



THE CITY OF SAN DIEGO

DATE: December 1, 2020
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

Background

As you know, since February 2020, we have pursued a ballot measure to amend the City Charter to provide the Office of the City Auditor with independent legal counsel on occasional projects which warrant it. We believe it is in the City's best interest that we have access to independent legal counsel, because the City Attorney's Office advises the City officials and departments that we are charged with auditing and investigating. In the course of pursuing this measure, we learned that the outside legal counsel assisting us with our ballot measure concludes that the City Charter already gives the City Council the authority to provide us, or any other City department, with independent legal counsel when the City Council has determined it is necessary.

On August 27, 2020, we [issued a memo](#) requesting that the City Council authorize us to obtain independent legal counsel. That request was based on a legal opinion from the City's outside counsel, Michael G. Colantuono, stating that the clear language of the City Charter Section 40 provides the City Council with this authority.

On September 8, 2020, the [City Attorney's Office issued a memo](#) reiterating that Office's longstanding opinion that only the City Attorney can authorize the use of independent legal counsel.

Mr. Colantuono was unpersuaded by the City Attorney's Memo, and he provided a legal opinion stating that the City Attorney's Memo incorrectly assigns the authority to obtain independent legal counsel exclusively to the City Attorney, when the Charter clearly assigns that authority to the City Council as well.

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On October 14, [we issued a memo](#) with Mr. Colantuono's legal response and we asked that the City Council docket our request to use existing funds in our budget to obtain independent legal counsel to obtain additional legal advice on issues described in August 27, 2020 memo that is linked above.

Status Update

We appreciate the City Council and Audit Committee's support of our efforts to obtain independent legal counsel. To that end, the Council President had tentatively docketed, and we were planning to present our request to obtain independent legal advice on certain specific issues at the November 17, 2020 City Council meeting. However, the City Attorney's Office ended Mr. Colantuono's legal services with our Office on November 9, 2020. Without Mr. Colantuono's legal assistance, we determined that we could not go forward with our request to City Council as intended.

After this occurred, we had a productive meeting with the City Attorney's Office (CAO), and they agreed to utilize their outside counsel contracts for the City Auditor to obtain second opinions on two issues: 1) whether and how the City Auditor can distribute confidential hotline reports to the Audit Committee and City Council, and 2) whether the Audit Committee and City Council can be provided detailed legal analysis regarding a previous Hotline Report of Abuse Related to the Improper Award of a Multi-Million Dollar Contract.

We also asked for a second opinion on whether and how our Office should be given access to attorney-client privileged documents, such as we requested during our Public Liability Audit. The CAO has requested that the California State Bar analyze whether the City Auditor should have access to attorney-client privileged documents; therefore, instead of a second opinion on this issue, the CAO agreed to provide the City Auditor with the specific question as posed to the State Bar for review. However, we want to ensure the question to the State Bar addresses the specific request previously made by the City Auditor, which was that the City Auditor would review such documents to identify other non-privileged records and facts related to the City Auditor's review of Public Liabilities, but attorney-client privileged documents would not be used in support of any public audit report.

Lastly, the CAO agreed to review legal information already provided to the City Auditor's Office regarding the Development Services Department's practice of not charging deposits to many development permittees or ensuring collection from many accounts that have gone into deficit. The CAO will consult with the City Auditor's Office regarding previous advice given on this issue, and will seek to provide the City Auditor's Office with more detailed conclusions related to whether this practice violates Charter Section

93 regarding a prohibition on the City extending credit, and various state and local codes on prohibiting gifts of public funds.

Conclusion

It is a positive development for the City Auditor to obtain second opinions and additional legal advice on the issues outlined above, and we appreciate the CAO's assistance towards those ends.

However, it is clear that we must continue to pursue a March 2022 ballot measure for independent legal counsel for the Office of the City Auditor, as we are currently only able to obtain second opinions and independent legal advice when the City Attorney's Office agrees to provide them. In order to ensure our audits and investigations are always based on the most objective and independent advice available, we must be able to obtain independent legal advice when we determine it is needed to best serve the public. We believe there is a structural conflict because the CAO advises the City officials and departments that we are charged with auditing and investigating, which often places the CAO in a difficult position when it comes to advising us.

Again, we greatly appreciate the City Council's and Audit Committee's support on this matter. We will keep the City Council and Audit Committee apprised of further developments.

Respectfully submitted,



Andy Hanau
City Auditor

cc: Honorable Mayor Kevin Faulconer
Honorable City Attorney Mara Elliott
Aimee Faucett, Interim Chief Operating Officer
Jeff Sturak, Assistant Chief Operating Officer
Almis Udrys, Assistant Chief Operating Officer
Matthew Helm, Chief Compliance Officer
Jessica Lawrence, Policy Advisor, Office of the Mayor
Andrea Tevlin, Independent Budget Analyst