THE CITY OF SAN DIEGO

DATE: August 27, 2020

TO: Honorable City Council Members

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

SUBJECT: Request to Obtain Independent Legal Counsel for the Office of the City Auditor

Overview

Beginning in 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. See **Attachment 1** for the outside counsel's legal opinion.

Thus, a ballot measure to amend the Charter may not be necessary. We therefore request that the City Council authorize the Office of the City Auditor to obtain independent legal counsel when the City Auditor or the Audit Committee determine it is in the best interests of the City, using budgeted resources of the Office and after meeting and conferring with affected bargaining units.

The City Attorney's Office Has Opined That We Cannot Obtain Independent Legal Counsel Without Their Approval

The third-to-last paragraph of Section 40 of the City Charter states: "The Council shall have authority to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith. The Council shall provide sufficient funds in the annual appropriations ordinance for such purposes and shall charge such additional legal service against the appropriation of the respective Departments."

The City Attorney's Office has nevertheless historically opined that City departments, including the Office of the City Auditor, cannot utilize independent legal counsel unless

the City Attorney determines that their office has a conflict of interest, or lacks the technical expertise or resources to provide legal advice on certain matters. Even in these cases, the Office of the City Attorney has historically opined that any outside legal counsel obtained would report to the Office of the City Attorney. See **Attachment 2** and **Attachment 3** for opinions from the City Attorney's Office to this effect.

The City Attorney's Office Currently Advises the Office of the City Auditor and the City Officials the City Auditor Is Charged with Auditing and Investigating, Creating an Inherent Conflict

Our audits and investigations frequently require legal advice on a range of issues, such as how certain laws, regulations, and policies should be interpreted. Because the City Attorney's Office has opined that we cannot obtain independent legal counsel without their authorization, we have had to rely on legal advice provided by the City Attorney's Office for these issues – even though the City Attorney's Office also advises the same departments and City officials we are charged with auditing and investigating. This arrangement is not in the public interest, as it raises concerns about whether the public will have confidence that the Office of the City Attorney's legal advice is — and appears to be — objective and fully independent of the matters we are auditing. We believe the City's best interests would be served by our having access to independent legal counsel on those occasions when we determine it is needed.

We Proposed a City Charter Amendment to Obtain Independent Legal Counsel

To resolve this situation and ensure that our audits and investigations are always based on the most objective legal advice possible, in February 2020 we proposed a ballot measure to amend the City Charter to provide the City Auditor and Audit Committee with access to independent legal counsel when necessary. Our proposed Charter amendment was based on a 2004 City Charter amendment to provide the Ethics Commission with independent legal counsel. Like our office, the Ethics Commission also investigates the same City officials that the City Attorney's Office advises, and voters approved that amendment "to ensure that the Ethics Commission is completely independent and unbiased." Our proposal was supported by both the Audit Committee and the Rules Committee, as well as the Institute of Internal Auditors and the Association of Local Government Auditors — two international authorities on the auditing profession.

The City's Outside Legal Counsel Concludes that the City Charter Already Authorizes the City Council to Hire Independent Legal Counsel for Issues Connected to City Departments, Including the Office of the City Auditor

In the course of pursuing this ballot measure, we were able to utilize outside counsel due to the City Attorney's decision their office had a conflict on this issue. The City Attorney's office designated Michael G. Colantuono to serve as outside counsel for this project. Mr. Colantuono concludes the City Attorney's historical interpretation of Charter

Section 40 is incorrect. While Charter Section 40 provides that the City Attorney is the chief legal adviser of all City departments and officials, it also authorizes the City Council to obtain independent legal counsel for issues connected to City departments, including the Office of the City Auditor and both provisions must be given effect; one cannot override the other. The Charter does not limit the Council's authority to circumstances in which the City Attorney determines that their office has a conflict of interest or lacks the technical expertise or capacity to advise on an issue. The City Council holds the authority to determine when independent legal counsel is necessary. We provided the outside counsel's legal opinion to the City Attorney's Office on July 30th, and the City Attorney's Office intends to provide a formal response but indicated that they cannot do so until early September due to other matters they are working on. However, they indicated that they stand by their historical opinions described above. The City Council waived the attorney-client privilege associated with Mr. Colantuono's opinion and it is now of public record. See **Attachment 1** for Mr. Colantuono's legal opinion.

We Request the City Council Exercise Its Charter Authority to Provide the Office of the City Auditor with Independent Legal Counsel

According to the outside counsel's opinion, the City Council can exercise its authority to provide independent legal counsel by making the determination that such independent counsel is necessary, and by providing sufficient funds for this purpose.

While we appreciate the City Attorney's Office's legal advice and may not often need outside counsel, several instances have arisen in the last year alone in which we, and by extension, the Council and the public would have benefited from independent legal counsel. Specifically, we request that the City Council authorize us to use existing funds to obtain independent legal advice on the following issues:

- The City Attorney's Office has advised us the we cannot provide our confidential hotline reports to the Audit Committee and City Council that identify employees who were the subject of an investigation, or outside firms for which we are recommending the City pursue debarment due to misconduct. Two specific instances are our recent hotline reports related to the improper award of a multi-million dollar contract that was reviewed by the City Attorney's Office, and the receipt of gifts by a City employee who performed favors for contractors in return. We believe it would be in the City's best interest to obtain an independent legal opinion on whether, and to what extent the Office of the City Auditor may distribute these confidential hotline reports to the Audit Committee and City Council so that those charged with governance can most effectively carry out their responsibilities.
- In the case of the improper award of a multi-million-dollar contract, we reached conclusions related to Charter, San Diego Municipal Code, and Administrative Regulation violations. Although City management chose not to renew the subject contract, our investigation identified legal issues that relate to future contracts. It

is critical that the City establish a fair and consistent legal framework for multi-million-dollar contracts that are awarded without a competitive process. We think a complete legal analysis explaining the basis for our conclusions would assist decisionmakers to evaluate the most important legal implications related to the violations we found. Yet the City Attorney must defend the City from some of those potential consequences and may have provided advice underlying the conduct we investigated. This puts the City Attorney's Office in a difficult position, and in this case the City Attorney's Office did not provide detailed legal analysis to the City Council and Audit Committee related to the issues we identified. We believe it would be in the City's best interest to obtain an independent legal opinion on whether a memorandum that includes a detailed legal analysis and conclusions can be provided to the Audit Committee and City Council, which will help guide policy changes to prevent financial fraud, waste, or impropriety.

- City Charter Section 39.2 states that the City Auditor shall have access to, and authority to examine all City records and documents. On our recent Performance Audit of the City's Public Liability Management, the City Attorney's Office refused to provide us records maintained by their office that show whether certain liability issues have been corrected – for example, whether a damaged City sidewalk, which had resulted in a trip and fall claim, had been repaired. According to the City Attorney's Office, providing us with such records would violate the attorney-client privilege. As a result, we declared a scope impairment on that audit because we could not determine whether the City effectively addresses liabilities after a claim against the City has been filed. See **Attachment 4** for our memo to the Audit Committee regarding the scope impairment, and **Attachment 5** for the City Attorney's Office's response. Other auditors we contacted stated that they would have access to such records. We believe it would be in the City's best interest to obtain an independent legal opinion on whether, and to what extent the Office of the City Auditor should have access to such records. Again, the City Attorney's Office's roles in defending the City from liability and in advising our office put it in a difficult position and suggest that independent counsel would make our work more effective. It will also allow us to ensure accountability by the City Attorney's Office, as we are called to do for all City functions.
- City Charter Section 93 prohibits the City from extending credit to any individual, association or corporation; except that suitable provision may be made for the aid and support of the poor. On our recent Performance Audit of the Development Services Department's Deposit Account Management, we found that the department frequently failed to charge required deposits for deposit accounts, and such accounts go into deficit and may not ever be paid in full. The City Attorney's Office effectively declined to answer our question as to whether this practice is lawful and, again, is in a difficult position because it may have advised the Development Services Department on these issues and would have

to defend any litigation that might follow from our conclusion that the practice is unlawful. We believe it would be in the City's best interest to obtain an independent legal opinion on whether it is likely that the department's practice violates Charter Section 93, which would affect the urgency with which this issue must be addressed.

The opinions we received from the City Attorney's Office on these issues may well have been objective. However, given that the City Attorney's Office advises the same departments and officials that were the subject of our audits and investigations, it would be in the City's best interest to obtain second opinions on all of the issues above.

The Office of the City Auditor Will Continue to Need Independent Legal Advice on Future Audits and Investigations, Due to a Structural Conflict with the City Attorney's Office

Under City Charter Section 39.2, the City Auditor has the authority to investigate any potential financial fraud, waste, or impropriety within any City department, which we accomplish via our audits and investigations. Thus, as an independent department with oversight responsibilities, we believe it is in the public interest for our office to have access to obtain independent legal counsel on similar issues that may arise in the future. For example, our FY 2021 work plan includes an audit of the City's real estate acquisition process, including for the 101 Ash St. building, as well as the City's use of CARES Act funds. It is highly likely that we will require legal assistance on such topics, both of which the City Attorney's Office represents City departments and officials on. For issues such as these, we also ask that the City Council authorize us to obtain independent legal counsel when we determine it is in the best interest of the City. If needed, we plan to request a mid-year budget adjustment to ensure we have sufficient funds for such ongoing needs.

