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CITY OF SAN DIEGO

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REPORT TO THE AUDIT COMMITTEE

LEGAL ANALYSIS OF ALLEGED SCOPE LIMITATION RELATED TO THE PUBLIC LIABILITY AUDIT

INTRODUCTION

At the December 11, 2019 meeting of the Audit Committee (Committee), the City Auditor's Office (Auditor) intends to inform the Committee that there is a scope limitation related to the Auditor's Public Liability Audit because the Auditor claims not to have access to confidential documents created by the City Attorney's Office (Office). This Report is prepared to assist the Committee in understanding the ethical duties and obligations that are implicated by the Auditor's request for access to the Office's confidential attorney work product and attorney-client privileged communications when the contents of such documents could be included in a public audit report.

The Auditor's Public Liability Audit was originally suggested to the Auditor by the City Attorney, and this Office fully supports and applauds the Auditor's efforts in reviewing the City's public liability and recommending ways to mitigate such liability in various areas. However, we have serious concerns with the Auditor's request for access to confidential materials, concerns that were raised previously with the Auditor and which we raise again here to the Audit Committee:

The Auditor's request implicates State law and Rules of Professional Conduct. As our Office confirmed with the California State Bar Ethics Hotline, an attorney who granted the Auditor access to confidential materials would likely be in violation of State law and the Rules of Professional Conduct. Such a violation could result in those attorneys being sanctioned by the California State Bar, or ultimately jeopardizing their livelihood by losing their license and ability to practice law.

The Auditor's request creates unnecessary risk for the City and its taxpayers. Once confidentiality has been willingly breached for one party, such as the Auditor, the City loses that protection against requests for confidential information from additional parties, including those whose intentions are averse to the City's. In proposing the Public Liability Audit to the Auditor, the City Attorney hoped such an audit would reduce, not enlarge, the City's liability and exposure to lawsuits.

The Auditor's request for confidential information is not needed to perform the audit. The confidential information the Auditor seeks from the City Attorney's Office is based on source documents created and retained by the Department of Transportation and Storm Water (TSW). Those primary documents have been available to the Auditor throughout the course of the audit. The decision to instead seek secondary, confidential documents is apparently based on the volume

and condition of the TSW documents and the amount of time the Auditor would need to review them. This is not a scope limitation. This Office is not responsible for the volume and condition of TSW documents or for the Auditor's decision not to allocate resources for their examination.

BACKGROUND

On April 3, 2019, the Auditor initiated an audit on the City's Public Liability Mitigation and met with City staff as well as this Office to discuss the proposed audit as part of a regularly scheduled entrance conference initiated for each audit. As part of the proposed audit, the Auditor ultimately wanted to find ways that the City could take to mitigate the City's liability, particularly as it related to trip and fall and employee vehicle accident matters. Shortly thereafter, on May 9, 2019, Auditor staff met with attorneys from this Office requesting access to confidential attorney work product and attorney-client privileged communication because Auditor staff was encountering difficulty in attaining this information from public documents kept and maintained by City staff. Over the course of several months, attorneys from this Office met with, brainstormed, and discussed possible ways that the Auditor could have access to at least portions of such records or the information contained in those documents without compromising the confidentiality of such documents and information.

From the very beginning, this Office's concern has been to support the Auditor in its efforts on this important audit, while at the same time, recognizing our need to comply with the strict ethical obligations required by attorneys under state law and by the California State Bar to uphold the duty of confidentiality, protect the confidentiality of attorney-client privileged communication, and to preserve the confidentiality of attorney work product. In fact, the Office contacted the State Bar's Ethics Hotline to discuss this situation and was informed that these concerns are implicated given the risk that information from records that the Office created could find its way into a publicly issued audit report.

It is important to note that the Auditor has never conducted an audit where a public report was issued that relied on information contained in attorney-client privileged or attorney work product documents. To assist the Auditor by obtaining ideas on how to best move forward on this issue, the Office proactively contacted auditor offices in other cities. None of the auditor offices contacted had ever conducted an audit where a public report was issued that relied on information contained in attorney work product or attorney-client privileged documents. In fact, the typical practice in those other auditor offices, as well as with the Auditor, is to preserve the confidentiality of sensitive information by including any such information in a separate confidential audit report.

