

CITY OF OAKLAND
Office of the City Attorney
Legal Opinion

To: Deborah Edgerly, City Administrator
Cc: Courtney Ruby, City Auditor
From: John Russo, City Attorney
Date: June 22, 2007
Re: City Auditor's Right to Examine City Records

I. QUESTION

What City records is the City Auditor entitled to review?

II. BRIEF ANSWER

The City Auditor's Office is entitled to examine any City record that she determines, in her reasonable discretion, to be necessary or appropriate for her to exercise her duty and power to conduct surveys, reviews, and audits that is in the best public interest as defined by the Charter.

III. BACKGROUND

The City Auditor's Office is conducting a survey, review or audit of the City's payroll system. As a part of this action, she wishes to examine personnel records. You have asked whether the City Auditor's Office has the authority to examine personnel records.

IV. ANALYSIS

To answer the question, we must examine City Charter. Section 403 of the Charter sets forth the City Auditor's powers.

When is the City Auditor Entitled to Conduct A Survey Review or Audit?

The City Charter defines the powers and duties of the City Auditor and includes the express power to "conduct surveys, reviews, and audits as the Auditor deems to be in the best public interest"

Section 403. City Auditor. . . . The City Auditor shall have the power and it shall be his or her duty to audit the books, accounts, money and securities of all departments and agencies of the City. . . . The City Auditor shall conduct surveys, reviews, and audits as the Auditor deems to be in the best public interest For these purposes the public interest shall include, but not be limited to:

(1) Reviewing and appraising the soundness, adequacy and application of accounting, functional, and operating controls and reliability and timeliness of accounting and other data generated within the organization.

(2) Evaluating the city's internal controls to ensure that the City's assets and resources are reasonably safeguarded from fraud, waste, and mismanagement.

(3) Ascertaining compliance with Council's resolutions and policies and the Mayor's Administrative Instructions and Directives, as well as applicable State and Federal laws and regulations.

Section 403 gives the City Auditor the power and duty to examine the "books, accounts, money and securities" in the context of audit. But while "books, accounts, money and securities" may seem to imply inquiries only into financial documents, the Charter goes further.

The Charter also gives the City Auditor the responsibility to "conduct surveys, reviews, and audits as the Auditor deems to be in the best public interest" and then goes on to give examples of what the "public interest" is. The City Auditor's surveys, reviews, and audits may concern the "soundness, [and] adequacy of . . . functional, and operating controls . . . and the reliability of other data generated within the organization. (Section 403(2).) She may "[e]valuate the city's internal controls to ensure that the City's assets and resources are reasonably safeguarded from . . . mismanagement." She may "[a]scertain compliance with Council's resolutions and policies and the Mayor's Administrative Instructions and Directives, as well as applicable State and Federal laws and regulations." (Section 403(3).)

The Charter does not specify what the City Auditor may examine to conduct these "surveys, reviews, and audits or the means she may use to conduct these duties. In other words, the Charter defines when the City Auditor may conduct a survey, review, or audit, but does not specify "how" she may conduct her surveys, reviews, or audits.

"How" The City Auditor May Conduct A Survey, Review, or Audit

Legal authorities consistently say that City officers may use any "lawful and reasonable means" to carry out their express powers and any doubt as to the propriety of the means should be resolved in favor of the City officer.

In general, powers given to municipal corporations include the further power to employ such modes of procedure as are appropriate and necessary for their effective exercise. The delegation of power to municipal corporations, without providing the mode for carrying such power into effect, impliedly gives them the right to select lawful and reasonable means whereby that power is to be carried out. All doubts as to the propriety of means used in the exercise of an undoubted municipal power should be resolved in favor of the municipality, where there is no abuse of power or discretion. A municipal corporation may act through such agencies as the legislature directs. (Ravettino v. City of San Diego 70 Cal.App.2d 37, 47 (1945) (City Charter's express power to operate a port included the implied authority to operate a power crane, and the Charter did not need to expressly specify the operation of power cranes for the municipality to have the authority to operate power cranes at the port.))