If the budget for use of outside counsel is approved by City Council per outside counsel's interpretation of Charter Section 40, before we use outside counsel for a second opinion, the City will engage in the good faith meet and confer process with any impacted recognized employee organization on mandatory subjects of bargaining as required by the Meyers-Milias-Brown Act.

Thank you for your consideration of this important issue. Please contact me with any questions.

Respectfully submitted,

Kyle Elser

Kyle Elser
Interim City Auditor

CC: Honorable Audit Committee Members
Honorable Mayor Kevin Faulconer
Honorable City Attorney Mara Elliott
Michael G. Colantuono, Esq.
Ryan A. Reed, Esq.

ATTACHMENTS:

1. Memorandum from Michael G. Colantuono, Esq., re: City Council Authority to Engage Outside Counsel
2. Memorandum from the City Attorney re: Standards and Procedures Regarding Outside Legal Counsel
3. Memorandum from the City Attorney re: Retention of Outside Counsel
4. City Auditor Memorandum re: Public Liability Audit Scope Impairment
5. City Attorney Memorandum re: Public Liability Audit Scope Impairment

ATTACHMENT 1

CONFIDENTIAL

420 Sierra College Drive, Suite 140
Grass Valley, CA 95945-5091
Main: (530) 432-7357
FAX: (530) 432-7356

COLANTUONO
HIGHSMITH
WHATLEY, PC

Michael G. Colantuono
(530) 432-7359
MColantuono@chwlaw.us

MEMORANDUM

TO:	Kyle Elser, Interim City Auditor City of San Diego	FILE NO:	49017.0025
FROM:	Michael G. Colantuono, Esq. Ryan A. Reed, Esq.	DATE:	July 29, 2020
CC:	Andy Hanau, Interim Assistant City Auditor		
RE:	City Council Authority to Engage Outside Counsel		

As you asked, we write to opine on the City Council's authority under the third-to-last paragraph of Section 40 of the City Charter to authorize the use of counsel independent of the City Attorney.

QUESTION PRESENTED: What is the scope of the City Council's authority to engage outside legal counsel under City Charter section 40?

SHORT ANSWER: The City Council has authority to hire outside legal counsel "to investigate or prosecute matters connected with City departments," if it finds such counsel "is necessary in connection therewith" and the Council has "provide[d] sufficient funds in the annual appropriation ordinance for such purposes." Thus, the limits are two: outside advice must be necessary in connection with City departments and funds must be included in the annual budget. The Charter does not limit the Council's authority to circumstances in which the City Attorney's Office lacks capacity or technical expertise or has a disqualifying conflict of interest. Rather, the City Council may determine when outside legal assistance is necessary.

ANALYSIS. The third-to-last paragraph of San Diego City Charter Section 40 states:

> The Council shall have authority to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith. The Council shall provide sufficient funds in the annual appropriation ordinance for such purposes and shall charge such additional legal service against the appropriation of the respective Departments.

The City Attorney's Office has interpreted this provision — at various times over many years and under a variety of elected City Attorneys — to limit the City Council's authority to circumstances in which "the City Attorney determines that his office does not have the expertise or needed personnel to handle the matter or is conflicted."[1] Further, the City Attorney has opined that outside counsel must work under the supervision of the City Attorney's Office unless a conflict of interest precludes that. We respectfully disagree with these opinions. We conclude that a court would construe the third-to-last paragraph of Section 40 of the City Charter as we do here under the canons of construction — the rules of law governing how writings are interpreted.

THE PLAIN MEANING CANON. "We first look to the language of the charter giving effect to its plain meaning. Where the words of the charter are clear, we may not add or alter them to accomplish a purpose that does not appear on the face of the charter or from its legislative history."[2] The plain language of Charter Section 40 authorizes the City Council to engage outside legal assistance so long as it relates to a City department and is funded from that department's annual budget.

THE HARMONIZATION CANON AND EXCEPTIONS TO GENERAL RULES. Although Charter Section 40 also provides "[t]he City Attorney shall be the chief legal advisor of, and attorney for the City and all Departments and offices thereof in matters relating to

---

[1] City Atty. MOL-2009-11.

[2] *Domar Electric, Inc. v. City of Los Angeles* (1995) 9 Cal.4th 161, 172.

their official powers and duties, except in the case of the Ethics Commission," this language must be harmonized with the third-to-last paragraph of Section 40, quoted above.[3] Courts harmonize apparently conflicting provisions by "giving effect to all parts of all [charter provisions] if possible."[4] While any exception to a general rule can be argued to conflict with that general rule, courts read exceptions as such — i.e., to give them force as exceptions to the general rule. Otherwise, exceptions would work to repeal the general rule or work its partial repeal, or vice versa.[5] As the City Attorney's general role is described in the third paragraph of Section 40 (the first paragraph to address substance, the first two paragraphs address the City Attorney's election and tenure) and the provision for contracting out appears in the third-to-last paragraph, it is naturally read as an exception to the general rule. It is typical to state general rules before exceptions to them.

Accordingly, we conclude that the limits on the City Council's power to contract for outside legal services are those the Charter provides — and no others. Thus, we conclude a court would conclude, if required to do so, the City Charter gives the City Attorney's Office no role in determining whether and when the City Council can hire outside legal counsel. Rather, the Charter places that authority solely with the Council.

THE SURPLUSAGE AND PREDICATE ACT CANONS. The City Attorney's 2009 memorandum references the plain language canon to support its interpretation of the provision above, but cites no specific language. The argument may rely on Section 40's use of the word "necessary." Arguably, the only time outside legal assistance is "necessary" is when the City Attorney's Office cannot complete the work — either due to capacity, technical expertise, or a disqualifying conflict of interest. However, reading "necessary" to mean "strictly necessary" in this way would render the third-to-last paragraph of Section 40 of the charter surplusage — i.e., meaningless. Other law, including the Rules of Professional Conduct of the California State Bar require the City Attorney to abstain in favor of outside counsel in each of these cases. "It is a settled axiom

---

[3] E.g., *Medical Bd. of California v. Superior Court* (2001) 88 Cal.App.4th 1001, 1013 ("*Medical Board*").

[4] *Ibid.*

[5] *Id.*, at p. 1018.

of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided."[6] Accordingly, we conclude a court would not read the third-to-last paragraph of section 40 as do the City Attorney's opinions.

Moreover, the Charter is best interpreted to empower the City Council to decide whether outside counsel is "necessary in connection []with" the departments of the City. This is an application of the "predicate act" canon, which provides that express authority to do a thing implies authority to do all acts necessary to accomplish the thing expressly authorized.[7] As a determination that outside counsel services are "necessary" is required for the City Council to retain outside counsel, the Charter is interpreted to empower the City Council to make that judgment.

CONSISTENT USAGE CANON. "[W]hen the drafters of a statute have employed a term in one place and omitted it in another, it should not be inferred where it has been excluded."[8] Charter Section 40 explicitly provides for joint action of the City Council and City Attorney. For example, "the City Attorney shall apply, upon order of the Council ..." for an injunction to restrain misapplication of City funds. The City Attorney must "perform such other duties of a legal nature as the Council may by ordinance require." In contrast, the provision for outside counsel authorizes the Council alone to engage such counsel. It makes no reference to the City Attorney. Had the authors of Section 40 of the Charter intended to provide a role for the City Attorney in Council decisions to employ outside counsel, they would have expressed that intention — as they did elsewhere in Section 40.

---

[6] *People v. Woodhead* (1987) 43 Cal.3d 1002, 1010.

[7] A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts (2012) at pp. 192–194. California has adopted that rule as Civil Code section 1656 which also reflects the *expressio unius* rule: "All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded."

[8] *People v. Woodhead* (1987) 43 Cal.3d 1002, 1010.

THE *EXPRESSIO UNIUS* CANON. This rule of construction is labelled by a Latin phrase meaning, "to say one thing is to exclude another." This rule reads legislation to intentionally exclude restrictions on statutory language that are not included when other restrictions are.[9] Under this rule, that the Charter expressly limits the Council's power to retain outside counsel to "matters connected with the departments of the City," when "necessary in connection therewith" and when the Council has "provide[d] sufficient funds in the annual appropriation ordinance," implies that it intended no other restrictions. Had it intended them, it would have stated them.

THE GENERAL VS. SPECIFIC CANON. This rule requires a specific provision of legislation to control its subject matter even when it is at variance with a more general provision.[10] This reinforces our conclusion just as does the rule regarding exceptions noted above. The Council's authority under the third-to-last paragraph of Section 40 is specific to the topic of use of outside counsel; the third paragraph broadly describing the role of the City Attorney is a general rule that must give way to a specific exception.