We disagree with the Auditor's assessment that there is a scope limitation because there are alternatives that would allow the Auditor access to the requested information that would not implicate State law and Rules of Professional Conduct or create unnecessary risk for the City and its taxpayers. This Report will discuss all of these issues in further detail below.

DISCUSSION

I. WHILE THE AUDITOR HAS AUTHORITY TO ACCESS CITY RECORDS, ATTORNEYS MUST NEVERTHELESS COMPLY WITH STATE LAW AND THE CALIFORNIA RULES OF PROFESSIONAL CONDUCT AS IT RELATES TO ACCESS TO SUCH RECORDS CREATED OR MAINTAINED BY THE OFFICE

San Diego Charter (Charter) section 39.2 states that "[t]he City Auditor shall have access to, and authority to examine any and all records, documents, systems and files of the City and/or other property of any City department, office or agency, whether created by the Charter or otherwise." At the same time, that authority is not without limits.

As a charter city, San Diego enjoys autonomous rule over municipal affairs pursuant to article XI, section 5 of the California Constitution, subject only to conflicting provisions in the federal and state constitutions and to preemptive state law. *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, 21 Cal. 4th 352, 363 (1999). When a court is asked to resolve a claimed conflict between a state statute and the law of a charter city, it must first satisfy itself that an actual conflict exists. *California Fed. Savings & Loan Assn. v. City of Los Angeles*, 54 Cal. 3d 1, 16 (1991). There is a conflict between a state law and a local law if the local law duplicates or contradicts the state law, or if the local law enters into an area fully occupied by general law, either expressly or by implication. *City of Watsonville v. State Dept. of Health Services*, 133 Cal. App. 4th 875, 883 (2005).

The California Supreme Court has stated that the "[r]egulation of attorneys and control over the practice of law have always been considered matters of statewide concern." *Baron v. City of Los Angeles*, 2 Cal. 3d 535, 540 (1970). Indeed, the California State Bar was created by the State Bar Act of 1927, codified under California Business & Professions Code sections 6000-6238. The California Supreme Court determined that "[t]he State Bar Act is a comprehensive scheme for the regulation of all aspects of law practice, which includes all professional services performed by attorneys for their clients." *Baron*, 2 Cal. 3d at 541. As such, the City may not enact a law or interpret law in such a way that it conflicts with the ethical obligations promulgated pursuant to the State Bar Act, which include the California Rules of Professional Conduct (CRPC) and California case law interpreting these provisions. *See Id.* at 542 (attorneys must conform to the professional standards in whatever capacity they may be acting in a particular matter); *See also State Comp. Ins. Fund v. WPS, Inc.*, 70 Cal. App.4th 644, 656 (1999).

There is a real risk that attorney work product and attorney-client privileged documents accessed and relied upon by the Auditor could be required to be disclosed pursuant to a Public Records Act (PRA) request. In particular, California Government Code section 36525 states with limited exception that "[a]ll books, papers, records, and correspondence of the city auditor pertaining to his or her work are public records" subject to the Public Records Act. While the City would certainly assert the attorney-client privilege and attorney work product privilege in response to any request for public disclosure of such documents, the City risks that a court would determine that these privileges were waived by information in such documents being put into a public audit report.

A. Attorneys in the Office Risk Violating the Duty of Confidentiality Owed to the City by Providing Access to the Office's Confidential Records that May Appear in a Public Audit Report

If confidential or otherwise privileged information is disclosed to the public, the attorneys in the Office risk violating their duty of confidentiality owed to their client. The Office's client is the City of San Diego as a municipal corporation acting through the Mayor and the City Council. 2010 City Att'y MOL 392 (2010-21; Oct. 5, 2010). The public policy rationale for the duty of confidentiality is to ensure that the trust that is the hallmark of the attorney-client relationship is preserved so that the client is encouraged to seek legal assistance and communicate fully and frankly with the lawyer even on embarrassing or detrimental subjects. California Rules of Professional Conduct, Rule 1.6, comment 1.

