

Meeting Date: 1/18/2022
Closed Session
Agenda Item No.: 3(22-049)

Derek P. Cole
dcole@colehuger.com

REPLY TO:
☒ ROSEVILLE ☐ ONTARIO

January 3, 2022

VIA E-MAIL AND U.S. MAIL

Sean Joyce
Interim City Manager
City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648
E-Mail: sean.joyce@surfcity-hb.org

Craig A. Steele, Esq.
Richard Watson Gershon
350 South Grand Avenue
37th Floor
Los Angeles, CA 90071
E-Mail: csteele@rwglaw.com

**Re: Demand for Termination of All Work on Purported Audit of City Attorney
Michael Gates**

Dear Messrs. Joyce and Steele:

This office represents Michael Gates, the elected Huntington Beach City Attorney. We write because we understand, based on conversations with former City Manager Oliver Chi, a written report may be forthcoming documenting an "audit" Mr. Steele is performing concerning a recent lawsuit against the City Attorney's Office. As to the subjects of this audit, we are advised that the City Council has been meeting in closed session and engaging in other communications with Mr. Steele in violation of the Ralph M. Brown Act and the City Charter. By this letter, we request that all work on the audit immediately cease and that all other necessary actions be taken to discontinue the Charter and Brown Act violations. Issuance of any report concerning the audit would only serve to perpetuate the violations that have already occurred. Overall, we ask that all Charter and legal violations immediately end, so no further harm is done to the City's interests.

The meetings and communications to which we refer involve an alleged audit of certain matters Mr. Gates has handled or has been involved in as City Attorney. We understand Mr. Steele and his law firm may be undertaking, among other things, a review of Mr. Gates' actions related to a recent age-discrimination lawsuit involving the City Attorney's Office. We also understand Mr. Steele may have given advice related to the recent "H item" the City Council considered during its December 21, 2021 meeting, along with communications by Mr. Gates and this office related to that item (Agenda Item 2021-1088). As we explain, any communications about these matters between Mr. Steele and the City Council (or any individual councilmembers or City employee) is unlawful, and must immediately be discontinued.

As a starting point, under the City Charter, Mr. Steele and his law firm cannot enter into any agreement for legal services that is not subject to City Attorney direction or supervision. I have thoroughly addressed the City Charter provisions concerning contracting for legal services

Sean Joyce
Craig A. Steele, Esq.
January 3, 2022
Page 2

in a December 21, 2021 letter to the City Council concerning the recent proposed “H item.” I incorporate that discussion by reference here. (See **Attachment A.**) While audits of actions taken by the City Attorney’s Office may be permissible under limited and appropriate circumstances, they still must be *initiated* through the City Attorney’s Office, which did not happen here. The Council may not simply bypass the City Attorney’s Office and contract directly with outside legal counsel, as we understand the Council has done with Mr. Steele and his firm.

We also understand that Mr. Steele’s services may have been retained because of a perceived conflict of interest Mr. Gates was believed to have with the subjects of the audit. An alleged conflict of interest, however, furnishes no basis from altogether excluding the City Attorney’s Office from its supervisory role over City legal services. To the extent Mr. Gates himself had any actual or potential conflict of interest, an ethical wall could have been created between him and the other office attorneys. This is a common practice in in-house municipal legal offices. (See, C.E.B., California Municipal Law Handbook, § 2.187 [2021 ed.].) And, even when retention of outside counsel is still warranted after an ethical wall is created, at least one attorney in the City Attorney’s Office—such as the Assistant City Attorney—should be responsible for reviewing outside counsel’s agreement and ensuring such counsel’s services are performed timely and competently.

Yet here, with the exception of the age-discrimination litigation—in which Mr. Gates was a defendant—we are unaware of any actual or potential conflict of interest that could justify Mr. Gates’ wholesale exclusion. It appears that members of the City Council believe that a conflict of interest exists whenever they disagree with an opinion of or action Mr. Gates takes. But conflicts of interest, as legally understood, are defined by the California Rules of Professional Conduct. In the context of municipal attorney-client relationships, Rules 1.7, 1.9, 1.11, and 1.13 are the provisions that principally govern. We are aware of no basis under these rules by which Mr. Gates could be excluded from any discussions concerning matters unrelated to the age-discrimination lawsuit.