POLICY CONSIDERATIONS. The City Attorney's 2009 memorandum argues the City Attorney has an ethical obligation under the Rules of Professional Responsibility to identify when it does not have sufficient expertise or personnel to handle a matter, or when it has a disqualifying conflict of interest. Therefore, that memorandum argues, outside legal counsel cannot be retained without a determination from the City Attorney's Office that one of those three circumstances exists. Further, the City Attorney must ensure competent legal advice if the City retains independent legal counsel. Therefore, the City Attorney must have control of outside legal counsel.

The City Attorney's memorandum is correct that outside legal counsel must be sought if the Office does not have sufficient expertise or personnel to handle a matter, or has a disqualifying conflict of interest. However, it does not follow in logic that these are

[9] E.g. *Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 514.
[10] *Medical Board, supra,* 88 Cal.App.4th at pp. 1004–1005.

the only circumstances in which the Charter empowers the City Council to retain outside counsel. Such a reading violates the canons of construction discussed above.

This argument also reads the City Attorney's ethical obligations too broadly. An attorney is ethically responsible to his or her client for the advice the client retains him to provide, not for advice the client seeks elsewhere.[11] Thus, work performed by outside counsel selected by the City Council triggers the ethical duties of those lawyers to provide competent, ethical representation. Had the Charter intended the City Attorney to supervise the elected City Council's use of outside counsel it would have stated so — as other charters do, as discussed below. San Diego's Charter did not, for the reasons explained above. The City Attorney has an obligation under the Rules of Professional Responsibility to ensure the competency of legal advice she provides or supervises for the City. The City Charter defines the scope of the City Attorney's relationship to her client, the City. As described above, the City Charter expressly permits the City Council to contract for independent legal counsel. We conclude that matters the Council refers to outside counsel, and the conduct of those outside counsel, are outside the scope of the City Attorney's ethical obligations.

Another policy argument supports our conclusion. Lawyers are agents for their clients; the clients are the principals.[12] Thus, the purpose of the relationship is to serve the client's ends, not to empower the attorney to choose those ends or to supervise or to control those ends.

Still further, the language of the charters of other large cities in California empowers their city councils to choose independent counsel in at least some

[11] Rules of Professional Conduct rule 1.1 (Competence). The first comment on this rule states: "This rule addresses only a lawyer's responsibility for his or her own professional competence. See rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers." Those latter rules apply when a lawyer "has direct supervisory authority over another lawyer." This is a question of fact. (Comment [5] to Rule of Professional Conduct, rule 5.1.) Unless the City Council were to direct the City Attorney to supervise the work of an outside lawyer, we see no factual basis to conclude the City Attorney must supervise other counsel the City Council retains.

[12] *Wentland v. Wass* (2005) 126 Cal.App.4th 1484, 1495.

circumstances. Those which give the City Attorney a role in those decisions do so expressly:

- Los Angeles: Charter section 275 requires consent of both the City Council and elected City Attorney to use outside counsel.
- San Jose: Charter section 800(c) similarly requires a request or recommendation of the appointed City Attorney for the City Council to use outside counsel.
- San Francisco's Charter section 6.102(1.) limits use of outside counsel to circumstances in which the elected City Attorney has a conflict of interest, but provides for a neutral decisionmaker to review any contested conclusion of the City Attorney that he does not have a conflict.
- Fresno Charter section 803(g) allows the City Council to employ outside counsel: "The Council shall have control of all legal business and proceedings and may employ other attorneys to take charge of any litigation or matter or to assist the [appointed] City Attorney therein."
- Sacramento Charter section 72 limits use of outside counsel to "situations where the [appointed] city attorney determines that is a conflict in representation by that office."
- Long Beach Charter section 603 requires a request of the elected City Attorney for the City Council to "employ other attorneys to assist the City Attorney."
- Oakland's Charter section 401(6) allows use of outside counsel "upon the City Attorney[']s recommendation and the approval of the Council, when he or she has a conflict of interest in litigation involving another officer of the City in his official capacity … ."
- Bakersfield's Charter does not expressly address use of outside counsel but provides that all city powers "shall be exercised and enforced in the manner prescribed by this charter, or when not prescribed here, in such manner as shall

be provided by ordinance or resolution of the Council." (Section 12.) The city does not appear to have an ordinance on the subject.

- Anaheim City Charter section 703 provides: "The City Council shall have control of all legal business and proceedings of the City and may employ or contract with other attorneys to take charge of or assist in any civil litigation or other civil legal matter or business." It is substantively the same as the Fresno language quoted above. Riverside's charter uses substantively identical language.[13]

Thus, the common practice of large California City charters expressly provides for use of outside counsel in language similar to the third-to-last paragraph of Section 40 of San Diego's Charter or expressly forbids or limits use of outside counsel. We conclude a court will not read such restrictions into San Diego's Charter because it framers did not include them — as other city's charters do.

SCOPE OF REPRESENTATION. You also asked us to confirm that we are authorized to provide this opinion to you.

The scope of work included in our Legal Services Agreement with the City directs us broadly to: "[p]rovide legal services related to the Office of the City Auditor's proposed ballot measure for amendment of the San Diego City Charter ..." including whether the proposed measure will require meet-and-confer with recognized bargaining units. This opinion is "related to the Office of the City Auditor's proposed ballot measure for amendment of the San Diego City Charter" because it touches on whether that amendment is necessary and addresses alternative means to achieve its goal.

A CAVEAT. We understand the City Council has not often used its authority to contract for outside counsel other than on recommendation of the City Attorney, likely

[13] Riverside City Charter, § 702.

due to the City Attorney opinions noted above.[14] Therefore, resort to this authority might constitute a change in policy and practice triggering a duty to meet and confer with any affected bargaining units. In our judgment, that question is not sufficiently "related to the Office of the City Auditor's proposed ballot measure" to bring it within our scope of services. Accordingly, we recommend the City consult other counsel on this issue.

CONCLUSION. Thank you for the opportunity to assist. If there is more we can do to be helpful, please contact either of us.

[14] This fact does not strip the Council of the authority the third-to-last paragraph of Section 40 grants under the desuetude canon — failure of government officials to implement a statute does not annul it; it is the law until the legislative body (here, San Diego voters) repeals it. (E.g., *People v. Cole* (2006) 38 Cal.4th 964, 988.)

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Jan I. Goldsmith
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

ATTACHMENT 2

MEMORANDUM OF LAW

DATE: November 4, 2009

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Standards and Procedures Regarding Outside Legal Counsel

INTRODUCTION

In recent years, the City of San Diego has increasingly relied upon outside legal counsel in both advisory and litigation roles. Although there is a need for outside counsel in certain circumstances, policy makers have also expressed a strong desire to limit the use of outside counsel as much as possible.

This Memorandum of Law reaffirms and updates an opinion rendered by former City Attorney John Witt dated November 10, 1977, and sets forth the standards and procedures regarding the use of outside legal counsel.

QUESTIONS PRESENTED

1. May the City Council or Mayor retain outside counsel to provide legal opinions or other legal services beyond those provided by the City Attorney?

2. What is the procedure for retaining and supervising outside counsel?

SHORT ANSWERS

1. The City Council may retain outside counsel subject to the limitations set forth in San Diego Charter section 40. There is no corresponding Charter authorization for the Mayor.

2. The City Council is authorized to hire outside counsel when the City Attorney determines that his office does not have the expertise or needed personnel to handle the matter or is conflicted. The private outside attorneys would work through and with the City Attorney's Office except where the office is conflicted.

DISCUSSION

I. Standards for Retaining Outside Legal Counsel

A. City Council Authority

The Charter of the City of San Diego [Charter] section 40 states that the City Attorney is the chief legal advisor and attorney for the City and all its departments and offices. The City Attorney's duties may be performed either personally "or by such assistants as he or she may delegate." The City Council has limited authority "to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith." Charter section 40.

In a Memorandum of Law dated November 10, 1977, City Attorney John Witt addressed the question of general standards and procedures regarding outside legal counsel. 1977 City Att'y MOL 283. Attached as Exhibit A. City Attorney Witt opined that the "Council does not have the power to retain its own attorney" but has limited authority to hire outside legal counsel "when [the City Attorney's] office does not have the expertise or needed personnel to handle the matter." *Id.* at 284. In those limited circumstances where outside legal counsel is retained, the City Attorney emphasized that they must "work through and with this office." *Id.* at 284. The City Attorney's 1977 opinion remains an accurate statement of the law.

