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Office of the City Auditor
Roland E. Smith, CPA
City Auditor

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To: Rules and Legislation Committee

From: Office of the City Auditor

Date: April 1, 2004

Subject: RESOLUTION IN SUPPORT OF ASSEMBLY BILL NO. 2318, A PROPOSAL TO AMEND THE GOVERNMENT CODE FOR THE PURPOSE OF ALLOWING THE CITY AUDITOR, IN CONFORMITY WITH RULES APPLICABLE TO THE STATE AUDITOR, TO EXEMPT FROM DISCLOSURE CERTAIN INFORMATION OTHERWISE MADE AVAILABLE TO THE PUBLIC UNDER THE CALIFORNIA PUBLIC RECORDS ACT.

Assembly Bill No. 2318 was introduced in response to the legislative agenda adopted by the City Council in the fall of 2003. It is consistent with the specification considered at that time.

Statement as to the need for this legislation: Financial information of contractors with the City is frequently requested and difficult to obtain since the contractors maintain that disclosure to the auditor will make proprietary and personal information available to the public. The contractors see such information as revealing operating and trade secrets which will injure them in the market place.

The requested information is needed by the City Auditor for the following matters:

1. Determination of the financial stability of bidding contractors in order to report on their ability to perform under a proposed contract,
2. Determination of the financial stability of contractors performing under existing contracts and their ability to continue through to completion,
3. Assessment of the financial qualifications of entities receiving grants and loans from the City,
4. Evaluation of the ability of entities to perform on delinquent loans due the City, and
5. Risk assessment, testing and auditing with the required conformity with Government Auditing Standard prescribed for local government by the Controller General of the United States in Chapter 6, Paragraph 6.15 et. seq.

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The type of information we must have access to includes, but is not limited to:

1. General ledger,
2. Journals,
3. Payroll records and reports,
4. Revenue records and reports,
5. Expenditure records and reports,
6. Contracts, agreements and judgments,
7. Proprietary litigation such as trade secrets,
8. Pending litigation,
9. Liens, and
10. Business license tax information.

Current Rule: Research and an opinion from the City Attorney dated April 28, 2003, indicated "a record that the City Auditor possesses and controls is subject to disclosure pursuant to the California Public Records Act and City of Oakland Sunshine Ordinance unless the record is expressly exempted from disclosure by one of these laws." The full text of this legal opinion is attached as Exhibit I of this report.


Remedy: The remedy is to make the rules on confidentiality of the State Auditor applicable to City Auditors. Assembly Bill No. 2318 accomplishes this by making the provisions of Government Code section 8545 for the State Auditor duplicated in Government Code Section 36525 for City Auditors. These provisions protect information supplied by a person or entity in cooperation with a City Auditor. A copy of Assembly Bill No. 2318 is attached as Exhibit II of this report.

The first hearing for this bill is April 14, 2004 before the Assembly Committee on Local Government. Accordingly, prompt action by the City Council is important.

A resolution follows this report.

Please adopt a supporting position.

Respectfully submitted,


Roland E. Smith, CPA, CFS
City Auditor

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Rules & Legislation Com.
April 1, 2004

CITY OF OAKLAND

Office of the City Attorney

Legal Opinion

To: Roland Smith, City Auditor
From: Tracy Chriss, Deputy City Attorney
Date: April 28, 2003
RE: Disclosure of Records That the City Auditor Prepares, Owns, Uses or Retains

I. Issue

In performing his duties, the City Auditor collects a variety of information from City departments and private entities and individuals who desire to do or are doing business with the City. This information includes, but is not limited to, contracts, financial records, business operational data, tax records and employment information. The Auditor is concerned that disclosure of such records may prove harmful to those who provide the information to his office. He has asked whether there is any legal basis to maintain the confidentiality of these documents.

