

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: September 8, 2020

TO: Honorable City Council Members

FROM: City Attorney

SUBJECT: Response to Statements Alleged by the Office of the City Auditor in its Request to Obtain Independent Legal Counsel for the Office of the City Auditor

INTRODUCTION

On August 27, 2020, the Office of the City Auditor issued its memorandum titled, “Request to Obtain Independent Legal Counsel for the Office of the City Auditor” (Auditor Memo). Attached to the Auditor Memo is a legal memorandum dated July 29, 2020 (Colantuono Opinion) issued by outside counsel, Colantuono, Highsmith & Whatley PC, who was originally engaged to assist the Office of the City Auditor (Auditor) with drafting a proposed ballot measure that would ask voters to amend the San Diego Charter (Charter) so that the Auditor could obtain independent legal counsel.

Our Office is issuing a separate legal opinion to address the underlying legal issues related to Charter section 40 raised in the Colantuono Opinion. This memorandum is intended to clarify certain statements alleged by the Auditor by providing additional context to most accurately represent the situations described.

RESPONSES TO STATEMENTS ALLEGED IN AUDITOR MEMO

Starting on page 3 of the Auditor Memo, the Auditor requests City Council (Council) approval to obtain independent legal advice on four issues. Our Office does not believe the Auditor’s requests are warranted for the following reasons:

1. Confidential Fraud Hotline Reports: The Auditor seeks independent legal advice on whether confidential fraud hotline reports that identify employees who were the subject of an investigation, or third-party vendors who allegedly engaged in misconduct, can be provided to the Audit Committee and Council.¹

The Auditor omits that this request is unnecessary because our Office, and outside counsel hired by the City to provide the Auditor with a second opinion, have already advised the Auditor on this issue. State law governing whistleblower hotlines, including fraud hotline reports, is very clear. It states that “[a]ny investigative audit conducted pursuant to this subdivision shall be kept confidential, except to issue any report or an investigation that has been substantiated, or to release any findings resulting from a completed investigation that are deemed necessary to serve the interests of the public. *In any event, the identity of the individual or individuals reporting the improper government activity, and the subject employee or employees shall be kept confidential.*” Cal. Gov’t Code § 53087.6(e)(2) (emphasis added).

The law further states that “the auditor or controller may provide a copy of a substantiated audit report that includes the identities of the subject employee or employees and other pertinent information concerning the investigation to the *appropriate appointing authority* for disciplinary purposes.” Cal. Gov’t Code § 53087.6(e)(3) (emphasis added).

There are two key points in these provisions:

The first is that the Auditor must keep hotline investigation reports confidential, but may disclose findings as necessary to serve the interests of the public. The Auditor typically addresses this by issuing a confidential report containing detailed information along with a public report containing that contains general findings without revealing personally identifying information. The Auditor determines what to include in a confidential report and what to include in a public report subject to these constraints. For example, the Auditor clearly may not include the names of any whistleblowers or subject City employees in the public report. Also, to ensure that the legislative purpose of the statute is not thwarted, the Auditor should also not include in any public report information that could be used to identify such individuals. Any information included in a public report would obviously be available to everyone including the Council and Audit Committee.

The second is that the statute only allows the Auditor to share a confidential fraud hotline report with “the *appropriate appointing authority* for disciplinary purposes” and also with law enforcement. This is consistent with the legislative intent of the statute to balance individual privacy interests with the need to address the harms uncovered in the

¹ It is worth noting that it is the Auditor’s standard practice to *not* issue a confidential fraud hotline report to the Audit Committee or the Council, and that the Auditor has never issued such a report to the Audit Committee or the Council.

hotline investigation.² The appropriate appointing authority has the legal ability and responsibility to take disciplinary action against the employees under its supervision—in this case, neither the Audit Committee nor Council have that power.³ (emphasis added.)

The Auditor mentions two fraud hotline reports that involved Mayoral department employees. Under applicable law, no one other than the appointing authority and law enforcement are entitled to the confidential fraud hotline report.⁴

2. Detailed Legal Analysis on Awarding Future Contracts: The Auditor asserts that “a complete legal analysis explaining the basis for its conclusions would assist decisionmakers to evaluate the most important legal implications related to the violations that we found” and that it should be provided by independent legal counsel. This Office did provide legal advice on this matter in both confidential and public memoranda. We could not release our confidential memorandum to the Audit Committee or Council for the same reason that the Auditor could not release its confidential report – because it contained detailed information that could be used to identify the individuals involved. Also, it is unclear why there is such a need for additional funds to be expended on outside counsel when the Auditor has already completed its work and City management has already agreed to implement all of the recommendations requested by the Auditor.
3. Access to Confidential Attorney-Client Privileged and Attorney Work Product Documents: The Auditor’s request pertains to documents that are confidential under the attorney-client and the attorney work product privileges. These privileges are defined by state law, case law, and the California Rules of Professional Conduct. In the particular instance raised by the Auditor Memo, the Auditor wished to deviate from its standard practice of issuing a separate confidential report that would include attorney-client privileged information and attorney work product, and instead intended to publicly issue a report including this privileged information. After concluding that the Auditor was not entitled to review such confidential information for purposes of including it in a publicly issued report, our Office contacted the State Bar of California for ethical guidance, and the State Bar agreed that our concerns were valid. It is important to note attorneys are not independently authorized to waive most of these privileges. An attorney who fails to comply with ethical standards can lose his or her license to practice law. Since this issue has been resolved, it is unclear for what purpose outside counsel would be retained.

² For example, the whistleblower statute allows the identity of the whistleblower to be disclosed to a law enforcement agency that is conducting a criminal investigation. Cal. Gov’t Code § 53087.6(e)(1). If this were not the case, individuals identified through a fraud hotline complaint as possibly committing criminal activity would be more shielded from the consequences of their own conduct due to the possible lack of identified witnesses.

³ An additional issue, which our Office noted publicly at an Audit Committee hearing, is that the fraud hotline complaints alleged misconduct by one or more vendors that could potentially lead to debarment proceedings. Because the Council is the ultimate fact-finder for certain types of debarments, it would create a due process concern for the Council to review the detailed facts of the investigations outside the debarment process.

⁴ It is not within the scope of this memorandum to address whether outside entities may be entitled to receive information in a confidential fraud hotline report.

4. Request for Legal Analysis on Whether a City Department's Practice with Extending Credit Violates Charter section 93: The Auditor inaccurately states that this Office declined to answer whether the practice of extending credit was unlawful. This Office did provide preliminary legal advice to the Auditor to help it accurately frame its audit report, and in fact the Auditor did revise its report consistent with our advice. After the issuance of our preliminary legal advice, the Auditor never asked this Office to provide further legal advice and never suggested that an outside legal opinion was necessary. Furthermore, the Auditor's report is complete and City management has agreed to implement all of the Auditor's recommendations. As such, it is unclear for what purpose outside counsel would be retained.

CONCLUSION

This Office is and always has stood ready, willing, and able to provide information, documents, and objective legal advice on any issues on which the Auditor requests advice. At the same time, this Office is required to follow all applicable laws and to execute its ethical duties consistent with the Rules of Professional Conduct. In all instances described by the Auditor, this Office provided appropriate and thorough legal advice, the underlying matters have been resolved, and there is no need or justification for spending additional funds to retain outside counsel.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Jim McNeill

Jim McNeill

Assistant City Attorney

JM:soc

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cc: Honorable Mayor Kevin Faulconer
Honorable Audit Committee Members
Aimee Faucett, Chief of Staff, Mayor's Office
Kris Michell, Chief Operating Officer
Andrea Tevlin, Independent Budget Analyst