

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: August 4, 2014

TO: Councilmember Scott Sherman, Chair, Audit Committee

FROM: City Attorney

SUBJECT: Powers Granted by the City Charter to the City Auditor to Compel the Cooperation of Witnesses

INTRODUCTION

You have asked this Office whether the City Charter includes a grant of subpoena power to the City Auditor. Your request was prompted by a request by the City Auditor to docket the issue for discussion at Audit Committee.

On July 11, 2014, the City Auditor issued a memorandum to the Audit Committee Chair requesting that an item be placed on the Audit Committee agenda relating to the alleged refusal of a key witness to cooperate with his investigation of Balboa Park Celebration, Inc. and its planned celebration of Balboa Park's 100-year anniversary. In the memorandum, the City Auditor asserts that he has the power to subpoena uncooperative individuals while investigating potential claims of financial fraud, waste, or impropriety, and seeks to consult with the Audit Committee on this matter. *See* Attachment 1, City Auditor Memorandum dated July 11, 2014.

On July 15, 2014, the Chair of the Audit Committee issued a memorandum requesting a formal opinion regarding the powers granted by the City Charter to the City Auditor as it relates to this issue. *See* Attachment 2, Memorandum from Audit Committee Chair dated July 15, 2014.

Based on this request for an opinion from this Office, the City Auditor has since rescinded his request to docket this issue for discussion. *See* Attachment 3, Memorandum from City Auditor to the Chair of the Audit Committee dated July 24, 2014.

QUESTIONS PRESENTED

1. Does the San Diego City Charter confer upon the City Auditor the power to subpoena?
2. If not, what power(s), if any, does the Charter confer upon the City Auditor to compel individuals to provide testimony to the City Auditor?

SHORT ANSWERS

1. No, the Charter does not confer subpoena power on the City Auditor. That power must be expressly granted, but is not included in the Charter.
2. Charter section 39.2 grants to the City Auditor the power to summon any officer, agent, or employee of the City, any claimant or other person, and examine him or her upon oath or affirmation relating to any material claim of financial fraud, waste or impropriety within any City department.

ANALYSIS

“[W]hen a charter creates a public office or body, the charter is the source of the body’s or officer’s authority and responsibilities.” 2010 City Att’y MOL 312 (2010-12; Jun. 10, 2010). Charter section 39.2, enacted by the voters in 2008, establishes the Office of the City Auditor and sets forth the powers conferred upon the City Auditor.

I. THE CHARTER DOES NOT GRANT THE CITY AUDITOR THE POWER TO SUBPOENA

In his memorandum to the Audit Committee Chair dated July 11, 2014, the City Auditor contends that he possesses the power to subpoena, citing the case of *Dibb v. County of San Diego*, 8 Cal. 4th 1200 (1994). This case establishes that a Charter provision granting subpoena power is not barred by state law. *Id.* at 1204, 1210-11. At the same time, this case reinforces the legal principle that such power must be expressly granted through the Charter. *Id.* In other words, the *Dibb* case provides that the City Auditor *may* be conferred the power to subpoena, not that such power has been actually conferred on the City Auditor.

For that, we must look to Charter section 39.2 which establishes the Office of the City Auditor and sets forth the duties and powers of the office. Section 39.2 reads in relevant part as follows:

The City Auditor may investigate any material claim of financial fraud, waste or impropriety within any City Department and for that purpose may summon any officer, agent, or employee of the City, any claimant or other person, and examine him or her upon oath or affirmation relative thereto.

There is no mention of subpoena power relating to the City Auditor in the Charter, which appears to be an intentional omission. The minutes of a Charter Review Financial Reform Sub-Committee meeting dated June 29, 2007, make it clear that there was no need to confer the power of subpoena on the City Auditor because “such a power was not necessary given the Auditor’s ability to go to senior management, the Audit Committee and the public to compel compliance.” See Attachment 4, Actions for Charter Review Financial Reform Sub-Committee dated June 29, 2007.

In 2001, this Office issued a report on whether the Ethics Commission has the power to subpoena. See 2001 City Att’y Report 470 (2001-4; Feb. 6, 2001). In that report, based on an analysis of relevant California case law, this Office opined that “[e]xpress language in the Charter delegating this authority to the Ethics Commission is necessary to ensure that the Commission’s subpoena power is not vulnerable to a legal challenge.” *Id.* at 2.

