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CITY ATTORNEY

**MEMORANDUM OF LAW**

**DATE:** May 14, 2007

**TO:** Honorable Mayor and City Council Members

**FROM:** City Attorney

**SUBJECT:** City Attorney's Authority to File a Civil Action under the California False Claims Act

**INTRODUCTION**

The California False Claims Act allows a private plaintiff or a prosecuting authority, such as the City Attorney, to file a lawsuit to recover damages and impose civil penalties upon anyone who knowingly submits a false claim to the City. A question has arisen regarding the City Attorney's authority to initiate such actions without prior approval of the City Council.

**QUESTION PRESENTED**

May the City Attorney file a civil action under the California False Claims Act [CFCA] without first seeking approval of the City Council?

**SHORT ANSWER**

Yes. The City Attorney has inherent authority under the CFCA and the City Charter to initiate CFCA litigation on the City's behalf without first seeking approval of the City Council.

**ANALYSIS**

**The City Attorney Has Authority Under the CFCA and the City Charter to Initiate CFCA Litigation on the City's Behalf.**

The California False Claims Act (Cal. Gov't Code §§ 12650-12656)<sup>1</sup> [CFCA] is designed to prevent fraud on the public treasury and ultimately to protect the public fisc. *State v.*

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<sup>1</sup> Future section references are to the California Government Code unless otherwise specified.

*Altus Finance*, 36 Cal. 4th 1284, 1296-1297 (2005). It provides that any person who knowingly submits a false claim to the State of California, or to a political subdivision, may be liable in a court action for treble damages and civil penalties. *State ex rel. Harris v. PricewaterhouseCoopers, LLC*, 39 Cal. 4th 1220, 1223 (2006) (*PwC*); §§ 12651, 12652. For purposes of the CFCA, a political subdivision includes “any city, city and county, county, tax or assessment district, or other legally authorized local government entity with jurisdictional boundaries.” *Id.* at 1227; § 12650(b)(3).

In *PwC*, the Supreme Court considered who may prosecute actions under the CFCA:

The CFCA specifies in detail who may bring and prosecute actions under that statute, depending on whether state or political subdivision funds are involved. If *state* funds are involved, the *Attorney General* may bring the action. (Gov. Code, § 12652, subd. (a)(1).) If *political subdivision* funds are involved, the action may be brought by the political subdivision’s ‘prosecuting authority’ (*id.*, § 12652, subd. (b)(1)), i.e., ‘the *county counsel, city attorney*, or other local government official charged with investigating, filing, and conducting civil legal proceedings on behalf of, or in the name of, [*the*] *particular political subdivision*’ (*id.*, § 12650, subd. (b)(4), italics added). Where both state and political subdivision funds are involved, each of these officials may intervene, on *behalf of the public entity he or she represents*, in an action initiated by the other. (*Id.*, § 12652, subds. (a), (b).)

*PwC*, 39 Cal. 4th at 1227 (final emphasis added; others in original). A third category, of private plaintiffs with independent knowledge of the facts, may bring a qui tam action for and in the name of the state or the political subdivision, so long as the private plaintiff “gets to the courthouse first” to initiate the action. *PwC*, 39 Cal. 4th at 1228, 1229-1232; § 12652 (c).<sup>2</sup>

San Diego Charter section 40, which details the City Attorney’s powers, requires the City Attorney “to prosecute or defend, as the case may be, all suits or cases to which the City may be a party.” The City Attorney is therefore the City’s “prosecuting authority” within the meaning of the CFCA. *See* § 12650(b)(4).

The CFCA does not directly address whether a prosecuting attorney representing a defrauded city must first seek permission from the entity before filing a lawsuit under its provisions. The CFCA *requires* the prosecuting authority of a city to “diligently investigate violations under Section 12651 involving political subdivision funds.” § 12652(b)(1). However, it merely *permits* the prosecuting authority to bring such a civil action in the name of the City.<sup>3</sup>

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<sup>2</sup> Public entities, such as cities, are not permitted to initiate qui tam lawsuits under the CFCA on behalf of other public entities. *PwC*, 39 Cal. 4th at 1223, 1238.

Other sections of the CFCA may shed light on this question. If successful, “the defrauded entity or entities themselves receive 67 percent of the proceeds. The remaining 33 percent goes to the officials who litigated the case, for use in investigating and prosecuting other false claims against the entities they represent. (Gov. Code, § 12652, subd. (g)(1)(A)-(C)).” PwC, 39 Cal. 4th at 1228. A separate fund is established in the State Treasury to hold the proceeds of state actions under the CFCA, which may only be appropriated by the Legislature to support the ongoing investigation and prosecution of false claims under the Act. *See* § 12652(j).