In explaining his reasoning, City Attorney Witt relied on the plain meaning of the Charter and the policy behind it:

> One of the important checks and balances, established by the original draftsman of our Charter, was establishment of an elected City Attorney, an independent officer, not subject to direct control by the City Council, except in the traditional budgetary sense. *Id.*

"The only exception to the rule that the City Attorney shall serve as the lawyer for the City, its departments, officers and employees would occur when some kind of conflict of interest exist[s] to incapacitate the City Attorney." *Id.* at 285. Mr. Witt emphasized, however, that the "contingency of a conflict of interest" is not a sufficient basis for hiring outside counsel. In other words, there must be an actual conflict of interest in the matter before the City. *Id.*

B. Mayoral Authority

Although Charter section 40 authorizes the City Council to hire outside counsel in limited circumstances, the Charter does not expressly authorize the Mayor to do the

same. It has been suggested that the Mayor may retain outside legal counsel given his authority under San Diego Municipal Code section 22.3223. This section states in relevant part, that *"[e]xcept as otherwise provided by Charter . . .* the City Manager[1] may enter into a contract with a Consultant to perform work or give advice without first seeking Council approval provided that . . . the contract and any subsequent amendments do in does not exceed $250,000 any given fiscal year." SDMC section 22.3223 (emphasis added). "Consultant" is broadly defined so that it could include professional legal services.

Notwithstanding the seemingly broad authority granted by Municipal Code section 22.3223, we must determine whether the Mayor's authority extends to legal services contracts in light Charter section 40. "The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs". *City of Grass Valley v. Walkinshaw*, 34 Cal. 2d 595, 598-599 (1949). In applying this principle, we next employ the rules of charter construction, to ascertain and effectuate intent. *City of Huntington Beach v. Board of Administration*, 4 Cal. 4th 462, 468 (1992). Thus, "[w]e first look to the language of the charter, giving effect to its plain meaning." *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 172 (1995) (citations omitted). Where the words of the charter are clear, courts will not condone adding or altering them to accomplish a purpose that does not appear on the face of the charter or from its legislative history. *Id.*

In this instance, the language of Charter section 40 is clear—the Council alone has the authority to enter into contracts for certain legal services. To construe Municipal Code section 22.3223 and its associated defined terms to include legal service contracts would alter the plain meaning of Charter section 40 and effectuate a purpose that does not appear on its face. Charter section 40 was intended to limit and restrict the City's overall ability to contract for outside legal services.

Municipal code provisions that conflict with charter provisions are void. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1995) (citations omitted). The Council cannot change the effect of the Charter. *Marculescu v. City Planning Commission*, 7 Cal. App. 2d 371, 374 (1935). Similarly, the Council may not delegate its legislative powers or responsibility which it was elected to exercise. Charter section 11.1. *See also* 4 McQuillan, Mun. Corp. section 13.03 (3rd ed. revised 2002), Powers of Council (a local legislative body cannot extend its powers by ordinance beyond the limits prescribed by the Charter).

To interpret Municipal Code section 22.3223 as Mayoral authority to retain outside attorneys without Council authorization would change the effect of the Charter

---

[1] All executive authority, power and responsibilities conferred upon the City Manager shall be transferred to, assumed and carried out by the Mayor. Charter section 260(b). All Charter references to the City Manager hereafter will be to the Mayor.

and cause section 22.3223 to be void. It would also constitute an improper delegation of legislative authority.

The Council intended to *limit* the City Manager's authority under Municipal Code section 22.3223. In harmony with Charter section 40, it authorized the City Manager to enter into a contract with a consultant, *except as otherwise provided by Charter*. The language in Charter section 40 restricting contractual authority to the City Council is one such exception.

Finally, the Charter provision creating the "Strong Mayor" form of government states that "[n]othing in this section shall be interpreted or applied to add or subtract from powers conferred upon the City Attorney in Charter sections 40 and 40.1." Charter section 265(b)(2). Charter section 265(b)(2) further confirms voter intent not to expand the powers conferred under Charter section 40.

II. Procedure for Retaining and Supervising Outside Counsel

As the City's chief legal advisor, the City Attorney has an obligation under rules of professional responsibility governing the conduct of attorneys to identify circumstances under which the City Attorney's Office has inadequate expertise or personnel to handle a legal matter. California Rule of Professional Responsibility 3-110 [Rule 3-110] states:

> (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.
>
> (B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
>
> (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

As noted in the official comments to Rule 3-110, the Rule imposes the duty to supervise the work of subordinate attorney and non-attorney employees or agents. *See, e.g., Waysman v. State Bar*, 41 Cal. 3d 452 (1986); *Trousil v. State Bar*, 38 Cal. 3d 337, 342 (1985); *Palomo v. State Bar*, 36 Cal. 3d 785 (1984); *Crane v. State Bar*, 30 Cal. 3d 117, 122-123 (1981); and *Black v. State Bar*, 7 Cal. 3d 676, 692 (1972)

In determining whether the office has inadequate expertise or personnel to handle a particular legal matter, the City Attorney should evaluate all the circumstances of the legal matter, review the manner in which comparable legal matters were handled, consult with

attorneys in the office, and receive input from City personnel. The City Attorney's obligation to make this determination is a professional responsibility under the Charter and Rule 3-110 and may not be delegated to others. *See*, Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties, 70 Notre Dame L. Rev. 259 (1994).

As set forth above, the City Attorney has the obligation under Rule 3-110 to identify circumstances under which the City Attorney's Office has inadequate expertise or personnel to handle a legal matter. Accordingly, the City Attorney *must* initiate the retention of outside legal services once he concludes that the office has inadequate expertise or personnel to handle a legal matter. This is not only consistent with the Charter, but the City Attorney's obligation under Rule 3-110.

Conversely, under Charter section 40, absent an *actual* conflict of interest by the City Attorney's Office, outside legal services may not be retained without a determination that the City Attorney's Office has inadequate expertise or personnel to handle a particular matter. Accordingly, the City Attorney *may not* initiate or approve a request to retain outside legal services absent that determination. Consistent with this obligation, the City Attorney may not approve any contract for outside legal counsel absent this determination. *See* Charter section 94 ("All contracts before execution shall be approved as to form and legality by the City Attorney.")

Assuming the City Attorney determines that the office has inadequate expertise or personnel to handle a legal matter, the City Attorney is obligated to advise the Mayor and City Council consistent with Rule 3-110(c), which provides:

> If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Accordingly, the Mayor and City Council have two options to consider. First, the City could retain outside legal counsel to handle the matter in association with the City Attorney's Office. Second, the City Attorney's Office could acquire the necessary expertise or personnel to handle the mater.

Upon retention of outside legal counsel, the City Attorney continues to have a professional responsibility under Rule 3-110 to ensure the competent delivery of legal services. This obligation does not end with retention of outside counsel. *See Moore v. State Bar*, 62 Cal. 2d 74 (1964). Outside legal counsel must work through and with the Office of the City Attorney. 1977 City Att'y MOL at 284. The City Attorney should manage and control outside counsel. *The Use and Control of Outside Counsel* at *26-29*. Accordingly, contracts retaining outside legal counsel must make that stipulation clear except in cases where the City Attorney's Office is conflicted.

CONCLUSION

Charter section 40 allows the City Council to retain outside counsel upon the City Attorney's determination that the office does not have adequate expertise or personnel to handle the particular matter. Where the City Attorney has an actual conflict of interest, the City Attorney's Office should not be involved other than to advise the City of the conflict of interest and the need to retain outside counsel.

JAN I. GOLDSMITH, City Attorney

JIG:MJL:jab:lkj
ML-2009-11
Attachment

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
JOHN W. WITT
CITY ATTORNEY

BERT S. TEAZE
ASSISTANT CITY ATTORNEY

CTIS M. FITZPATRICK
SENIOR CHIEF DEPUTY CITY ATTORNEY

CITY ADMINISTRATION BUILDING
SAN DIEGO, CALIFORNIA 92101
(714) 236-6220

MEMORANDUM OF LAW

DATE: November 10, 1977

TO: Councilman Leon Williams

FROM: City Attorney

SUBJECT: Special Attorney Ordinance

You have asked us to process for Council action an ordinance which would estabish a procedure by which the Council could retain a special attorney when the Council deems such services are necessary for the purpose of providing legal advice in conducting investigation of City Departments. We understand that this ordinance will be considered by the Rules Committee in the near future.

The ordinance recites that the Council has an inherent right to make inquiries of City operations and says such power is unlimited by virtue of the doctrine that a Charter City has plenary authority with respect to matters that are municipal affairs. As authority for the Council to hire such a special attorney, the ordinance cites a sentence from Charter Section 40 which deals with the duties and powers of the City Attorney's Office. That sentence is the first of a paragraph that reads as follows:

. . . .

> The Council shall have authority to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith. The Council shall provide sufficient funds in the annual appropriation ordinance for such purposes and shall charge such additional legal service against the appropriation of the respective Departments. . . .

ATTACHMENT

Whatever may be the inherent powers of the Council, it is obvious that the Council cannot exercise any that contravene the provisions of its Charter. An ordinance cannot change or limit the effect of the Charter. Marculescu v. City Planning Commission, 7 Cal.App.2d 371 (1935). To be valid, an ordinance must harmonize with the Charter. South Pasadena v. Terminal Ry. Co., 109 Cal. 315 (1895).