Likewise, for the City Auditor to possess the power to subpoena, such power must be expressly provided in the Charter. *Id.* Given that the Charter does not contain such language and the fact that the express intent of the Charter Review Financial Reform Sub-Committee was not to confer such power, the City Auditor does not have subpoena power.

II. THE CHARTER GRANTS THE CITY AUDITOR THE POWER TO SUMMON CITY OFFICERS, AGENTS, AND EMPLOYEES AS WELL AS ANY CLAIMANT OR OTHER PERSON RELATING TO ANY MATERIAL CLAIM OF FINANCIAL FRAUD, WASTE OR IMPROPRIETY WITHIN ANY CITY DEPARTMENT

While Charter section 39.2 does not confer upon the City Auditor the power to subpoena, it does expressly provide the City Auditor with the power to summon as it relates to his investigation of any material claim of financial fraud, waste or impropriety within any City department.¹

This Charter language is similar to language found in Charter section 82, which confers similar authority upon the Chief Financial Officer.² Charter section 270(h) also provides that “[a]ny City official or department head in the administrative service may be summoned to appear before the Council or any committee of the Council to provide information or answer any question.”

San Diego is a charter city. Cal. Const. art. XI, § 3(a); *Mira Development Corp. v. City of*

¹ We note that Charter section 39.2 grants the City Auditor the power to summon witnesses as it relates to an investigation of a City department for any material claim of financial fraud, waste, or impropriety. However, the Charter does not grant the power to summon when the City Auditor is exercising his authority to verify compliance of City vendors with the terms of a City contract.

² Originally, this authority to summon was conferred upon the Auditor and Comptroller. However, effective July 8, 2008, this authority as well as all power and responsibilities conferred upon the Auditor and Comptroller were transferred to the Chief Financial Officer pursuant to Charter section 39. The term “Auditor” as used here is separate and distinct from the City Auditor under the current City governance structure. The Office of the Auditor and Comptroller no longer exists and has since been replaced by the Chief Financial Officer.

San Diego, 205 Cal. App. 3d 1201, 1214 (1988). The Charter represents the supreme law of the City, subject only to conflicting provisions in the federal and state constitutions and to preemptive state law. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 (1994).

Furthermore, under the California Constitution, a charter city possesses autonomy over its “municipal affairs.”³ Cal. Const. art. XI, § 5(a); *Brown v. City of Berkeley*, 57 Cal. App. 3d 223, 236 (1976). “The subpoenaing of witnesses and documents concerning a matter pending before a city commission is a municipal affair.” *Brown*, 57 Cal. App. 3d at 236.

Like a subpoena, a summons commands the recipient to appear or to take a certain action at a specific time and place for a specific purpose. *See* Cal. Civ. Proc. Code §§ 412.20 and 1985. Given the similarities between a subpoena and a summons, the City Auditor’s power to summon to investigate any financial fraud, waste, or impropriety within any City department would also reasonably be considered a municipal affair. We are unaware of any conflicting provisions in the federal and state constitutions and any preemptive state law on the granting of the power to summon. Accordingly, the Charter can legally vest the City Auditor with the power to summon.

While a subpoena is generally self-executing, however, a summons is not. *See* Cal. Civ. Proc. Code §§ 1209(a)(9) and 1991.1. If the recipient of the summons fails to appear, the City would need to apply to the court for an order enforcing the summons. *See, e.g.*, Cal. Gov’t Code § 7474(b)(1) (Attorney General may petition court for enforcement of administrative summons seeking financial records associated with violations of antitrust law). Violation of that court order would then constitute contempt. *See* Cal. Civ. Proc. Code § 1209(a); Cal. Penal Code § 166(a)(4).

To our knowledge, the power to summon under Charter sections 39.2 and 82 has not been exercised. However, in July 2007, pursuant to the authority granted to the City Council under Charter section 270(h), former Councilmember Donna Frye summoned Mayor Jerry Sanders’ staff to appear before the City Council regarding a mandatory recycling program. Although Mayor Sanders initially refused to do so, ultimately his staff appeared before the City Council, avoiding the issue of enforcement of the summons.⁴

CONCLUSION

The City Auditor does not have the power to subpoena because that power must be expressly conferred by the Charter. However, pursuant to Charter section 39.2, the City Auditor does have the power to summon officers, agents, and employees of the City as well as any claimant or other person relating to any material claim of financial fraud, waste, or impropriety within any City department.