We also note that discussions concerning any and all subjects encompassed by the audit have improperly occurred in violation of the Brown Act. We understand that the audit subjects have been discussed in closed session at City Council meetings held on July 20, 2021, November 2, 2021, December 7, 2021, and December 21, 2021, under the exception for exposure to anticipated litigation. A closed-session discussion is, however, appropriate under this exception only when:

“A point has been reached where, in the opinion of the legislative body of the local agency on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the local agency.” (Gov. Code, § 54956.9(d)(2), emphasis added.)

Under this Brown Act provision, a City Council cannot meet in closed session to discuss anticipated litigation without advice from its City Attorney that “existing facts and circumstances”¹ justify the discussion. To this end, Mr. Gates has never advised the Council that potential litigation could be anticipated for any subjects of the audit. Nor is he aware of any basis to conclude that any one of the statutorily defined facts or circumstances exist. There accordingly has never been any basis for the Council to convene in closed session to discuss any subjects the audit encompasses.

In short, the City Council has no basis to be considering the purported audit, and Mr. Steele and his office have no basis to be performing the audit. As we explained in our December 21, 2021 letter, municipal contracting must carefully follow the requirements of a city’s charter and ordinances. Here, legal advice has been given entirely outside the City Attorney’s direction or supervision, by legal counsel who has not properly established an attorney-client relationship with the City Council, and who is allowing closed-session discussions to occur in plain violation of the Brown Act. These actions flout basic and well understood municipal-law requirements.

Because the purported audit was never properly initiated under the City Charter, and because there has never been a lawful basis for the Council and Mr. Steele to discuss the audit subjects in any event, Mr. Gates makes the following demands:

1. All work on the audit be immediately stopped, and no further work on the audit be undertaken, including the preparation of or finalization of any written report;
2. No further closed session meetings, under the anticipated litigation exception or otherwise, be placed on any City Council agenda concerning the subjects of the audit;
3. Mr. Steele and members of his law firm refrain from having any discussion with any councilmember or group of councilmembers, in writing or orally, about the subjects related to the audit; and
4. All records related to the audit be provided to Mr. Gates as requested in the CPRA request attached as **Attachment B** to this letter. We note that, because Mr. Steele and his law firm did not properly enter into any agreement for this audit under the City Charter, they cannot lawfully claim attorney-client privilege over any communications with the City Council or any individual councilmembers concerning the subjects of the audit.

¹ The Brown Act identifies five situations in which such facts and circumstances exist.
(See, Gov. Code, § 54956.9(e)(1)-(5).)

Sean Joyce
Craig A. Steele, Esq.
January 3, 2022
Page 4

We will expect a prompt written confirmation that all the requested actions will be taken, such that further action on Mr. Gates's part will not be necessary. Should you have any questions in advance of providing that confirmation, please do not hesitate to contact me by telephone (direct line: 916.787.6520) or email (dcole@colehuber.com.)

Sincerely,



Derek P. Cole
COLE HUBER LLP

DPC/kgm
Attachments (A&B)

cc: Michael Gates, City Attorney
Mayor and Members of the City Council (via electronic delivery only to
city.council@surfcity-hb.org)
Robin Estanislau, City Clerk

ATTACHMENT A

Derek P. Cole
dcole@coleshuber.com

REPLY TO:
☒ ROSEVILLE ☐ ONTARIO

December 21, 2021

VIA ELECTRONIC DELIVERY
CITY.COUNCIL@SURFCITY-HB.ORG

Mayor Barbara Delgleize and
Members of the City Council
City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648

Re: Regular Meeting of the Huntington Beach City Council
December 21, 2021 Agenda, Item 21-1008
Comments of City Attorney Michael Gates

Dear Mayor Delgleize and Members of the City Council:

This Office represents Michael Gates, the elected Huntington Beach City Attorney, regarding Item 21-1008 on the City Council's December 21, 2021 meeting agenda. For reasons we explain within, we write to advise the Council that this proposed item would be unlawful if approved, and we demand that the Council refrain from taking the proposed action.

