



THE CITY OF SAN DIEGO

DATE: February 10, 2022

TO: Council President and Rules Committee Chair Sean Elo-Rivera
Honorable City Council Members
Honorable Audit Committee Members

FROM: Andy Hanau, City Auditor

SUBJECT: Independent Legal Counsel for the Office of the City Auditor

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 currently advises both the Office of the City Auditor and the City Officials whom the City Auditor is responsible for auditing or investigating. This includes the Office of the City Attorney itself, which may be a subject of an audit or investigation conducted by the Office of the City Auditor.

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 with access to independent legal counsel, and our proposal has been advanced by both the Audit Committee and the Rules Committee since that time. In 2020, the Rules Committee also requested, and the Office of the City Attorney provided us with, outside counsel to assist with the ballot measure. We engaged in the meet and confer process with the Recognized Employee Organizations (REOs) but were unable to complete that process prior to the deadline for placing the ballot measure on the November 2020 ballot.

We are now targeting the November 2022 ballot, and the deadline for the City Council to place measures on that ballot is August 12, 2022. Accordingly, we are requesting the Rules Committee to:

OFFICE OF THE CITY AUDITOR
600 B STREET, SUITE 1350 • SAN DIEGO, CA 92101
PHONE (619) 533-3165 • CityAuditor@sandiego.gov

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1. Recommend that the City Council re-authorize the Human Resources Department to continue the meet and confer process for the Office of the City Auditor's proposed ballot measure for access to independent legal counsel as soon as possible, so that any necessary labor negotiations can be completed in time to place this measure on the November 2022 ballot.
2. Request the Office of the City Attorney to again provide outside legal counsel to assist the Office of the City Auditor in preparing the ballot measure language and related legal services.

The remainder of this memorandum provides further details on our proposed ballot measure. See **Attachment A** for a detailed timeline of events that have occurred since January 2020 on this issue.

The Ethics Commission and the Commission on Police Practices Have 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 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 Office of the City Attorney 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.

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."

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 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.

Proposed Charter Amendment Language

In 2020, the Rules Committee requested that the Office of the City Attorney provide outside independent counsel to provide necessary legal assistance with our ballot measure, given that the ballot measure affects the Office of the City Attorney. The Office of the City Attorney assigned outside independent attorney Michael G. Colantuono for this purpose, which included the preparation of ballot language and the necessary ordinance to place a measure on the ballot. Prior to the Office of the City Attorney ending Mr. Colantuono’s legal services with our Office, we worked with him to draft the proposed amendment to the City Charter. On June 10, 2020, the Rules Committee voted 4–1 to advance this proposal to the City Council, which would add a new section to read as follows:

SECTION 39.4: INDEPENDENT AUDIT COUNSEL

Subject only to an appropriation of the City Council by the annual budget or otherwise, the City Auditor may retain legal counsel, independent of the City Attorney, for any project or task if the City Auditor or the Audit Committee determines it is in the best interest of the City to do so. Such independent legal counsel shall serve under the direction of the City Auditor and the Audit Committee, except as otherwise required by the Rules of Professional Conduct of the California State Bar.

We Have Requested Outside Counsel to Assist with Necessary Legal Services for this Proposed Ballot Measure

While a significant portion of the required legal work on our ballot measure proposal has already been completed, we anticipate that additional legal services needs will likely arise as our measure moves forward through meet and confer and final Council approval. Therefore, we have requested to again use outside counsel for any remaining legal services needs. To date, the City Attorney has not agreed to provide outside counsel, stating that the Office of the City Attorney is not conflicted on this issue, and that the Office of the City Attorney performs all work possible in-house in order to save the City the costs of contracting out. We respectfully disagree with this assessment.

In our view, the fact that our ballot measure directly affects the Office of the City Attorney at a minimum creates a potential or perceived conflict of interest. In fact, the Office of the City Attorney has traditionally provided outside counsel for ballot measures that affect it, as was done for our ballot measure earlier in the process.

With regard to cost, we estimate that utilizing outside counsel for remaining legal services needs would cost approximately \$15,000. Sufficient funds for this purpose are available in the Office of the City Auditor's FY2022 budget. As described above, we have had to rely solely on the Office of the City Attorney for legal advice on several issues that the Office of the City Attorney was directly involved in, including audits of more than \$230 million in major building acquisitions and \$25 million per year in public liability costs. Our ballot measure is intended to correct this structural conflict, and we believe that \$15,000 in existing funds is a very reasonable cost to help ensure that all remaining legal work on this measure is perceived as objective.