An attorney's duty of confidentiality is codified both in state law under the State Bar Act as well as the ethical regulations that attorneys are required to comply with known as California Rules of Professional Conduct (CRPC).[1] The duty of confidentiality applies to all lawyers, including government attorneys. *Application of Atchley*, 48 Cal. 2d 408, 418 (1957). Under California Business and Professions Code section 6068(e)(1), it is the duty of an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of his or her client." This duty to protect client secrets is not limited to information communicated in confidence by the client, but applies to all information relating to client representation, whatever its source. Cal. State Bar Formal Opinion No. 2016-195.

Under Rule of Professional Conduct 1.6 entitled "Confidential Information of a Client," a lawyer is prohibited from revealing information protected from disclosure by Business and Professions Code section 6068(e)(1), unless the client gives informed consent or the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to an individual. This duty of confidentiality is so stringent that it survives the termination of the attorney-client relationship and even the client's death. *Wutchumna Water Co. v. Bailey*, 216 Cal. 564, 571 (1932); San Diego Bar Ass'n Opinion 1993-2. In fact, even when a lawyer is a whistleblower, an attorney cannot reveal attorney-client privileged or confidential information. 84 Op. Cal. Att'y. Gen. 71 (2001).

B. Attorneys Must Protect the Confidentiality of Attorney-Client Privileged Communication

An additional ethical obligation that is implicated with the Auditor's request for access to confidential documents of the Office is the attorney-client privilege, which protects against compelled disclosure of information that involves a confidential communication between clients and their lawyer(s). Cal. Evid. Code § 954. Like the duty of confidentiality, this privilege is fundamental to the proper functioning of the legal justice system. The United States Supreme Court has stated as follows:

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[1] The California Rules of Professional Conduct are the California Supreme Court's rules regulating attorney conduct. They have been "adopted by the Board of Trustees of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public, the courts and the legal profession; protect the integrity of the legal system; and promote the administration of justice and confidence in the legal profession. These rules together with any standards adopted by the Board of Trustees pursuant to these rules shall be binding upon all lawyers." CRPC Rule 1.0.

> Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

Furthermore, "[I]t is considered more important to keep certain information confidential than it is to require disclosure of all the information relevant to the issues in a pending proceeding." Cal. Evid. Code § 910, Law Rev. Comm'n Comment. The attorney-client privilege applies to government entities such as the City because the City must consult with attorneys for legal advice. *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 370-71. The attorney-client privilege exists so long as the City as the holder of the privilege, exists and it survives the termination of liability or threat of liability. Cal. Evid. Code § 954, Law Rev. Comm'n Comment; *Los Angeles County Bd. of Supervisors v. Sup. Ct.*, 2 Cal. 5th 282, 305 (2016).

An attorney has an affirmative duty to claim the privilege if present when a privileged communication is sought to be disclosed. Cal. Evid. Code § 955. The privilege applies in both litigation and nonlitigation contexts as well as regulatory and administrative matters. *Roberts*, 5 Cal. 4th at 371; *So. Cal. Gas. Co. v. Public Util. Comm'n*, 50 Cal. 3d 31, 38-39 (1990).

Information communicated between an attorney and client may be privileged even if the information itself is not. For example, the fact that an attorney sends his or her client a police report, newspaper clipping, law review article or other public document is privileged because "discovery of the transmission of specific public documents might very will reveal the transmitter's intended strategy." *Mitchell v. Sup. Court*, 37 Cal. 3d 591, 600 (1984).

If privileged documents are voluntarily disclosed or if a significant part of the privileged communication is disclosed, the attorney-client privilege is waived. *Id.* at 601-02; *In re Pacific Pictures Corp*., 679 F.3d 1121, 1130 (9th Cir. 2012) (Attorney's voluntary compliance with the government's subpoena without asserting the privilege or attempting to redact any of the confidential information waived the attorney-client privilege with respect to the documents).