Where a municipal officer has been conferred express powers, she has the "discretion" and "wide latitude" to choose the legal means she uses to exercise the powers.

If power is statutorily conferred on a municipal corporation and the law is silent as to the mode of exercising such power, the corporate authorities are necessarily clothed with a reasonable discretion to determine the manner in which such powers shall be exercised; all the reasonable methods of executing such power are inferred. (McQuillin Mun. Corp. § 10.32.)

"When the authority to exercise the power appears, wide latitude is allowed in its exercise and, unless some abuse of power or a violation of organic or fundamental right results, it will be upheld." (Id.) "If the method for exercising a municipal power is not specifically prescribed, the mode or means by which a municipality may exercise powers granted by the legislature will not be strictly construed." (Id. at 10:30 (2006).)

Nothing in Charter Section 403 limits the means by which the City Auditor conducts specified surveys, reviews, and audits. Accordingly, under the above articulated principles, Section 403 gives the City Auditor discretion and wide latitude to determine the means she carries out her duties, including what documents she may examine, .

Since the instant question concerns a potential conflict between the City Auditor and the City Administrator, we have also examined the Charter provisions concerning the powers of City Administrator. We have found no language that contradicts the City Auditor's "discretion" and "wide latitude" to choose the means to conduct her lawful "surveys, reviews, and audits." The Charter does not give the City Administrator the power to direct the way the City Auditor conducts her survey, reviews, or audits or what the City Auditor should or should not look at in her surveys, reviews, and audits.

Privacy Concerns.

You have expressed the concern that if the City Auditor's Office examines personnel records then employees' privacy rights will be violated.

An essential element of a cause of action for violation of the right of privacy is the plaintiff's reasonable expectation of privacy. In addition, invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. (Michael v. Gates, 38 Cal.App.4th 737, 745 (1995).) Under these tests, it has been held that allowing a city official to examine a personnel file is not in violation of an employee's privacy so long as the official has a right to the information to perform his/her duties. The employee had no reasonable expectation of privacy from examination by his employer, and examination of a City file by a City official is not a disclosure. Thus, the Michael court held that a city attorney's examination of a retired police officer's personnel file, as a part of the city attorney's official duties (litigation against the City), did not constitute disclosure and therefore did not violate the employee's privacy rights.

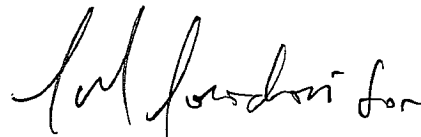
Similarly, here the City Auditor and her employees, like the city attorney in Michael, are city officials. Her office is examining personnel records as a part of her official duties. The City Auditor has a confidentiality policy requiring that staff in her office not disclose private information. In addition, only those City Auditor's Office staff who are conducting the survey, review, or audit will examine the files. Given these protections, there is no disclosure here that would constitute a breach of the employees' privacy rights.

V. CONCLUSION

Where there is no clear and demonstrable abuse of her Charter duties and powers, the City Auditor has the "discretion" and the "wide latitude" to choose the means that she conducts her "surveys, reviews, and audits" so long as her means are reasonable. Here it clearly is a reasonable exercise of the City Auditor's broad latitude and discretion to examine personnel or other records that she deems necessary or appropriate to conduct surveys, reviews and audits in the context of a payroll audit. Specifically, she has the discretion and wide latitude to determine what City papers, files, or records, including personnel records, she may examine to conduct her "surveys, reviews, and audits."

Since the City Auditor is a City officer, and not a third party or member of the public, and since the City Auditor's Office maintains a confidentiality policy, her office's examination of personnel records is not a violation of City employees' privacy rights. Finally, we note that the City Administrator has every right to request a legal opinion from this Office regarding the City Auditor's authority. In the future if the City Administrator has other questions about the City Auditor's authority to examine a particular record, she should again request a legal opinion from this Office. Such an opinion not only resolves the issue, but it also protects the City Administrator in the event of a challenge.

Respectfully submitted,



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