The ordinance is invalid because it does not harmonize with Section 40 of the Charter which places in the City Attorney the duty and responsibility of advising the City Council on all matters before it. One of the important checks and balances, established by the original draftsmen of our Charter, was establishment of an elected City Attorney, an independent officer, not subject to direct control by the City Council, except in the traditional budgetary sense. The proposed ordinance would weaken that check and balance seriously by downgrading the independence of the legal advice which may be given the Council at times of critical importance to the City.

It cannot be more obvious that Section 40 makes the City Attorney the Chief Legal Advisor of the City and all its departments and offices. The Council does not have the power to retain its own attorney. The portion of Section 40 recited in the ordinance cannot be construed to give the Council such power. So construed, it displaces the City Attorney from his function as Chief Legal Officer of the City.

It is a fundamental rule of construction of charters that effect should be given to all the language thereof and all provisions upon a subject are to be construed harmoniously. Gallagher v. Forest, 128 Cal.App. 466 (1932). The only proper construction to be placed on the portion of Section 40 relied on by the ordinance is that it gives the Council authority to hire special attorneys when this office does not have the expertise or needed personnel to handle the matter. Such attorneys, of course, work through and with this office.

Furthermore, the other sentence in the cited paragraph from Section 40 requires the Council to include in the budget of departments involved the cost of retaining needed attorneys. From this it is clear the intent was that investigations and prosecutions were for City departments, not of them.

The only exception to the rule that the City Attorney shall serve as the lawyer for the City, its departments, officers and employees would occur when some kind of conflict of interest existed to incapacitate the City Attorney. Generally, in such cases, other governmental attorneys such as the District Attorney or Attorney General, because of concurrent responsibility, have and can be expected in the future to undertake the particular legal assignments required.

In summary, we do not believe that the contingency of a conflict of interest gives the Council the power to adopt an ordinance which would in effect transfer the duties and responsibilities of this office to another attorney whenever the Council deems it desirable. That is what the ordinance attempts to do and for that reason, it is illegal because it cannot be harmonized with the position of the City Attorney as the Chief Legal Officer of the City.

John W. Witt
City Attorney

JWW:RST:rb 016

ATTACHMENT 3

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Michael J. Aguirre
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: August 29, 2005

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Retention of Outside Counsel

QUESTIONS PRESENTED

1. Under San Diego Charter §40 may the City Council retain outside counsel to provide legal services to the City in matters involving investigations by the U.S. Securities and Exchange Commission?

2. If the retention of such counsel violates Charter §40, must the City pay invoices submitted for their services?

SHORT ANSWERS

1. Pursuant to Charter §40, the City Council may not retain outside counsel to provide legal services to the City in matters involving investigations by the U.S. Securities and Exchange Commission.

2. The City is under no obligation to pay for the services of outside counsel retained in violation of Charter §40.

ANALYSIS

By a vote of the people, a city may adopt a charter for its government. Once adopted, a charter is the supreme law of the city, construed to permit the city to exercise all powers not expressly limited either by the document itself,[1] by preemptive state law, or by constitutional constraints. (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 394-397; *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 170.) Through a long line of cases beginning with *City of Grass Valley v. Walkinshaw* (1949) 34 Cal.2d 595, the California Supreme Court has held that a charter operates not as a grant of power but rather as an instrument of limitation and restriction

on the exercise of power over all municipal affairs that the city is assumed to possess. In other words a charter city may exercise all powers relative to municipal affairs unless specifically and explicitly limited by its charter.[2]

In this opinion we are concerned specifically with those sections of San Diego Charter §40 establishing the City Attorney as the City's chief legal advisor and permitting the Council to "employ additional competent technical legal attorneys": We consider whether this language permits the City Council to retain outside counsel for representation in U.S. Securities and Exchange Commission (SEC) investigations relating to false and misleading statements in San Diego's offer and sale of municipal securities. In addition we consider whether the City would have to pay for the services of outside counsel retained in this matter.

After reviewing relevant Constitutional, statutory, and case law, we determine that the City Council may not retain outside counsel to represent the City in matters before the SEC and that if the Council does, nevertheless, retain such counsel, the City would not be liable for payment of any services that they might render.

In interpreting a charter, the California Supreme Court has stated,

> we construe the charter in the same manner as we would a statute. Our sole objective is to ascertain and effectuate legislative intent. We look first to the language of the charter, giving effect to its plain meaning. Where the words of the charter are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the charter or from its legislative history. (*Domar Electric, Inc.*, *supra* at 171-172. [Citations omitted.])

As with statutes, if the words of the charter are clear, no construction is necessary, and the plain language should be given effect. (*Caminetti v. Pac. Mutual L. Ins.* (1943) 22 Cal.2d 344, 353-354.)[3] Returning to the Charter sections now under consideration, we note that §40 provides that the City Attorney:

> shall be the chief legal advisor of, and attorney for the City and all Departments and offices thereof and that the Council shall have authority to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith.

This language has been part of the Charter since 1931, when San Diego voters determined that the City Attorney should be an independently elected official. (City Attorney of San Diego website.)

In applying the rules of statutory construction cited above, we determine that, when San Diego voters adopted Charter §40, they intended to convey a mandate for the City Attorney to represent the City of San Diego in all matters except for those that require narrow technical legal expertise. Because the word *shall* leaves no room for discretion, no other interpretation could effectuate the plain language of the Charter. Charter §40 may be interpreted reasonably only to mean that the Council has no power to retain outside legal counsel except when the City Attorney's Office "does not have the expertise or needed personnel to handle the matter" in question.[4]

If the plain language were not sufficient, the intent of the voters in enacting Charter §40 would be clear from the section's legislative history alone. In 1929, the San Diego electorate defeated a proposed new charter containing a provision that the City Attorney be appointed. Following this defeat a Board of Freeholders was elected to write a new charter.

One major point of discussion among the Freeholders was the question of whether the City Attorney should be appointed or elected. In describing this discussion, attorney and board member James G. Pfanstief wrote:

> Some advocated with considerable degree of force that the city attorney should be elected by the people. The argument is that the city attorney is the attorney for the entire city and each and every elective and appointive officer thereof upon all questions pertaining to the municipality, and he should occupy an independent position so that his opinions may be uninfluenced by an appointive power.

And in a proposal that he submitted to the Freeholder Board, labor representative and member Ray Mathewson wrote:

> The duty of the city attorney is to give legal advice to every department and official of the city government on municipal matters. He must also act as the representative of the various departments before the courts. He should occupy an independent position so that his opinions would not be influenced by any appointive powers. For this reason he should be elected by the people. If elected, the city attorney is in a position of complete independence [sic] and may exercise such check upon the actions of the legislative and executive branches of the local government as the law and his conscience dictate.

Seeing the worth of these arguments, on November 12, 1930, a unanimous Board of Freeholders adopted the proposal for an independently elected City Attorney. In doing so, members rejected the concept that the City Attorney would be "only the council's

lawyer." In the general election of April 7, 1931, San Diegans overwhelmingly voted in support of the new charter containing the mandate for an elected City Attorney. A contemporary ballot brochure explaining Section 40 states:

> The city attorney is to be elected by the people. This is a guarantee that the legal head of government will be able to fearlessly protect the interests of all San Diego and not merely be an attorney appointed to carry out wishes of council or manager.

It is clear from reading these materials that San Diegans wanted an independent City Attorney who could, free from control by the City Council, represent their interests. As former City Attorney John Witt opined in 1977: "It cannot be more obvious that Section 40 makes the City Attorney the Chief Legal Advisor of the City and all its departments and offices. The Council does not have the power to retain its own attorney."

In his opinion, Mr. Witt also interpreted the Charter §40 language permitting the City Council "to employ additional technical legal attorneys."

> The only proper construction to be placed on [this] portion of Section 40 is that it gives the Council authority to hire special attorneys when this office does not have the expertise or needed personnel to handle the matter. Such attorneys, of course, work through and with this office.

Fortunately for the taxpayers of San Diego, the current City Attorney's office has such expertise. Not only does the City Attorney have 25 years of securities law experience but he also has the benefit of advice and help from a talented staff led by Executive City Attorney Don McGrath, a civil securities law litigator for more than 27 years.

As discussed above, under Charter §40, the City Council may retain outside attorneys only to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith. The necessity clause becomes the measure of the City's power to incur any liability beyond the limit fixed by Charter § 40. *City of San Ta Cruz v. Wykes* (1913) 202 F. 357.

When a City's power to make a contract is statutorily limited to a certain prescribed method and a contract is created in violation of the prescribed method, the contract is void:

> [T]he contract is void because the statute prescribes the only method in which a valid contract can be made, and the adoption of the prescribed mode is a jurisdictional prerequisite to the exercise of the power to contract at all and can be exercised in no other

> manner so as to incur any liability on the part of municipality. Where the statute prescribes the only mode by which the power to contract shall be exercised the *mode* is the *measure* of the power. A contract made otherwise than as so prescribed is not binding or obligatory as a contract and the doctrine of implied liability has no application in such cases. *Reams v. Cooley* (1915) 171 Cal. 150, 154.

