

CITY OF OAKLAND



ONE FRANK OGAWA PLAZA • 6TH FLOOR • OAKLAND, CALIFORNIA 94612

Office of the City Attorney
John A. Russo
City Attorney

January 21, 2011

(510) 238-3814
FAX: (510) 238-6500
TDD: (510) 839-6451

**Re: Role of City Attorney as Legal Counsel for the Municipal Corporation
which Acts Through Its Mayor and Other City Officers and Officials**

Dear Mayor Quan:

Last week, articles in the *San Francisco Chronicle* and the *Oakland Tribune* reported that Dan Siegel, a private attorney, is volunteering as your legal consultant to provide advice on, among other things, the City budget, the medical cannabis ordinance, and the authority of the City Attorney to file gang injunctions without City Council authorization. These articles also reported that attorney Siegel will advise the Mayor on police issues and give the Police Chief direct advice.

We are mindful that news reports reach a broad audience and that the public may give these reports credence. Therefore, to avoid ambiguity and confusion, we are writing to publicly apprise you of the role of the City Attorney in the City of Oakland under the Oakland City Charter.

News Articles from the *Oakland Tribune* and the *San Francisco Chronicle*

The January 13, 2011 *Oakland Tribune* includes the following:

- Siegel said his actual conversations with the mayor are private under the attorney-client privilege, but that he expects to be asked about a wide range of current hot topics.
- “The budget’s obviously hot right now, and we have lots of issues involving (the Oakland Police Department),” Siegel said. “There’s also a marijuana ordinance in front of city council. Those are examples of things I would plan on discussing with her.”

- "If there is a question about what is the authority of the city attorney to bring these (gang injunction) cases without the authorization of city council, that would be a legal opinion, and my opinion would be given to the mayor confidentially," Siegel said.

The Tribune's January 13th article also quoted your spokeswoman Sue Piper as follows:

- "She's got a lot of legal issues she relies on (Siegel) for as a legal consultant . . . He's there to give her information on what legal issues may be coming up so she can make up her mind."

The January 13, 2011 *San Francisco Chronicle* included the following:

- "I certainly think I would be advising Jean on policing issues and giving the police chief advice," said Siegel, a friend of Quan's since 1968, when they were both at UC Berkeley.
- Quan's spokeswoman, Susan Piper, confirmed that Siegel would be joining Quan's administration, but was not available for further comment.

In addition, during briefings with this Office, you stated that you anticipate consulting other counsel, in addition to the City Attorney, on legal issues.

Informal Advisors/Consultants and Personal Attorneys Cannot Serve As Counsel to the Mayor in Her Official Capacity or as the Attorney for the Municipal Corporation

Prior Mayors have informally consulted with friends, family members and advisors, and you have expressed your interest in doing so as well. There is no problem with this. This Office does not fear having its analyses tested and reviewed – we are confident in the quality and objectivity of our opinions.

The singular and critical distinction between any such informal advisors – or so-called "kitchen cabinets" – and this Office is this: The City Attorney is the City's only attorney. As such, he/she is the only attorney empowered by the Charter to provide official advice and determinations and interpretations of the City Charter and other applicable laws on behalf of the municipal corporation as counsel to the Mayor and City departments and agencies.

Informal advisors who advise the Mayor on City legal issues such as the ones reported in the Tribune and Chronicle or who serve as personal attorneys for the Mayor in her private capacity:

- Do not and cannot serve as legal counsel to the Mayor in her official capacity;

- Cannot provide advice to the Police Chief, the Police Department or any other City agency or department as the City's legal counsel;
- Cannot be hired by the Mayor to serve as legal counsel;
- Cannot assert and maintain attorney-client privilege regarding any communications with the Police Chief, staff of the Police Department or any other Department head, the City Administrator or any staff under his/her jurisdiction;
- Cannot assert and maintain attorney-client privilege on behalf of the municipal corporation which acts through its constituent sub-entities and officials such as the Mayor, City Council and City departments and agencies.

