



THE CITY OF SAN DIEGO

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

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

The Ethics Commission Has Independent Legal Counsel

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

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

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



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client relationship with the City.

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

Other Government Audit Agencies Have Access to Independent Legal Counsel

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

Estimated Cost for Independent Legal Counsel

The City of San Diego Ethics Commission retains its own legal counsel, independent of the City Attorney, for legal support and carrying out its responsibilities and duties. The Commission's legal support budget is \$180,000, with an average expenditure of \$60,000 per year². While it is difficult to project, we estimate our expenditures for legal

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

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

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

Audits and Investigations Often Require Legal Advice and Conflicts Have Occurred

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

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

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

Proposed Change to City Charter Sections 40 and 39.2

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

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

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

Conclusion

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

Respectfully submitted,



Kyle Elser
Interim City Auditor

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