

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

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

Michael J. Aguirre
CITY ATTORNEY

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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

CITY MANAGER AUTHORITY TO CONTRACT FOR LEGAL REPRESENTATION OF
THE MAYOR AND COUNCILMEMBERS IN CONNECTION WITH FEDERAL
INVESTIGATION INTO FINANCIAL DISCLOSURE

INTRODUCTION

In February 2004, the Securities and Exchange Commission [SEC] and United States Attorney's Office informed the City that they were investigating certain financial disclosure practices by the City. These investigations are ongoing, and various City employees have been asked to participate in interviews or give testimony before the SEC, Federal Bureau of Investigation, and Federal Grand Jury.

The Mayor and City Councilmembers may receive subpoenas requesting them to participate in interviews or give testimony related to the investigation being conducted by the SEC. Because this Office is representing the City as an entity, and conducting an independent investigation of these matters, in our view it is appropriate for the Mayor and City Councilmembers to have separate counsel to advise them in anticipation of a civil proceeding by the SEC. A question has arisen regarding the circumstances under which the City may provide for the legal representation of the Mayor and Councilmembers. Under these circumstances, it is our recommendation that the City Manager enter into one or more contracts in the aggregate up to his authority of \$250,000, for such services

DISCUSSION

In a previous Report to Mayor and Council, this Office addressed the question of whether and under what circumstances the City of San Diego is authorized to pay for the legal fees and expenses for outside legal counsel to represent former and current City employee witnesses in the federal civil proceedings. City Att'y Report 2004-22 (December 21, 2004). See Attachment 1.

The City is authorized to pay for outside legal counsel for an employee or official for representation in a civil proceeding, if the matter is related to the employee's or official's scope of employment. California Government Code section 995 provides that upon request of an

employee or former employee, a public entity shall provide for the defense of any civil action on account of an act or omission in the scope of his or her employment as an employee of the city.

The City may refuse to pay for legal fees only if (i) the employee's act or omission was not within the scope of the employee's employment. Cal. Gov't Code § 995.2(a)(1); (ii) the employee acted or omitted to act because of fraud, corruption, or malice. Cal. Gov't Code § 995.2(a)(2); and (iii) paying the legal bills would create a specific conflict of interest between the public and the employee-witness. Cal. Gov't Code § 995.2(a)(3). Thus, the City may employ attorneys to represent the employees or officials when they are interviewed or provide testimony to the federal agencies conducting the investigation. Cal. Gov't Code § 996. The City may decline to do so only if it determines that the employee acted or omitted to act because of fraud or corruption. At this stage of the proceedings, no findings of fraud or corruption have been made against any employee or official of the City.

The City Manager has authority to enter into a contract for outside attorney services for a City official without City Council approval in the event that the contract does not exceed \$250,000, and the total amount of contract awards by the City to the attorney does not exceed \$250,000 in any given fiscal year. San Diego Municipal Code § 22.3223. The City Council is not required to make findings in order for the City Manager to enter into these contracts, because of the lack of evidence at this time of fraud or corruption on the part of any City official in this matter. Therefore, the City Manager has independent authority to enter into contracts for the legal representation of the Mayor and Councilmembers in this matter up to his authority pursuant to the San Diego Municipal Code.¹ It is our opinion that the City Manager should enter into one or more agreements for the provision of independent counsel to the Mayor and City Councilmembers pursuant to California Government Code section 995 under these circumstances, but initially, in the aggregate not more than \$250,000.

CONCLUSION

Under California Government Code section 995, the City of San Diego may pay the reasonable costs of outside legal counsel for the Mayor and Councilmembers related to the SEC investigation. The City Manager is authorized to enter into the contracts for the legal representation without City Council approval, provided that none of the contracts is in excess of \$250,000, and that none of the outside attorneys receive an award of more than \$250,000 in a given fiscal year. The Manager may provide for the legal representation of the officials on the

¹ It should also be noted that the Mayor and Councilmembers are each permitted to establish a legal defense fund for the purpose of defraying attorney's fees and other legal costs incurred in conjunction with civil, criminal, or administrative proceedings arising directly out of the performance of the official's governmental activities or duties. San Diego Municipal Code § 27.2965. Officials may accept contributions from individuals in an amount up to \$250 per calendar year for that purpose, separate from any campaign contributions, and not subject to the limits on campaign contributions. San Diego Municipal Code § 27.2965(c); 27.2965(d). Therefore, a legal defense fund is an alternative source of funding for the outside legal representation of City officials in conjunction with the federal investigation.

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condition that if any are found to have acted fraudulently or corruptly the City would be reimbursed by the official. It is our opinion that the City Manager should proceed accordingly.

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

LAF:laf:hk:jb
Attachment
RC-2005-1

cc: City Manager