Because under Charter §40, the City Council is without power to retain outside attorneys to represent the City before the SEC,

> neither the officers of the corporation nor the corporation, by any of the agencies through which they act, have any power to create the obligation to pay for the work, except in the mode which is expressly prescribed in the charter; and the law never implies an obligation to do that which it forbids the party to agree to do. *Reams v. Cooley* (1915) 171 Cal. 150, 155 (quoting from *Brady v. Mayor etc. of New York*, 16 How. Pr. 432).

Any contract made without regard to the Charter's limitations and restrictions is void and unenforceable. *Domar Electric, Ind. v. City of Los Angeles* (1994) 9 Cal. 4th 161, 171; *Miller v. McKinnon* (1942) 20 Cal. 2d 83, 88; *Reams v. Cooley* (1915) 171 Cal. 150, 153-154; *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal. App. 4th 1178, 1186.

Should the Council retain outside attorneys against the advice of the City Attorney, the Council would do so in violation of Charter §40. The Council's action would be *ultra vires*--that is, beyond the scope or in excess of its legal power or authority. An *ultra vires* act is one "performed without any authority to act . . .[An] *ultra vires* act of a municipality is one which is beyond powers conferred upon it by law." Black's Law Dictionary 1522 (6th ed.1990).

Because those contracting with a municipality are presumed to know the extent of its authority, all who act contrary to those limitations must bear the risk of the contract being deemed void as a matter of law. *Law Offices of Cary S. Lapidus v. City of Waco* (2004) 114 Cal. App. 4th 1361. All parties contracting with the City are required to ensure that liability contracts are made in compliance with the Charter:

> It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglects this, or chooses to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or

> ought to know it, before he places his money or services at hazard. *Reams v. Cooley* (1915) 171 Cal. 150, 157.

Therefore, should a law firm enter into a contract with the City Council or its designee, the City Manager, such contract would be void and unenforceable, and the firm would not be entitled to collect its fee for those services.

CONCLUSION

The above history of Charter §40 reveals no evidence that the electors of 1931 wanted or decided to empower the Council to retain outside attorneys whenever they decide to do so. These voters opted instead for an independently elected City Attorney who would be the City's chief legal advisor. The only way to accomplish an abrogation of this duty that the Charter bestows on the City Attorney is through a voter-enacted amendment. This assertion is strengthened by cases holding that local legislative bodies may not by indirection accomplish that which they are precluded from accomplishing by direction. The only time that the Council is permitted to hire attorneys is when the City is in need of technical legal advice.

In addition, those parties contracting with the City of San Diego to represent the City of San Diego over the objection of the elected City Attorney are presumed to have known that such retention was contracted in violation of Charter §40's limits and that they have no means of obtaining payment. *Weaver v. City and County of San Francisco* (1986) 111 Cal. 319. A law firm's ignorance of the law is no excuse: "A party engaging in business relationships with a municipality is presumed to know the law including the procedures necessary to enter into a binding contract." See *Miller v. McKinnon* (1942) 20 Cal. 80, 83; *Seymour v. State* (1984) 156 Cal. App. 3d 200, 205.

San Diegans of 70 years ago decided that they needed the protection of an independently elected City Attorney who would check the power of the City Council and balance the interests of the people with the interests of other elected officials and the bureaucracy that they create. The only control that they gave Councilmembers over the City Attorney was in the traditional budgetary sense. Permitting the Council to hire attorneys in disregard of Charter §40's limitations would "weaken that check and balance seriously by downgrading the independence of the legal advice which may be given the Council at times of critical importance to the City."

MICHAEL J. AGUIRRE, City Attorney

By
Michael J. Aguirre
City Attorney

MJA/MRR
ML-2005-20

ATTACHMENT 4

THE CITY OF SAN DIEGO

DATE: December 6, 2019

TO: Honorable Members of the Audit Committee

FROM: Kyle Elser, Interim City Auditor

SUBJECT: Public Liability Audit Scope Limitation

Government Auditing Standards require us to report significant constraints imposed on our audit approach by information limitations or scope impairments, including denials or excessive delays in accessing records necessary for the audit.[1] Pursuant to this requirement, I am writing to inform the Audit Committee of limitations encountered on our forthcoming Performance Audit of the City's Public Liability Management, which we expect to issue by January. Specifically, because we were unable to access or utilize certain documents from the City Attorney's Office, the audit has taken substantial time and resources to complete. While we were ultimately able to address most components of the audit objective and will make several recommendations to help the City manage its public liability risks more effectively, we were not able to determine if corrective measures taken in response to claims are tracked, monitored, and implemented effectively.

PUBLIC LIABILITY AUDIT – SCOPE LIMITATION

The City spends an average of approximately $35 million per year to resolve a wide variety of public liability claims, such as trip and falls and City vehicle accidents, and the overall objective of the audit is to identify ways the City could better manage its liabilities and reduce these significant claims and costs. More specifically, the audit objective is:

To determine whether the City is managing the risk of public liability efficiently and effectively including:

- *Whether City departments incurring liabilities are utilizing risk management and internal control best practices to cost effectively decrease annual claims against the City;*
- *Whether the Risk Management Department is presenting City departments with sufficient information to allow these departments to design adequate risk management strategies; and*
- *Whether the Risk Management Department adequately coordinates with City departments to identify, record, implement, and monitor corrective actions to reduce potential liabilities.*

[1] Government Auditing Standards Section 7.11 (2011 Edition) and 9.12 (2018 Edition).

To achieve these objectives, our audit methodology included selecting a sample of 362 closed claims files and reviewing them to obtain specific information on the facts of each case. For example, for trip and fall claims, our analysis required information such as the location of the incident resulting in the claim, the size of the sidewalk uplift, whether the City had received notifications of any dangerous conditions in the surrounding area, and what corrective measures the City took to prevent another liability from occurring.

Much of this information is already summarized in a variety of documents prepared by the City Attorney's Office. However, the City Attorney's Office asserts that although the City Charter Section 39.2 states that *"the City Auditor shall have access to, and authority to examine any and all records, documents, systems, and files of the City,"* that they cannot allow us to access or examine these documents because of the risk that information from such reports could be included in a public audit report[2] as they are protected by attorney-client privilege, are attorney work product, and as attorneys, they have a legal duty of confidentiality to the City.[3] After several months of working with the City Attorney's Office to find an efficient alternative means of obtaining the needed information, no mutually agreeable solution was reached. As a work-around, my staff spent many hundreds of hours reviewing the extensive documentation in each file in order to attempt to identify the information needed for our analysis.

While this review was very time-consuming and duplicative of work already performed by operational departments and the City Attorney's Office, we were able to identify the majority of the needed information and achieve most components of the audit objectives. Our forthcoming audit will identify a variety of ways the City can more efficiently and effectively manage its public liability risks and reduce liability claims and costs.

However, we were unable to locate sufficient information to answer one component of our audit objective regarding corrective measures. Specifically, we could not determine what corrective measures the City took to prevent further liabilities from occurring – such as fixing a broken sidewalk where a trip and fall claim had been filed against the City – and whether those

[2] It should be noted that our request was to review the City Attorney documents in order to identify other non-sensitive information, such as work orders for corrective actions, that could be used as support for the audit report. The City Attorney documents themselves would not be cited. This is the approach several other audit organizations use to protect sensitive information, as documents the City Auditor obtains but does not use to support a public audit are restricted from public disclosure per California Government Code Section 36525.

[3] In addition, for cases that involve settlements above $50,000, closed session proceedings are required and according to the City Attorney's Office, some documentation is further protected by the Brown Act. However, this affects only 31 of the 362 cases in our sample.

corrective measures are being effectively tracked and monitored.[4] We understand that information on corrective measures is often included in various City Attorney reports that we were unable to access or utilize because of the confidentiality concerns raised by the City Attorney's Office as described earlier.

While the information in the claims files was not sufficient to determine what corrective measures were implemented, according to the Risk Management Department, in 2018 they worked with the City Attorney's Office to institute a process to improve tracking of corrective measures. This includes tracking information such as the planned corrective action and the corrective action implementation date for all claims resulting in settlements or judgments above $25,000. However, the City Attorney's Office would not allow us to access or examine the spreadsheet used to track corrective measures, again citing certain legal concerns.

As an alternative, the City Attorney's Office suggested that we seek to obtain information on corrective measures directly from operational departments. However, given the significant time and resources spent on the audit thus far, and given that we would be asking departments to duplicate work that had already been completed (re-compiling information on corrective measures used in City Attorney reports and the tracking spreadsheet) for potentially hundreds of claims, we decided to conclude the audit without completing the objective related to corrective measure tracking and implementation.