³ The City’s power over its “municipal affairs” has been discussed extensively in prior City Attorney memoranda so it will not be discussed at length here.

⁴ The ability to legally enforce any particular summons issued by the City Auditor would have to be separately analyzed.

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To avoid potential legal issues with abuse of discretion and the ability to enforce the summons in court, this power to summon should be used sparingly and judiciously, only after all other reasonable avenues to gain voluntary compliance have been exhausted.

This Office stands ready to provide any further legal guidance that may be necessary regarding the City Auditor's authority.

JAN I. GOLDSMITH, CITY ATTORNEY

By 

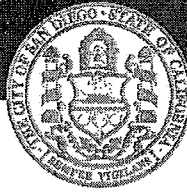
Kenneth So
Deputy City Attorney

KS:jdf

Attachments


MS 2014-16

cc Audit Committee Members
Eduardo Luna, City Auditor



THE CITY OF SAN DIEGO

ATTACHMENT 1

DATE: July 11, 2014
TO: Honorable Audit Committee Chairman Scott Sherman
FROM: Eduardo Luna, City Auditor 
SUBJECT: Investigation of the Balboa Park Celebration Inc.

The City Auditor is requesting that an item be placed on the Audit Committee agenda related to the refusal of a key witness to cooperate with our investigation of the Balboa Park Celebration Inc. planned celebration of Balboa Park's 100-year anniversary. The witness involved was a principal executive of the organization receiving City funds. A legal question has arisen between the Office of the City Auditor and City Attorney, as to whether San Diego voters granted the City Auditor authority to subpoena non-cooperating persons upon the adoption of City Charter section 39.2. The City Auditor is of the opinion that Charter Section 39.2 allows the City Auditor to subpoena non-cooperative persons, while investigating potential claims of financial fraud, waste, or impropriety. *Dibb v. County of San Diego (1994) 8 Cal. 4th 1200, 1217-1219.* The City Auditor seeks to consult with the Audit Committee on this matter.

cc: Audit Committee Members
Jan Goldsmith, City Attorney
Ken So, Deputy City Attorney





ATTACHMENT 2

City of San Diego
Councilmember Scott Sherman
Seventh District

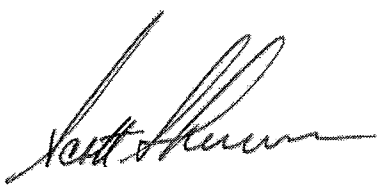
MEMORANDUM

DATE: July 15, 2014

TO: City Attorney Jan Goldsmith

FROM: Councilmember Scott Sherman, Chair, Audit Committee

RE: Request for Formal Opinion of Powers Granted to City Auditor




On Friday, July 11th, City Auditor Eduardo Luna sent out a memo requesting the Audit Committee discuss whether or not Charter section 39.2 granted the City Auditor the power of subpoena. In advance of considering a date for this discussion, I am requesting that the City Attorney address this question and provide me with a response as to whether or not the Charter grants this power.

Thank you for your attention to this matter.



THE CITY OF SAN DIEGO

ATTACHMENT 3

DATE: July 24, 2014
TO: Honorable Audit Committee Chairman Scott Sherman
FROM: Eduardo Luna, City Auditor 
SUBJECT: Update Regarding Audit of Balboa Park Celebration, Inc.

I am writing to update you on developments that have occurred since my previous memorandum to you dated July 11, 2014.

First, it is my understanding that your office has requested a formal legal opinion from the City Attorney regarding the Office of the City Auditor's authority to summon certain people to provide information. I appreciate your efforts in this regard. As a result of your request to the City Attorney for this opinion, I am rescinding my request to place this issue on an upcoming Audit Committee agenda.

Second, I recognize that there was a misunderstanding regarding Ms. Dubick's willingness to cooperate with our audit. Subsequent to my July 11, 2014 memorandum to you, Ms. Dubick has contacted my office. In her voicemail messages to my staff, Ms. Dubick has pledged her cooperation and willingness to meet with the audit team. We appreciate Ms. Dubick's willingness to facilitate this audit. As we discussed at our meeting today, this issue can be resolved as soon as the audit team can meet with Ms. Dubick. To that end, time is of the essence, and we look forward to scheduling that meeting and interviewing Ms. Dubick as soon as possible. Further, I understand that you recently met with Ms. Dubick, and I appreciate your encouraging her to meet with my staff.