Agenda Item 21-1008 is a proposal by Mayor Delgleize, Mayor Pro Tem Posey, and Councilmember Kalmick. It calls for City staff to "engage in a process to facilitate City Council selection of an outside legal firm that would directly report to and support the City Council." If the item is approved, the Council would direct the City Manager to take the actions necessary to retain a law firm to provide legal advice and representation outside the City Attorney's supervision. Under both the City Charter and California law, the retention of any outside law firm for these purposes is beyond the Council's authority, and would be unlawful.

Before outlining the reasons why the Council must refrain from taking the proposed action, we note we are well positioned to opine on Item 21-1008. Our law firm specializes in representation of municipal clients. Like other private law firms, we serve as contract city attorney to a number of cities and as special or litigation counsel to several cities. Because of our representation of municipal clients, we are very familiar with the unique nature of the attorney-client relationship in municipal settings. In particular, we understand that any contract not made in conformance with a city charter or applicable law is void. (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 171.) Like all municipal law firms, we are scrupulous about respecting a city's contracting requirements and procedures because we know that our failure to abide by these could render our agreements unenforceable. (*Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104, 109.)

ADVANCING YOUR AGENDA

00082827.3

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Fax: 916.780.9050

Southern California:
3401 Centrelake Dr., Suite 670
Ontario, CA 91761
Phone: 909.230.4209
Fax: 909.937.2034

Consistent with these limitations on municipal contracting, it is our opinion that no law firm could lawfully enter into any agreement with the City Council under the terms and conditions Item 21-1008 proposes. To be sure, there is no dispute the City Attorney may retain outside legal counsel for a variety of purposes, as the City Attorney has historically done. Cities of all sizes regularly retain attorneys to perform specialized services in areas such as litigation, land use, environmental law, public contracting, and employment law. Even in cities with large in-house city-attorney offices, the complexities and demands of these and other unique areas of law often require the retention of specialists that can only be found in private law firms.

But while state law affirms the practice of retaining outside legal counsel when circumstances dictate (Gov. Code, § 37103), courts have made clear that such counsel may never be retained to replace or duplicate the work performed by in-house city attorneys. (*Rafael v. Boyle* (1916) 31 Cal.App. 623, 626; *Denman v. Webster* (1903) 139 Cal. 452, 456.) California law makes plain that when a city charter creates and enumerates the powers of city offices, a city council may not contract with private parties to perform those officers' duties. (*Hubbard v. City of San Diego* (1976) 55 Cal.App.3d 380, 388.)

Here, the powers of your City Attorney are clearly enumerated in Section 309 of your Charter. This section vests the exclusive power in the City Attorney to do the following:

“(a) Represent and advise the City Council and all City officers in all matters of law pertaining to their offices.

(b) Prosecute on behalf of the people any or all criminal cases arising from violation of the provisions of this Charter or of City ordinances and such state misdemeanors as the City has the power to prosecute, unless otherwise provided by the City Council.

(c) Represent and appear for the City in any or all actions or proceedings in which the City is concerned or is a party, and represent and appear for any City officer or employee, or former City officer or employee, in any or all civil actions or proceedings in which such officer or employee is concerned or is a party for any act arising out of their employment or by reason of their official capacity.

(d) Attend all regular meetings of the City Council, unless excused, and give their advice or opinion orally or in writing whenever requested to do so by the City Council or by any of the boards or officers of the City.

(e) Approve in writing the form of all contracts made by and all bonds and insurance given to the City.

(f) Prepare any and all proposed ordinances and City Council resolutions and amendments thereto.” (Emphasis added.)

