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CITY OF OAKLAND



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Legal Opinion

May 12, 2015

PUBLIC SAFETY COMMITTEE
Oakland, California

**Re: May 12, 2014 Draft Domain Awareness Center Privacy Policy
Item on Public Safety Committee Agenda – Draft Policy’s
Restrictions on City Attorney’s Access to the Domain
Awareness System and Data**

Dear Chairperson Desley Brooks and Members of the Public Safety Committee:

I. INTRODUCTION

The purpose of this opinion is to advise the Council that a provision in the proposed draft Domain Awareness Center (DAC) privacy policy that purports to prohibit the City Attorney from viewing the DAC system and data conflicts with the City Charter and therefore would be and unenforceable. That proposed provision interferes and conflicts with the City Attorney’s Charter powers and duties.

When the ad hoc committee presented the first draft of the privacy policy to the Public Safety Committee in February, 2015, the Committee directed the group to do additional work. A revised draft is scheduled to be considered by the Committee on May 12th. The revised draft includes a provision which would exclude the City Attorney from viewing the DAC system and data.

II. QUESTION AND BRIEF ANSWER

A. Question

Is the provision in the proposed Domain Awareness Center (DAC) privacy policy that states that the City Attorney cannot view the DAC system and/or data, enforceable?

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B. Brief Answer

No. The proposed policy provision conflicts with the City Charter and would be unenforceable as it would interfere with and therefore impede the City Attorney’s ability to perform her charter mandated duties to provide legal advice and counsel to her clients, including the Mayor, City Council, each and every department of the City¹ in their official capacities and all officers, boards, commissions, and other agencies of the City. The City Attorney cannot competently advise on legal matters without having access to all relevant facts and information, and this may require access to the DAC system and data.

III. BACKGROUND

The City activates the Emergency Operations Center (EOC) when an event requires the dedication of a significant amount of City resources and personnel. Fire, Police, Public Works and Information Technology staff and City Attorney representatives typically are present in the EOC and/or in telephonic communication during activation. The City Attorney’s clients request that the City Attorney brief them and provide legal advice regarding operations and strategies during activation. To properly advise City staff, the City Attorney and members of her Office must be free to move around the EOC, confer with City staff and view the video screens and data that come into the EOC.

The DAC is located in the EOC. When it is completed, the center will house a computer system that collects, consolidates and stores data from several City and Port systems into one computer system. It will receive data from Port security cameras, vessel tracking and truck management, the Police and Fire automatic vehicle location system, City traffic cameras in the Port area and Shot Spotter Audio Sensor systems adjacent to the Port. The finished system will be able to display and combine information and live images from these feeds on large screens in the EOC “Situation Room”, to enable the City’s public safety personnel critical situational awareness they need to deal with public safety threats, such as natural disasters, major emergencies and violence likely to cause great bodily injury, in real time.

¹ The City Attorney is counsel for all departments except for offices and departments the Charter specifically enumerates as independent departments, such as the Port Department.

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Privacy advocates² have raised concerns about the DAC’s capacity to capture and store data and information on citizens as they go about their daily business, and the potential for governmental agencies or other parties to access and misuse the data to invade citizens’ privacy. To respond to these concerns, the Council established an ad hoc group, comprised of representatives of privacy advocacy organizations, to develop and recommend to the Council a privacy policy for access to the DAC system and data.

The ad hoc group presented its first draft of the policy to the Public Safety Committee on February 10, 2015. The proposed policy designates persons who are authorized to view the DAC system and data and sets forth protocols for such persons to access the system and data. Authorized persons are defined as those with a “specific need to access the system or data in order to conduct one’s official duties in connection with” defined uses allowed under the policy. The policy prohibits any other persons from viewing the system or data and requires strict adherence to the protocols. The Committee directed the ad hoc group to obtain more public input, address questions raised in committee and then return to the committee.

The revised draft is scheduled for consideration at the May 12th Public Safety Committee. It now includes a new provision that purports to prohibit viewing of the DAC system or data by the City Attorney during an EOC activation. The reason proponents offered for the prohibition is that the City Attorney has a “conflict of interest” because the Office must defend the City and its employees in court against claims of misuse of the DAC or violations of the privacy policy. It is our understanding that the City Administrator does not support the proposed City Attorney restriction. In any event, as we explain below, the policy would conflict with the City Charter and therefore is unenforceable.

IV. ANALYSIS

The Oakland City Charter grants the City Attorney the power to serve as legal counsel for the City, as the municipal organization, for elected and appointed officials, department heads and departments, in their official capacities and for other agencies and entities. Oakland City Charter Section 401(6), entitled “Powers of the City Attorney,” declares in relevant part:

² The American Civil Liberties Union of Northern California and the Oakland Privacy Working Group were among the organizations that contacted Councilmembers and attended Council meetings.