A qui tam private plaintiff retains the right to a hefty percentage of the proceeds of a successful lawsuit, whether or not officials representing the defrauded entity intervene in the lawsuit. PwC, 39 Cal. 4th at 1228; § 12652(g)(2) and (3). After such official intervention, the officials are entitled to their 33 percent, and the qui tam plaintiff’s share – up to 33 percent of the proceeds – is subtracted from the proceeds that would have been received by the defrauded entity. PwC, 39 Cal. 4th at 1228; § 12652(g)(2). “This carefully balanced scheme enlists ‘nongovernmental’ resources - informants acting partly in their own self-interest - in the battle to ferret out and prosecute public fraud. On the other hand, it costs the government nothing in time, resources, or money beyond what a defrauded entity might spend to investigate and prosecute on its own behalf.” PwC, 39 Cal. 4th at 1232.

It is apparent from this scheme that a defrauded city and the official *and/or* the private person suing on the city’s behalf all have separate interests in the outcome of the action.<sup>4</sup> The nature of this scheme provides incentives for *both* public prosecuting authorities and private plaintiffs to protect the public fisc. A defrauded entity such as a city has no power to determine whether a private individual will initiate a lawsuit on its behalf, even though its representatives may later intervene in such a lawsuit. *See* § 12652(c), (e) and (f).

The California Supreme Court has implied that local prosecuting authorities may “unilaterally” initiate actions under the CFCA. *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 1183 (2006). As a practical matter, it is also in a defrauded city’s best interest to have its prosecuting authority file the action as expeditiously as possible - doing so would allow the city to foreclose participation by a qui tam plaintiff, who would reduce the city’s potential recovery. In light of the CFCA’s purpose to protect the public fisc and the incentives the CFCA provides to public and private plaintiffs, a city should not be able to prevent its own “prosecuting authority” from initiating a similar lawsuit on its behalf, especially when that prosecuting attorney is elected by the public.

This interpretation is also consistent with the language of San Diego Charter section 40. Paragraph 5 of Section 40 states in relevant part: “It shall be the City Attorney’s duty . . . to

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<sup>4</sup> If the defendant is successful, the court may “award to the defendant its reasonable attorney’s fees and expenses against the party that proceeded with the action if the defendant prevails in the action and the court finds that the claim was clearly frivolous, clearly vexatious, or brought solely for purposes of harassment.” § 12652 (g)(9).

prosecute or defend, as the case may be, all suits or cases to which the City may be a party. . .” The broad language of this paragraph is not limited or preconditioned by any requirement that the City Attorney obtain consent of the City Council before prosecuting or initiating cases on behalf of the City. The breadth of this authority is underscored by, and contrasts with, later language in Section 40 that *does* limit the City Attorney’s ability to initiate specific types of lawsuits unless the City Council orders the action.<sup>5</sup> See, Memorandum from Richard C. Solomon and Ellen Peck to City Attorney Michael Aguirre (October 26, 2005), “Ethical Issues Involved in San Diego City Attorney Filing Litigation Without City Council Approval.” <http://www.sandiego.gov/cityattorney/pdf/legalauthority051026.pdf>. As this Office has consistently opined, Charter section 40 places no limitation on the power of the City Attorney to initiate cases on behalf of the City, except as it expressly provides. Section 40 does not expressly reference CFCA actions. Thus, Section 40 does not require City Council approval before the City Attorney initiates and prosecutes an action under the CFCA on the City’s behalf.

### CONCLUSION

As set forth above, this Office concludes that the CFCA may be interpreted to provide a city attorney with the same freedom to initiate civil litigation as that afforded to private plaintiffs, namely without the consent of the defrauded city. Moreover, the San Diego City Charter permits the City Attorney to initiate and prosecute this type of civil lawsuit on behalf of the City without first seeking the consent of the City Council.

Recognizing that time may be of the essence in filing a lawsuit to protect the City's rights, and our conclusion that the City Attorney may file these matters without Council pre-approval, the City Attorney nonetheless intends to consult with the Council prior to initiating a CFCA action when it is feasible to do so.

MICHAEL J. AGUIRRE, City Attorney

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<sup>5</sup> Paragraph 7 of Charter section 40 provides:

The City Attorney shall apply, *upon order of the Council*, in the name of the City, to a court of competent jurisdiction for an order or injunction to restrain the misapplication of funds of the City or the abuse of corporate powers, or the execution or performance of any contract made in behalf of the City which may be in contravention of the law or ordinances governing it, or which was procured by fraud or corruption. The City Attorney shall apply, *upon order of the Council*, to a court of competent jurisdiction for a writ of mandamus to compel the performance of duties of any officer or commission which fails to perform any duty expressly enjoined by law or ordinance. (emphasis added.)

Honorable Mayor and City  
Council Members

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By  
City Attorney

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