The Mayor in her official capacity does not have the authority to act independently of the municipal corporation – you must comply with the City Charter and other applicable laws. You can act independently in your private capacity so long as you do not violate your fiduciary duties as a City officer, the City Charter or other applicable laws. Therefore, the Mayor cannot:

- Waive the attorney-client privilege which the municipal corporation holds regarding confidential and privileged City information, such as advice the City Attorney provides to you and the Council or oral or written information that you receive in closed session;
- Disclose information to third parties, such as informal advisors or personal attorneys, who have a conflict of interest with the municipal corporation if that information may compromise or be detrimental to the City's interests or expose the City to liability (Attorney Siegel has a conflict of interest with the municipal corporation given his ongoing representation of defendants in the City's gang injunction law suit by attorneys who work for his firm);
- Waive Attorney Siegel's conflict of interest;
- Hire Attorney Siegel or any other attorney to serve as legal counsel to the Mayor;

The City Charter is the Supreme Law of the City of Oakland

As adopted by the Oakland electorate, the City Charter is the supreme law regarding Oakland's municipal affairs. (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 170.) A charter city may not act in conflict with its charter. (*Id.* at p. 171.) "Any act that is violative of or not in compliance with the charter is void." (*Ibid.*)

City Attorney is the Sole Legal Counsel for the Municipal Corporation and the Mayor and the City's Other Constituent Officers and Officials and Departments

The City Charter establishes the Office of City Attorney as an independent elected Office and empowers the City Attorney to serve as sole counsel for the municipal corporation and for the Mayor and other officers, officials and departments that act on the municipal corporation's behalf.

City Charter section 401 establishes the Office of the City Attorney and enumerates the City Attorney's powers. Section 401(6) provides in relevant part:

Powers of the City Attorney. The City Attorney shall serve as counsel to the Mayor, City Council and each and every department of the City, except departments specifically enumerated by this Charter as an independent department of the City, in their official capacities pursuant to state law and the Charter, and as counsel, shall assert and maintain the attorney-client privilege pursuant to state law. (emphasis added.)

Any informal advisors or consultants have no authority to provide legal advice to the Oakland Police Department or any other City Department or agency, or to purport to give direction to such agencies or departments, on behalf of the Mayor. In no event can any informal advisor or consultant contact City departments or agencies on your behalf or on behalf of any other City officer (e.g. City Administrator) and provide legal advice or purport to give direction to employees or officers of the City on legal issues/matters.

Only the City Attorney may advise the City's departments and agencies. Accordingly, informal advisors do not have any authority to assert or maintain the attorney-client privilege with respect to communications they may have with any City department or agency or City official or officer because the City Attorney is counsel for all City departments and agencies. They also are constrained by the Rules of Professional Conduct. (See Rule 2-100 which defines the circumstances in which attorneys must obtain the City Attorney's consent before they contact City departments or agencies.)

Attorney Siegel Has a Conflict of Interest

The Rules of Professional Conduct of the California State Bar regulate the professional conduct of all attorneys who are licensed to practice in the State of California, including but not limited to their duty to address conflicts of interest. (Rule 1 - 100.) Attorney Siegel has a conflict of interest with the municipal corporation given his ongoing representation of defendants in the City's gang injunction law suit by attorneys working for his law firm and his adversarial relationship with the City. (Rule 3-310.)

The Mayor Has a Fiduciary Duty to the Municipal Corporation to Exercise Due Care to Protect the City's Interests and to Maintain Confidential and Privileged Information

There are significant risks associated with communications between you and Attorney Siegel due to his conflict of interest. As a City officer you have a fiduciary duty to the municipal corporation to maintain confidential and privileged City information and to exercise due care to protect the City's interests. Providing information to third parties, such as your informal advisors, that could expose the City to liability, would violate that duty and could be detrimental to and compromise the City's interests. Revealing evidence or other confidential information to third parties who are engaged in litigation against the City would also violate your fiduciary duty.

Mayor Quan, under the circumstances, it is necessary that you communicate immediately and in writing with all City of Oakland department heads to inform them that they may not discuss the City's legal issues with, nor reveal any confidential information to, Mr. Siegel or any other purported "legal advisor to the Mayor."

Violation of the City Charter is a crime. It is now incumbent upon you to uphold your oath to defend the Charter, and to acknowledge the independence and authority granted to this Office by the People of Oakland through their Charter.

Very truly yours,



JOHN A. RUSSO
City Attorney

CC: City Council President Larry Reid
City Administrator Dan Lindheim
City Auditor Courtney Ruby
City Councilmember Rebecca Kaplan
City Councilmember Jane Brunner
City Councilmember Patricia Kernighan
City Councilmember Nancy Nadel
City Councilmember Libby Schaff
City Councilmember Ignacio De La Fuente
City Councilmember Desley Brooks
Chief of Police Anthony Batts
Assistant Chief of Police Howard Jordan