While the best approach to reducing risk is to be proactive and mitigate risks before a claim occurs, corrective measures taken in reaction to a claim are also important to prevent further liability. For example, while multiple trip and falls at the same location appear to be relatively uncommon, we did identify one trip and fall claim incident that occurred at a location where two previous trip and falls had also resulted in claims against the City. The City's costs to resolve these three claims totaled nearly $600,000.[5] Thus, it is important to verify whether appropriate corrective measures are being identified, tracked, and implemented, and given the limitations described above we were unable to do so.

[4] Overall, we were only able to determine the corrective measures taken for 65% of the cases in our sample. However, it is possible that corrective measures were taken on the remaining cases and recorded in various City Attorney documents, or more recently, the tracking spreadsheet. Without being able to verify this, we are unable to draw a conclusion about whether corrective measures were effectively tracked and implemented.

[5] This includes an incident that occurred on 1/20/2012 with total settlement and claim costs of $322,090; an incident that occurred on 3/27/2014 with total settlement and claim costs of $108,722; and an incident that occurred on 1/21/2016 with total settlement and claim costs of $143,390.

Respectfully submitted,

Kyle Elser
Interim City Auditor

cc: Honorable Mayor Kevin Faulconer
Honorable Members of the City Council
Honorable City Attorney Mara Elliott
Kris Michell, Chief Operating Officer
Ron Villa, Assistant Chief Operating Officer
Jessica Lawrence, Policy Advisor, Office of the Mayor
Andrea Tevlin, Independent Budget Analyst
Rolando Charvel, Chief Financial Officer
Julio Canizal, Director, Risk Management
Claudia Castillo Del Muro, Deputy Director, Risk Management

ATTACHMENT 5

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

MARA W. ELLIOTT

CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

December 6, 2019

REPORT TO THE AUDIT COMMITTEE

LEGAL ANALYSIS OF ALLEGED SCOPE LIMITATION RELATED TO THE PUBLIC LIABILITY AUDIT

INTRODUCTION

At the December 11, 2019 meeting of the Audit Committee (Committee), the City Auditor's Office (Auditor) intends to inform the Committee that there is a scope limitation related to the Auditor's Public Liability Audit because the Auditor claims not to have access to confidential documents created by the City Attorney's Office (Office). This Report is prepared to assist the Committee in understanding the ethical duties and obligations that are implicated by the Auditor's request for access to the Office's confidential attorney work product and attorney-client privileged communications when the contents of such documents could be included in a public audit report.

The Auditor's Public Liability Audit was originally suggested to the Auditor by the City Attorney, and this Office fully supports and applauds the Auditor's efforts in reviewing the City's public liability and recommending ways to mitigate such liability in various areas. However, we have serious concerns with the Auditor's request for access to confidential materials, concerns that were raised previously with the Auditor and which we raise again here to the Audit Committee:

The Auditor's request implicates State law and Rules of Professional Conduct. As our Office confirmed with the California State Bar Ethics Hotline, an attorney who granted the Auditor access to confidential materials would likely be in violation of State law and the Rules of Professional Conduct. Such a violation could result in those attorneys being sanctioned by the California State Bar, or ultimately jeopardizing their livelihood by losing their license and ability to practice law.

The Auditor's request creates unnecessary risk for the City and its taxpayers. Once confidentiality has been willingly breached for one party, such as the Auditor, the City loses that protection against requests for confidential information from additional parties, including those whose intentions are averse to the City's. In proposing the Public Liability Audit to the Auditor, the City Attorney hoped such an audit would reduce, not enlarge, the City's liability and exposure to lawsuits.

The Auditor's request for confidential information is not needed to perform the audit. The confidential information the Auditor seeks from the City Attorney's Office is based on source documents created and retained by the Department of Transportation and Storm Water (TSW). Those primary documents have been available to the Auditor throughout the course of the audit. The decision to instead seek secondary, confidential documents is apparently based on the volume

and condition of the TSW documents and the amount of time the Auditor would need to review them. This is not a scope limitation. This Office is not responsible for the volume and condition of TSW documents or for the Auditor's decision not to allocate resources for their examination.

BACKGROUND

On April 3, 2019, the Auditor initiated an audit on the City's Public Liability Mitigation and met with City staff as well as this Office to discuss the proposed audit as part of a regularly scheduled entrance conference initiated for each audit. As part of the proposed audit, the Auditor ultimately wanted to find ways that the City could take to mitigate the City's liability, particularly as it related to trip and fall and employee vehicle accident matters. Shortly thereafter, on May 9, 2019, Auditor staff met with attorneys from this Office requesting access to confidential attorney work product and attorney-client privileged communication because Auditor staff was encountering difficulty in attaining this information from public documents kept and maintained by City staff. Over the course of several months, attorneys from this Office met with, brainstormed, and discussed possible ways that the Auditor could have access to at least portions of such records or the information contained in those documents without compromising the confidentiality of such documents and information.

From the very beginning, this Office's concern has been to support the Auditor in its efforts on this important audit, while at the same time, recognizing our need to comply with the strict ethical obligations required by attorneys under state law and by the California State Bar to uphold the duty of confidentiality, protect the confidentiality of attorney-client privileged communication, and to preserve the confidentiality of attorney work product. In fact, the Office contacted the State Bar's Ethics Hotline to discuss this situation and was informed that these concerns are implicated given the risk that information from records that the Office created could find its way into a publicly issued audit report.

It is important to note that the Auditor has never conducted an audit where a public report was issued that relied on information contained in attorney-client privileged or attorney work product documents. To assist the Auditor by obtaining ideas on how to best move forward on this issue, the Office proactively contacted auditor offices in other cities. None of the auditor offices contacted had ever conducted an audit where a public report was issued that relied on information contained in attorney work product or attorney-client privileged documents. In fact, the typical practice in those other auditor offices, as well as with the Auditor, is to preserve the confidentiality of sensitive information by including any such information in a separate confidential audit report.

We disagree with the Auditor's assessment that there is a scope limitation because there are alternatives that would allow the Auditor access to the requested information that would not implicate State law and Rules of Professional Conduct or create unnecessary risk for the City and its taxpayers. This Report will discuss all of these issues in further detail below.

DISCUSSION

I. WHILE THE AUDITOR HAS AUTHORITY TO ACCESS CITY RECORDS, ATTORNEYS MUST NEVERTHELESS COMPLY WITH STATE LAW AND THE CALIFORNIA RULES OF PROFESSIONAL CONDUCT AS IT RELATES TO ACCESS TO SUCH RECORDS CREATED OR MAINTAINED BY THE OFFICE

San Diego Charter section 39.2 states that "[t]he City Auditor shall have access to, and authority to examine any and all records, documents, systems and files of the City and/or other property of any City department, office or agency, whether created by the Charter or otherwise." At the same time, that authority is not without limits.

As a charter city, San Diego enjoys autonomous rule over municipal affairs pursuant to article XI, section 5 of the California Constitution, subject only to conflicting provisions in the federal and state constitutions and to preemptive state law. *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, 21 Cal. 4th 352, 363 (1999). When a court is asked to resolve a claimed conflict between a state statute and the law of a charter city, it must first satisfy itself that an actual conflict exists. *California Fed. Savings & Loan Assn. v. City of Los Angeles*, 54 Cal. 3d 1, 16 (1991). There is a conflict between a state law and a local law if the local law duplicates or contradicts the state law, or if the local law enters into an area fully occupied by general law, either expressly or by implication. *City of Watsonville v. State Dept. of Health Services*, 133 Cal. App. 4th 875, 883 (2005).

The California Supreme Court has stated that the "[r]egulation of attorneys and control over the practice of law have always been considered matters of statewide concern." *Baron v. City of Los Angeles*, 2 Cal. 3d 535, 540 (1970). Indeed, the California State Bar was created by the State Bar Act of 1927, codified under California Business & Professions Code sections 6000-6238. The California Supreme Court determined that "[t]he State Bar Act is a comprehensive scheme for the regulation of all aspects of law practice, which includes all professional services performed by attorneys for their clients." *Baron*, 2 Cal. 3d at 541. As such, the City may not enact a law or interpret law in such a way that it conflicts with the ethical obligations promulgated pursuant to the State Bar Act, which include the California Rules of Professional Conduct (CRPC) and California case law interpreting these provisions. *See Id.* at 542 (attorneys must conform to the professional standards in whatever capacity they may be acting in a particular matter); *See also State Comp. Ins. Fund v. WPS, Inc.*, 70 Cal. App.4th 644, 656 (1999).

There is a real risk that attorney work product and attorney-client privileged documents accessed and relied upon by the Auditor could be required to be disclosed pursuant to a Public Records Act (PRA) request. In particular, California Government Code section 36525 states with limited exception that "[a]ll books, papers, records, and correspondence of the city auditor pertaining to his or her work are public records" subject to the Public Records Act. While the City would certainly assert the attorney-client privilege and attorney work product privilege in response to any request for public disclosure of such documents, the City risks that a court would determine that these privileges were waived by information in such documents being put into a public audit report.