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“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. He or she shall advise all officers, boards, commissions, and other agencies of the City on legal matters referred to him or her and shall render written legal opinions when the same are requested in writing by the Mayor or a member of the Council or the City Administrator or any other officer, board or commission of the City. He or she shall draft such ordinances, resolutions, contracts and other legal documents as directed by the Council or requested by the Mayor or City Administrator or any official board or commission of the City. He or she shall act as Counsel in behalf of the City or any of its officers, boards, commissions, or other agencies in litigation involving any of them in their official capacity. . .”

Thus, the Oakland City Charter mandates that the City Attorney provide its clients legal advice regarding interpretation, implementation and enforcement of Council and administrative policies and applicable laws and represent the City, its agencies, board and commissions and officials in litigation involving any of them in their official capacity.

The Oakland City Charter is the constitution of the City, i.e., it is the supreme law regarding municipal affairs subject only to conflicting state or federal law. The Charter grants the City the right and power to make and enforce all laws and regulations with respect to municipal affairs, subject only to the restrictions and limitations provided in the Charter, and it provides that the City shall take advantage of the provisions of Article XI of the Constitution of the State of California giving cities Home Rule as to municipal affairs. (City Charter Section 106.) California Constitution Article XI Sections 3(a) and 5(a) provide:

“The provisions of a charter are the law of the State and have the force and effect of legislative enactments.”

“City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.”

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City Charter provisions are controlling in the absence of preemptory state law. (*United Public Employees v. City and County of San Francisco* (1987) 190 Cal.App.3d 419, 422.)

The proposed provision prohibiting the City Attorney’s access to the DAC would interfere with the City Attorney’s power to carry out the Charter mandated duties specified in Section 401(6), in that the City Attorney would not be able to obtain all relevant data, including DAC system information and data, to provide fully informed advice and counsel to City agencies, departments, officials and employees regarding policy compliance, public safety operations, personnel issues, claims, litigation, applicable laws and other legal matters.³

Proponents of the restriction have not fully explained their concerns. “Conflict of interest” generally refers to conflicts in an official’s personal interests, such as financial or family connections, that could compromise actions taken in their official capacity. Certainly, the act of viewing the DAC system and data could not result in such a “conflict of interest”.

A conflict could arise with respect to the City Attorney’s duty to represent both the City *and* officials/employees named in a lawsuit if the parties have adverse interests – e.g., the City wishes to defend against liability and wishes to discipline the official/employee who is named. When a potential for adverse interests among the parties arises, the City Attorney is required to represent the municipal organization and retains/designates conflict counsel for the other party/parties.⁴ This avoids conflicts in representation. But, again, viewing the DAC system and data would have no impact or bearing on how representation in litigation is handled. In any event, there are well established rules and procedures that address the duties of city attorneys and other public lawyers and attorneys who represent corporations or other organizations in the event of a conflict.

³ Indeed, policies that conflict with the City Charter, including any Council policies, cannot amend Charter provisions or override the City Charter. A city council policy approved by ordinance, resolution or motion “can no more change or limit the effect of a charter than a statute can modify or supersede a provision of the State Constitution.” *Hubbard v. City of San Diego* (1976) 55 Cal.App.3d 380, 392. In order to change a City Charter, the people of the City must vote to change it. (California Constitution Article XI sections 3(a). Amendment of a charter by ordinance, resolution or agreement is “prohibited”. *San Francisco Fire Fighters v. Board of Supervisors*, 96 Cal.App.3d 538, 549 (1979). Since the proposed restrictions on the City Attorney’s powers conflict with the City Charter, they would not be enforceable even if the Council adopted them.

⁴ Rule 3-600 of the California Rules of Professional Conduct provides that it is the City itself, as opposed to any one individual public official that is the client of the City Attorney.

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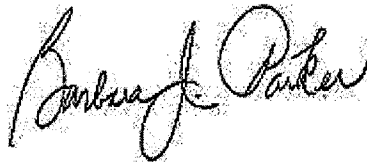
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V. CONCLUSION

The City Charter mandates that the City Attorney serve as counsel, and in that capacity, provide legal advice and counsel to the City Administrator, City departments and personnel as well as City officials, boards and commissions and the City Council.

To perform the City Attorney’s duties and exercise her powers as counsel for all City departments, officials and employees, including public safety, technology and other City personnel assigned to work at the EOC and DAC, the City Attorney must have access to all relevant information to provide sound and fully informed advice to departments, officials and other personnel on legal issues related to Council policy implementation, compliance and enforcement, related personnel matters, general department operations and activities and applicable laws. As counsel the City Attorney’s presence at the EOC is critical during emergencies and disruptions such as the destruction of property that has occurred after protests. Thus, the proposed provision conflicts with the City Charter and would be unenforceable.

Very truly yours,



BARBARA J. PARKER
City Attorney

Attorney Assigned:
Amadis Sotelo

cc: John Flores, Interim City Administrator
Claudio Cappio, Assistant City Administrator

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