I will contact Ms. Dubick to expeditiously resolve this issue, and I appreciate your assistance to date and going forward on this matter.

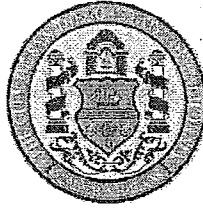
cc: Audit Committee Members
Jan Goldsmith, City Attorney
Ken So, Deputy City Attorney



OFFICE OF THE CITY AUDITOR
1010 SECOND AVENUE, SUITE 555 • SAN DIEGO, CA 92101
PHONE (619) 533-3165 • FAX (619) 533-3036

TO REPORT FRAUD, WASTE, OR ABUSE, CALL OUR FRAUD HOTLINE (866) 809-3500





ATTACHMENT 4

CHARTER REVIEW SUB-COMMITTEE OF THE CITY OF SAN DIEGO
FINANCIAL REFORM SUB-COMMITTEE
CHAIR- DONNA JONES

ACTIONS FOR
FRIDAY, JUNE 29, 2007, AT 9:00 A.M.

COUNCIL COMMITTEE ROOM (12TH FLOOR),
CITY ADMINISTRATION BUILDING
202 C STREET, SAN DIEGO, CALIFORNIA

For Information, contact Lisa Briggs,
202 C Street, 11th Floor, San Diego, CA 92101
619-236-6330

9:10 Call to Order. Roll Call

Committee Members:

Donna Jones, Chair	Present
John Gordon	Present
Vincent Mudd	Present
Lei-Chala Wilson	Excused
James Milliken	Present

Staff in Attendance:

Jay Goldstone, CFO, City of San Diego
Andrea Tevlin, IBA, City of San Diego
James Ingram, Committee Consultant
Lisa Briggs, Office of the Mayor
Woo-Jin Shim, Office of Council President Peters
Jeff Kavar, Office of the IBA
Brant C. Will, City Attorney's Office
Larry Tomanek, City Attorney's Office

NON-AGENDA PUBLIC COMMENT

There was no non-agenda public comment.

SUB-COMMITTEE COMMENT

There were no non-agenda comments from the subcommittee.

CITY ATTORNEY, COUNCIL INDEPENDENT BUDGET ANALYST AND MAYORAL STAFF COMMENT

There was no staff non-agenda comments.

ITEM – 1: Chief Financial Officer and the City of San Diego’s Financial Organizational Structure: Discussion Item – No Action Taken

Staff handed out draft “straw man” language on the position of CFO. Due to time constraints, this language has not yet been reviewed by the IBA or City Attorney’s office. Mr. Goldstone gave an overview of some of the elements of the proposed language and confirmed that this starting point language did encompass the duties outlined in Kroll as well as the practical duties of a CFO.

Regarding reference to any delegation of authority from the CFO to the City Council, it was reasoned that such delegation made sense under the City Manager form of government, but such language might not make sense in the Strong Mayor form of government.

Discussion then moved to the question of Council’s role in hiring the CFO. Members of the subcommittee commented that Council participation in the hiring process also raised the question of a right to appeal the Manager/Mayor’s decision to terminate the CFO. Such a requirement is not unique in the Charter. Currently, the positions of Treasurer and City Manager need to be confirmed by the City Council. In addition, the positions of Fire Chief and Police Chief have the right to appeal termination to the City Council. Staff was requested to bring all examples of this kind of Council hiring/firing authority contained in the Charter to the next meeting.

On the issue of authority to hire and fire, members of the committee commented that perhaps there should be a distinction established for “cabinet level” appointments. It was recognized that that the Manager/Mayor must have control over the senior management team.

Committee members then asked Mr. Goldstone just how much detail of day to day functions should go into the Charter? The response from Mr. Goldstone, echoed by the IBA and representatives from the City Attorney’s office was less detail on specific practices and functions. However, Mr. Goldstone did emphasize that the Charter should put the responsibility for regular and accurate reports to the Manager/Mayor, Council and public on the finances of the City. Mr. Goldstone will offer more detailed language on this issue at the next meeting.

ITEM – 2: Internal Auditor Function and Audit Committee: Discussion Item – No Action Taken

Staff handed out draft “straw man” language on both the creation of the Audit Committee and establishment of the Office of City Internal Auditor. Due to time constraints, this language has not yet been reviewed by the IBA or City Attorney’s office. Mayor staff and Mr. Goldstone gave an overview of some of the elements of the proposed language and confirmed that this starting point language did encompass the concerns outlined in Kroll as well as some of the comments made by the SEC Monitor, Mr. Stanley Keller.