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.

Estimated Cost for Independent Legal Counsel

As described above, 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. As of Fiscal Year 2020, the Ethics Commission's legal support budget was \$180,000,

with an average expenditure of \$60,000 per year.² While it is difficult to project, if voters approve our proposed ballot measure we estimate our budget needs for legal services will be less than the Ethics Commission's based on the number of times we would have benefited from independent legal counsel in the past. Similar to the Ethics Commission, our budget needs for independent legal counsel will likely fluctuate from year to year depending on the audits, investigations, and related needs for legal services that arise each year.

² The Former 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.

Conclusion

For the reasons stated above, we request that the Rules Committee recommend that the City Council re-authorize the Human Resources Department to continue the meet and confer process for the Office of the City Auditor's proposed ballot measure for access to independent legal counsel as soon as possible, so that any necessary labor negotiations can be completed in time to place this measure on the November 2022 ballot. We are also asking the Rules Committee to request the Office of the City Attorney to again provide outside legal counsel to assist the Office of the City Auditor in preparing the ballot measure language and related legal services.

We have greatly appreciated the Audit Committee and Rules Committee's past support on this matter. 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
Abby Jarl-Veltz, Assistant Director, Human Resources Department
Charles Modica, Deputy Director, Office of the Independent Budget Analyst

ATTACHMENT A

Timeline of Events Related to the Office of the City Auditor's Proposed Ballot Measure for Access to Independent Legal Counsel

Since January 2020, we have pursued a ballot measure to amend the City Charter to provide the Office of the City Auditor with the ability to obtain independent legal counsel on audit or investigative projects when we find it is necessary to best service the public interest, given the Office of the City Attorney's client relationship with City Management or the Office of the City Attorney's involvement in issues we are auditing or investigating.

Below is a high-level timeline of what has occurred to date:

- On January 24, 2020, [we issued a memo](#) to the Audit Committee outlining a Request for Independent Legal Counsel for the Office of the City Auditor.
- On February 19, 2020, the Audit Committee unanimously passed a motion to support the proposal and forward 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.
- On June 10, 2020, the Rules Committee passed a motion 4 to 1 to use outside legal counsel to draft the language for a Charter amendment ballot measure that would provide the Office of the City Auditor and Audit Committee access to independent legal counsel, forward this item to the full City Council for consideration to be submitted to voters on the November 2020 Municipal Special Election ballot, and request the City Council to authorize the Human Resources Department to guide the meet and confer process with the Deputy City Attorneys Association (DCAA), if necessary.
- Starting in June 2020, we engaged in the meet and confer process with DCAA and the San Diego Municipal Employees Association (MEA), and the City contracted outside independent attorney Michael G. Colantuono to provide legal services related to our proposed ballot measure. Mr. Colantuono drafted language for the ballot measure and assisted with other related legal services.
- 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 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 on October 14, 2020 [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 for additional legal advice on issues described in the August 27, 2020 memo that is linked above.
- On November 9, 2020, the Office of the City Attorney ended Mr. Colantuono's legal services with our Office, and as a result, we determined that we could not go forward with our request made on October 14, 2020 without Mr. Colantuono's assistance.
- On December 1, 2020, [we issued an update memo](#) stating that it is clear that we must continue to pursue a 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 Office of the City Attorney agrees to provide them.
- On July 1, 2021, the City entered into new Memoranda of Understanding (MOU) with DCAA and MEA. The City negotiated specific language into both of their MOUs to allow for continuing the meet and confer process for our independent legal counsel ballot measure proposal.
- In July 2021, the Human Resources Department informed us that they 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 Human Resources Department notified us that it is ready to resume the meet and confer process with MEA and DCAA for our independent legal counsel ballot measure proposal.
- At the January 26, 2022 Audit Committee meeting, we provided an informational status update to the Committee and informed them that the City Administration and Human Resources were prepared to resume meet and confer negotiations on our ballot measure proposal. Four members of the Committee expressed support for our continuing to advance our proposal and no members expressed any opposition.