set forth in this section, may retain and use legal counsel, independent of the City Attorney, for legal support and advice in any audit, investigation, or other activities within the authority and duties of the Office of the City Auditor.

The Office of the City Auditor must retain independent legal counsel by contract in a manner consistent with this Charter, including the City's required competitive bidding processes, and other applicable laws.

Before the Office of the City Auditor may use the independent legal counsel who is under contract, the Audit Committee must determine that the use on an audit, investigation, or other activities is within the "public interest," as that term is defined by generally accepted government auditing standards promulgated by the United States Government Accountability Office or successor agency.

The City Council has discretion to determine and appropriate funding for the Office of the City Auditor's independent legal counsel. The City Council may, by ordinance, establish additional rules and procedures to implement this section.

The Audit Committee may use retained independent legal counsel under the conditions set forth in this section for legal support and advice related to the Audit Committee's oversight responsibilities.

Independent legal counsel retained and used under this section will only be responsible for legal support and advice related to those activities within the authority of the Office of the City Auditor, acting through the City Auditor, and the Audit Committee's oversight responsibilities. Any attorney-client relationship between independent legal counsel and the City Auditor, the City Auditor's subordinates, and the Audit Committee must be formed in a manner consistent with California law and the Rules of Professional Conduct of the State Bar of California.

The proposal would also amend a portion of Charter Section 40 as follows:

SECTION 40: City Attorney

The City Attorney shall be the chief legal adviser 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 Commission on Police Practices, which each shall have its own legal counsel independent of the City Attorney, and in the case of the Office of the City Auditor, which may retain and use independent legal counsel for the City Auditor, the City Auditor's subordinates, and the Audit Committee on the conditions set forth in Charter section 40.2.