The first issue addressed was the establishment of the Audit Committee. Ms. Tevlin raised the concern that the proposed language did not identify how the public members of the audit committee would be appointed. Mayor staff responded that, because this was a first draft which did not have the benefit of IBA and City Attorney comment, that element was purposely left out. Mayor staff acknowledged that there will be conflicting points of view on composition of the committee and the appointment process; thus, it made more sense to staff to be silent on that point to allow all points of view to be discussed.

The IBA noted that the Audit Committee language should make clear that the Internal Auditor reports to the Audit Committee and that the Committee can request performance audits, review and comment on audits as well as establish the work plan for the Internal Auditor. The City Attorney noted that the Kroll report relied on an outdated version of GFOA guidelines in its recommendation for composition of the Audit Committee.

Sub-Committee members asked each staff member what their preference for composition might be:

- Mayor’s Staff: As set out in the draft language. Three public members with two Council members. Rationale: Need for financial expertise on the Audit Committee coupled with a concern that too many Council members on the Audit Committee might create a “too political” dynamic.
- IBA: As set out in the IBA report given on June 25, 2007. Two public members with three Council members. Rationale: Need true independence from management and Council is responsible for oversight of the budget.
- City Attorney: Would prefer all Council members, but could go along with the IBA recommendation.

Both the City Attorney and IBA recommended that any public members be appointed solely by the Council. Again, the rationale being full independence from management and Council’s role in approval and oversight of the budget. The IBA did acknowledge that in her initial response to the Kroll recommendations, she put forward the idea of a screening committee. Regardless of the method, the IBA reiterated her concern that the independence from management is key.

The question was raised as to who would appoint the Council representatives on the Committee and who appoints the Chair. The language is silent on this point and all agreed that this issue should be explored.

Discussion then turned to compensation for the Audit Committee members. The IBA and some committee members expressed strong opinions that compensation was not appropriate. The rationale was that payment is contrary to the spirit of public service as well as the practical question of deciding which of the City’s 328 boards, commissions and/or committees are also “worthy” of compensation. Other subcommittee members noted that the Audit Committee

would be doing significant work that is quite time consuming. Given the need for financial expertise, experience and time commitment, compensation is called for.

Due to the complexity and diverse views on this issue, it is anticipated that the subcommittee will continue these discussion over the next few meetings.

10:50 Break

11:10 Reconvene

Discussion began on the issue of creation of the position of City Internal Auditor. The proposed language reflected a dual reporting structure with the Mayor/Manager playing a role in the hiring and termination of the City Internal Auditor. Both the City Attorney and the IBA strongly objected to this idea. Both put forward the position that the approval and removal of the City Internal Auditor should be solely in the hands of the City Council.

At this point, Mr. James Ingram joined the meeting to go over his findings on the question of elected vs. appointed City Auditor. That report is attached to these minutes. In short, the subcommittee had asked the question: Is the fiscal health of a city impacted by whether an auditor is elected or appointed? The data did not indicate a relationship between the two issues.

Discussion then began on the question of elected vs. appointed Internal Auditor. It was noted that the elected City Auditor for the City of Los Angeles had addressed the Rules Committee and that her comments might be helpful on the issue.

Mr. Goldstone was again asked about how much detail of the duties of the Internal Auditor should be outlined in the Charter. He reiterated that day to day functions and/or reference to certain organizations (such as GFOA) was not appropriate. However, he again noted that clearly spelling out that there is a duty to publicly report out findings and results is important.

Members of the Subcommittee then asked about the need for subpoena power for the Internal Auditor. Mr. Goldstone, the IBA and the City Attorney all indicated that such a power was not necessary given the Auditor's ability to go to senior management, the Audit Committee and the public to compel compliance.

Due to the complexity and diverse views on this issue, it is anticipated that the subcommittee will continue these discussion over the next few meetings.

ITEM – 3: Action Item: Approve Minutes from June 15, 2007 and June 29, 2007, Financial Reform Subcommittee Meeting

Regarding the minutes of 6/15/07, staff was directed to correct the language to reflect that the IBA did not submit a report on the CFO issue. Staff was also directed to put more detail into the minutes.

Motion by Committee member Mudd, second by Committee member Gordon to accept the minutes. Passed 3-0.

Adjourn 12:00