Although the Auditor may assert that it is merely seeking basic facts related to various litigation matters, the fact that certain information may be publicly available does not necessarily relieve the Office of its duty to safeguard attorney-client privileged communication. The California State Bar has opined that:

> A lawyer may not disclose his client's secrets, which include not only confidential information communicated between the client and lawyer, but also publicly available information that the lawyer obtained during the professional relationship which the client has requested to be kept secret or the disclosure of which is likely to be embarrassing or detrimental to the client.

Cal. State Bar Formal Opinion No. 2016-195.

C. The Provision of Information in Attorney-Work Product Documents to Be Included in a Public Report Could Waive the Confidentiality of Such Documents

Lastly, the attorney work product doctrine, which is separate and distinct from the attorney-client privilege, is also implicated by the Auditor's request for access to confidential documents. The purpose of the attorney work product doctrine is to protect any writings containing an attorney's brain work such as mental impressions, opinions, conclusions and theories such as an attorney's written notes evaluating a client's demeanor or credibility. Cal. Civ. Proc. Code § 2018.030.

Unlike the attorney-client privilege and the duty of confidentiality, the holder of the attorney work product protection is the attorney. *Fellows v. Sup. Ct.*, 108 Cal. App. 3d 55, 63 (1980). Thus, if the Office were to consent to disclosure of attorney work product documents to the Auditor and the information from these documents were included in a public audit report, the protection could be deemed waived.

II. ALTERNATIVES TO DECLARING A SCOPE LIMITATION

Pursuant to Charter section 39.2, the Auditor is required to follow Government Auditing Standards, which are otherwise known as Generally Accepted Government Auditing Standards (GAGAS). GAGAS section 9.12 states as follows:

> Auditors should describe the scope of the work performed and any limitations, including issues that would be relevant to likely users, so that report users can reasonably interpret the findings, conclusions, and recommendations in the report without being misled. Auditors should also report any significant constraints imposed on the audit approach by information limitations or scope impairments, including denials of, or excessive delays in, access to certain records or individuals.

In the current situation, the Auditor is seeking access to confidential records of the Office because they more readily provide the information sought by the Auditor, which is the result of careful analysis by our attorneys of records from other City departments to best be able to defend the City in litigation. Given that the Office's litigators arrive at conclusions based on their review of records from other City departments, the Auditor should be able to do likewise as these same records are available from these same City departments. Such an approach would allow Auditor staff to make their own conclusions without relying upon attorney work product or attorney-client privileged documents and information.

GAGAS further states that government information is not to be used "in a manner contrary to law or detrimental to the legitimate interests of the audited entity or the audit organization. This concept includes the proper handling of sensitive or classified information or resources." GAGAS § 3.12. GAGAS also recognizes that the public's right of transparency of government information has to be balanced with the proper use of that information and that exercising discretion in using such information is an important part in achieving this balance. GAGAS § 3.13. In fact, "[i]mproperly disclosing any such information to third parties is not an acceptable practice." *Id.*

The use of confidential attorney-client privileged documents and attorney work product unquestionably contain sensitive information. It would be detrimental to the City if confidential attorney work product and attorney-client privileged communication are placed at risk of disclosure to the public. By potentially exposing the Office's strategy in handling different types of litigation, it could impair the City's ability to defend itself and could benefit private plaintiff attorneys seeking to sue the City. Furthermore, the public disclosure of such confidential information would create a potential chilling effect on the willingness of City staff to be as forthright as possible about all the circumstances involved in a particular matter, which would further hinder the Office's ability to defend the City in future litigation.

It is also inappropriate to declare a scope limitation because the portions of our records and information sought by the Auditor would have been made available to them if the Auditor were willing to only include any information gleaned from such records in a confidential audit report consistent with prior practice as it relates to confidential attorney-client privileged and attorney work product documents and information.

CONCLUSION

As evidenced by the numerous meetings and discussions that have occurred to date, this Office fully supports the Auditor's efforts to mitigate liability. However, the Auditor's authority to access records is not without limits; it cannot compel a disclosure that would violate State law and put the law license of the attorneys in this Office in jeopardy. There are options available to the Auditor that would produce the desired information without crossing ethical lines or putting the City at unnecessary risk. It is not appropriate to declare a scope limitation.

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By *__/s/ Mara W. Elliott__*
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