Charter Section 309 is unambiguous in assigning the responsibility for all essential municipal legal services to your City Attorney.¹ Critically, the section uses mandatory language—“The City Attorney shall”—in describing the duties to “represent and advise” the Council in “all” matters; prosecute “any and all” code-enforcement cases; “represent and appear” in all “actions or proceedings;” attend “all” regular Council meetings; approve the form of “all” contracts; and prepare “any and all” ordinances and resolutions. Also of note, Section 309 takes care to grant the City Attorney all necessary implied powers for carrying out these responsibilities. Subsection (h) of the section specifies the City Attorney must “[p]erform such legal functions and duties incident to the execution of the foregoing powers as may be necessary.” In short, the Charter vests authority over all legal services—express and implied—in your City Attorney.

Because of its comprehensive language, Section 309’s command is clear: the City Attorney must be responsible for all legal services provided to the City. Legal services can, of course, be performed by subordinates in the City Attorney’s office or, when appropriate, by outside counsel. But to carry out his or her duties under the City Charter, the City Attorney must be responsible for supervising subordinates or outside counsel in whatever tasks they are assigned. Necessarily, the City Attorney cannot execute his or her ultimate responsibility over “all” City legal matters if he or she cannot supervise or direct other attorneys working on City matters.

We understand that the Councilmembers proposing Item 21-1008 believe Charter Section 304(b) provides authority to retain legal counsel independent of City Attorney supervision. But this is a clear misinterpretation of the subsection, which merely authorizes retention of outside legal counsel. In this regard, the subsection states:

“... The City Council shall have control of all legal business and proceedings and all property of the legal department, and may employ other attorneys to take charge of or may contract for any prosecution, litigation or other legal matter or business.”

The language the Councilmembers rely on, the second clause of this sentence, simply authorizes the City Council to retain outside attorneys for “prosecution,” “litigation,” or “other” specialized legal matters. This language recognizes that, as the ultimate organizational decision-maker for the City, the City Council may retain attorneys in private practice when necessary or convenient for City purposes. But this language cannot be read to supplant or usurp the City Attorney’s role in supervising or controlling any counsel the Council retains.

¹ Your Charter is consistent with general state law in this regard. As Government Code section 41801 provides, “[t]he city attorney shall advise the city officials in all legal matters pertaining to city business.” (Emphasis added.)

Municipal charters are subject to the same rules that California courts have developed for interpreting statutes. (*Oneto v. City of Fresno* (1982) 136 Cal.App.3d 460, 465; *Castaneda v. Holcomb* (1981) 114 Cal.App.3d 939, 942.) Charters are to be interpreted according to their plain meaning. (*Squire v. City and County of San Francisco* (1970) 12 Cal.App.3d 974, 980.) They must be read as a whole, such that all charter provisions are given effect, and none is nullified or rendered meaningless. (*Don't Cell Our Parks v. City of San Diego* (2018) 21 Cal.App.5th 338, 349.)

Under these rules of interpretation, Charter Sections 304 and 309 must be read together such that they are harmonized. Because Section 309 states that the City Attorney shall “represent and advise the City Council and all City officers in all matters,” and is responsible for all matters related to litigation, contracts, ordinances, resolutions, and the like, Section 309 must be read in conjunction with the Council’s authority under Section 304. Although Section 304 affirms the Council’s right to retain counsel, this right must be interpreted to only authorize the hiring of attorneys, who upon retention become subject to the City Attorney’s direction. Section 304 cannot be read to allow the Council to retain legal counsel who act independently of the City Attorney. Such an interpretation would nullify the plain language of Section 309, which vests in the City Attorney the power to supervise all City legal matters.

Put more simply, Section 304 does not allow the City Council to hire its own attorney to act entirely outside City Attorney supervision. The Council cannot create its own “shadow” city attorney simply because it disagrees with his advice or the acts he has taken. In interpreting municipal charters, courts ultimately look to the voters’ intent. (*International Federation of Professional & Technical Engineers, AFL-CIO v. City of San Francisco* (1999) 76 Cal.App.4th 213, 224.) Surely City voters did not intend for their city’s legal services to be provided by dual layers of legal counsel, each serving the same City Council, but each acting separately—and no doubt in conflict—with each other. It is inconceivable City voters intended to sow the seeds of such organizational disunity in approving their City Charter.