A. Attorneys in the Office Risk Violating the Duty of Confidentiality Owed to the City by Providing Access to the Office's Confidential Records that May Appear in a Public Audit Report

If confidential or otherwise privileged information is disclosed to the public, the attorneys in the Office risk violating their duty of confidentiality owed to their client. The Office's client is the City of San Diego as a municipal corporation acting through the Mayor and the City Council. 2010 City Att'y MOL 392 (2010-21; Oct. 5, 2010). The public policy rationale for the duty of confidentiality is to ensure that the trust that is the hallmark of the attorney-client relationship is preserved so that the client is encouraged to seek legal assistance and communicate fully and frankly with the lawyer even on embarrassing or detrimental subjects. California Rules of Professional Conduct, Rule 1.6, comment 1.

An attorney's duty of confidentiality is codified both in state law under the State Bar Act as well as the ethical regulations that attorneys are required to comply with known as California Rules of Professional Conduct (CRPC).[1] The duty of confidentiality applies to all lawyers, including government attorneys. *Application of Atchley*, 48 Cal. 2d 408, 418 (1957). Under California Business and Professions Code section 6068(e)(1), it is the duty of an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of his or her client." This duty to protect client secrets is not limited to information communicated in confidence by the client, but applies to all information relating to client representation, whatever its source. Cal. State Bar Formal Opinion No. 2016-195.

Under Rule of Professional Conduct 1.6 entitled "Confidential Information of a Client," a lawyer is prohibited from revealing information protected from disclosure by Business and Professions Code section 6068(e)(1), unless the client gives informed consent or the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to an individual. This duty of confidentiality is so stringent that it survives the termination of the attorney-client relationship and even the client's death. *Wutchumna Water Co. v. Bailey*, 216 Cal. 564, 571 (1932); San Diego Bar Ass'n Opinion 1993-2. In fact, even when a lawyer is a whistleblower, an attorney cannot reveal attorney-client privileged or confidential information. 84 Op. Cal. Att'y. Gen. 71 (2001).

B. Attorneys Must Protect the Confidentiality of Attorney-Client Privileged Communication

An additional ethical obligation that is implicated with the Auditor's request for access to confidential documents of the Office is the attorney-client privilege, which protects against compelled disclosure of information that involves a confidential communication between clients and their lawyer(s). Cal. Evid. Code § 954. Like the duty of confidentiality, this privilege is fundamental to the proper functioning of the legal justice system. The United States Supreme Court has stated as follows:

---

[1] The California Rules of Professional Conduct are the California Supreme Court's rules regulating attorney conduct. They have been "adopted by the Board of Trustees of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public, the courts and the legal profession; protect the integrity of the legal system; and promote the administration of justice and confidence in the legal profession. These rules together with any standards adopted by the Board of Trustees pursuant to these rules shall be binding upon all lawyers." CRPC Rule 1.0.

> Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

Furthermore, "[I]t is considered more important to keep certain information confidential than it is to require disclosure of all the information relevant to the issues in a pending proceeding." Cal. Evid. Code § 910, Law Rev. Comm'n Comment. The attorney-client privilege applies to government entities such as the City because the City must consult with attorneys for legal advice. *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 370-71. The attorney-client privilege exists so long as the City as the holder of the privilege, exists and it survives the termination of liability or threat of liability. Cal. Evid. Code § 954, Law Rev. Comm'n Comment; *Los Angeles County Bd. of Supervisors v. Sup. Ct.*, 2 Cal. 5th 282, 305 (2016).

An attorney has an affirmative duty to claim the privilege if present when a privileged communication is sought to be disclosed. Cal. Evid. Code § 955. The privilege applies in both litigation and nonlitigation contexts as well as regulatory and administrative matters. *Roberts*, 5 Cal. 4th at 371; *So. Cal. Gas. Co. v. Public Util. Comm'n*, 50 Cal. 3d 31, 38-39 (1990).

Information communicated between an attorney and client may be privileged even if the information itself is not. For example, the fact that an attorney sends his or her client a police report, newspaper clipping, law review article or other public document is privileged because "discovery of the transmission of specific public documents might very will reveal the transmitter's intended strategy." *Mitchell v. Sup. Court*, 37 Cal. 3d 591, 600 (1984).

If privileged documents are voluntarily disclosed or if a significant part of the privileged communication is disclosed, the attorney-client privilege is waived. *Id.* at 601-02; *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1130 (9th Cir. 2012) (Attorney's voluntary compliance with the government's subpoena without asserting the privilege or attempting to redact any of the confidential information waived the attorney-client privilege with respect to the documents).

Although the Auditor may assert that it is merely seeking basic facts related to various litigation matters, the fact that certain information may be publicly available does not necessarily relieve the Office of its duty to safeguard attorney-client privileged communication. The California State Bar has opined that:

> A lawyer may not disclose his client's secrets, which include not only confidential information communicated between the client and lawyer, but also publicly available information that the lawyer obtained during the professional relationship which the client has requested to be kept secret or the disclosure of which is likely to be embarrassing or detrimental to the client.

Cal. State Bar Formal Opinion No. 2016-195.

C. The Provision of Information in Attorney-Work Product Documents to Be Included in a Public Report Could Waive the Confidentiality of Such Documents

Lastly, the attorney work product doctrine, which is separate and distinct from the attorney-client privilege, is also implicated by the Auditor's request for access to confidential documents. The purpose of the attorney work product doctrine is to protect any writings containing an attorney's brain work such as mental impressions, opinions, conclusions and theories such as an attorney's written notes evaluating a client's demeanor or credibility. Cal. Civ. Proc. Code § 2018.030.

Unlike the attorney-client privilege and the duty of confidentiality, the holder of the attorney work product protection is the attorney. *Fellows v. Sup. Ct.*, 108 Cal. App. 3d 55, 63 (1980). Thus, if the Office were to consent to disclosure of attorney work product documents to the Auditor and the information from these documents were included in a public audit report, the protection could be deemed waived.

II. ALTERNATIVES TO DECLARING A SCOPE LIMITATION

Pursuant to City Charter section 39.2, the Auditor is required to follow Government Auditing Standards, which are otherwise known as Generally Accepted Government Auditing Standards (GAGAS). GAGAS section 9.12 states as follows:

> Auditors should describe the scope of the work performed and any limitations, including issues that would be relevant to likely users, so that report users can reasonably interpret the findings, conclusions, and recommendations in the report without being misled. Auditors should also report any significant constraints imposed on the audit approach by information limitations or scope impairments, including denials of, or excessive delays in, access to certain records or individuals.

In the current situation, the Auditor is seeking access to confidential records of the Office because they more readily provide the information sought by the Auditor, which is the result of careful analysis by our attorneys of records from other City departments to best be able to defend the City in litigation. Given that the Office's litigators arrive at conclusions based on their review of records from other City departments, the Auditor should be able to do likewise as these same records are available from these same City departments. Such an approach would allow Auditor staff to make their own conclusions without relying upon attorney work product or attorney-client privileged documents and information.

GAGAS further states that government information is not to be used "in a manner contrary to law or detrimental to the legitimate interests of the audited entity or the audit organization. This concept includes the proper handling of sensitive or classified information or resources." GAGAS § 3.12. GAGAS also recognizes that the public's right of transparency of government information has to be balanced with the proper use of that information and that exercising discretion in using such information is an important part in achieving this balance. GAGAS § 3.13. In fact, "[i]mproperly disclosing any such information to third parties is not an acceptable practice." *Id.*

The use of confidential attorney-client privileged documents and attorney work product unquestionably contain sensitive information. It would be detrimental to the City if confidential attorney work product and attorney-client privileged communication are placed at risk of disclosure to the public. By potentially exposing the Office's strategy in handling different types of litigation, it could impair the City's ability to defend itself and could benefit private plaintiff attorneys seeking to sue the City. Furthermore, the public disclosure of such confidential information would create a potential chilling effect on the willingness of City staff to be as forthright as possible about all the circumstances involved in a particular matter, which would further hinder the Office's ability to defend the City in future litigation.

It is also inappropriate to declare a scope limitation because the portions of our records and information sought by the Auditor would have been made available to them if the Auditor were willing to only include any information gleaned from such records in a confidential audit report consistent with prior practice as it relates to confidential attorney-client privileged and attorney work product documents and information.

CONCLUSION

As evidenced by the numerous meetings and discussions that have occurred to date, this Office fully supports the Auditor's efforts to mitigate liability. However, the Auditor's authority to access records is not without limits; it cannot compel a disclosure that would violate State law and put the law license of the attorneys in this Office in jeopardy. There are options available to the Auditor that would produce the desired information without crossing ethical lines or putting the City at unnecessary risk. It is not appropriate to declare a scope limitation.

MARA W. ELLIOTT, CITY ATTORNEY

By _____
City Attorney

KRS:soc:cm
cc. Honorable Mayor and City Council
Kris Michell, Chief Operating Officer
Kyle Elser, Interim City Auditor
RC-2019-10
Doc. No. 2249612