The Charter has, moreover, already received relevant—and dispositive—court interpretation. In a 1981 decision, the Fourth District Court of Appeals, in an unpublished opinion, considered the appeal of a former deputy city attorney whose employment had been terminated. (*O’Connor v. Hutton* (4th Dist. Ct. App. 1981) 4 Civ. No. 24536.) The then City Attorney had terminated the appellant’s employment for insubordination after the deputy had met privately with a city council member and refused to disclose his communication. In upholding the appellant’s dismissal, the court explained:

“In exercising client control over the City’s legal business, the city council has power to hire other attorneys, but this power is limited by the city attorney’s power over City legal affairs and the City’s legal department under City Charter section 309 and City personnel rule 4-4. ... Deputy city attorneys hired by the City work under the city attorney’s supervision and have no independent authority to represent and advise the City; they may act only through the city attorney.” (Op. at p. 5, emphasis added.)

This appellate decision confirms that the City Council has no authority to divest or abridge the City Attorney's authority over City legal services. Under Charter Section 309, the City Attorney must always take charge of the City "legal department." This requires that all attorneys who provide legal services to the City—whether as subordinate attorneys in the City Attorney Office or outside counsel—do so under his or her supervision.

In sum, for the reasons described above, we demand that the City Council refrain from approving or otherwise acting on Item 21-1008. The retention of an outside law firm not subject to City Attorney direction would manifestly violate Charter Section 309. We trust that the Council will recognize the error in proceeding as proposed when it considers the proposed item. However, should the Council proceed as proposed, City Attorney Gates advises he will be required to seek immediate judicial relief to protect the integrity of his Office. We hope the Council will act reasonably and responsibly so that litigation is unnecessary.

Sincerely,



Derek P. Cole
COLE HUBER LLP

ATTACHMENT B

**REQUEST FOR RECORDS
UNDER THE CALIFORNIA PUBLIC RECORDS ACT**

Pursuant to the California Public Records Act, Cole Huber LLP, on behalf of City Attorney Michael Gates, requests to receive copies of all documents in the City of Huntington Beach's and Craig Steele/Richards Watson Gershon's possession regarding the following categories of records:

1. A copy of any legal services agreement (or amendment or addendum to any previous agreement) between the City of Huntington Beach ("City") and the law firm of Richards Watson Gerson ("Law Firm") related to any audit of the legal services performed by City Attorney Michael Gates or the City Attorney's Office ("Audit Services").
2. Copies of all billing records, invoices, and other financial records associated with any payment to Law Firm for Audit Services.
3. Copies of all correspondence, writings, and memoranda provided by Law Firm, or any member of Law Firm, to the entire City Council related to the Audit Services.
4. Copies of all correspondence, writings, and memoranda provided by Law Firm, or any member of Law Firm, to any employee of the City, including but not limited to former City Manager Oliver Chi, related to the Audit Services.
5. Any correspondence—including emails (on city or personal accounts) and text messages—regarding the Audit Services between Law Firm, or any member of Law Firm, and the following members of the City Council:
 - A. Mayor Delgleize
 - B. Mayor Pro Tem Posey
 - C. Councilmember Carr
 - D. Councilmember Peterson
 - E. Councilmember Kalmick
 - F. Councilmember Moser
 - G. Councilmember Bolton
6. Any correspondence—including emails (on city or personal accounts) and text messages—regarding the Audit Services between any member of the City Council and former City Manager Oliver Chi.

Please contact this office promptly to confirm your receipt of this request. Please also contact this office to make arrangements for inspection or delivery of the above documents in accordance with any public records policy the City has adopted. Our office is prepared to promptly make payments for any duplication fees established per City policy.