II. Summary Conclusion

The City Auditor has no privilege to withhold records by virtue of any law. Unlike attorney-client, doctor-patient, and other communications that are privileged, there is no privilege for records that the City Auditor prepares, owns, uses or retains. Therefore, a record that the City Auditor possesses or controls is subject to disclosure pursuant to the California Public Records Act and City of Oakland Sunshine Ordinance unless the record is expressly exempted from disclosure by one of these laws.¹

To protect a record from disclosure, the City bears the burden of showing that the record is exempt under the express provisions of the California Public Records Act and the City of Oakland Sunshine Ordinance, or that based on the facts of a particular case,

¹ Compare California Government Code Section 8545 exempts certain records of the **state** auditor: (1) personal records of a person who is receiving assistance from state auditor if that person requests confidentiality, (2) records pertaining to audits that have? not been? completed, and (3) records that are not used in support of an audit report. These exemptions do not apply to auditors of local agencies.

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the public interest in nondisclosure clearly outweighs the public interest in disclosure. Accordingly, this Office must conduct a case-by-case legal analysis of the facts and circumstances and applicable law for each record.

III. Analysis

A. The California Public Records Act

1. The Public Records Act Does Not Expressly Exempt Records that the City Auditor Prepares, Uses, Owns Or Retains

Records in the auditor's possession or control are, by definition, "public records" under the California Public Records Act unless they are protected by the Public Records Act and Sunshine Ordinance. The Act defines a "public record" as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Cal. Govt. Code §6252(e)). The auditor's records are writings prepared, owned, used or retained by the Office of the City Auditor, an office/department of a local agency, the City of Oakland.

The California Public Records Act expresses a strong policy in favor of disclosure of public records. Any refusal to disclose public information must be based on a specific exemption to that policy. The City bears the burden of demonstrating that a record is either exempt under the express provisions of the California Public Records Act or that based on the facts of a particular case, the interest in nondisclosure clearly outweighs the public interest in disclosure. California courts tend to construe the Act's exemptions narrowly in order to accomplish the general policy that favors disclosure. (Braun v. City of Taft, 154 Cal.App.3d 332, 342(1984).) The Act exempts the following documents from disclosure:

a. Records Containing Private Information

The California Public Records Act provides an exemption for medical records or similar files if their disclosure would constitute an unwarranted invasion of personal privacy. (Cal. Govt. Code § 6254(c)). An exemption under this provision must be based upon the information itself, not its location. (Braun v. City of Taft, 154 Cal.App.3d 332, 341-342 (1984).)

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b. Local Taxpayer Information

The California Public Records Act provides an exemption for information required from any taxpayer in connection with the collection of local taxes that is received in confidence where disclosure of the information would result in unfair competitive disadvantage to the person who provided the information. (Cal. Govt. Code §6254(i)).

c. Criminal Investigation Records

The California Public Records Act provides an exemption for investigatory records compiled by a local agency for correctional, law enforcement or licensing purposes. (Cal. Govt. Code §6254(f)). This exemption applies only where there is a concrete prospect of future criminal law enforcement proceedings. (State of California v. Superior Court (Los Angeles County), 43 Cal.App.3d 778, 784 (1974)).

d. Documents Exempted by Other Laws

The California Public Records Act does not mandate disclosure of records that federal or state law exempts from disclosure, nor does the Act require disclosure if federal or state law prohibits disclosure of a particular record. (Cal. Govt. Code §6254(k)). For instance, attorney-client privileged documents are exempt from disclosure under the Act. Similarly, tax records protected by state or federal law are not subject to disclosure under the Act.

e. Catchall Exception

The catchall exception to the Public Records Act's disclosure requirements authorizes withholding of records if the public interest in nondisclosure of the records clearly outweighs the public interest in disclosure. (Cal. Govt. Code § 6255). A factual determination must be made on a case-by-case basis.

B. The City of Oakland Sunshine Ordinance

1. The Sunshine Ordinance Requires the Disclosure of Additional Information

Oakland's Sunshine Ordinance provides that some information which is exempt from disclosure under the California Public Records Act must be disclosed upon request. Examples of records that are exempt from disclosure under the Public

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Records Act, but are subject to disclosure under the Sunshine Ordinance are the following:

a. Contracts

Pursuant to the City of Oakland Sunshine Ordinance, draft versions of an agreement are subject to disclosure after final action is taken. (OMC § 2.20.240 A 2). To comply with this provision, City agencies and departments are required to retain draft contracts. Final contracts are subject to disclosure immediately following bid closure. (OMC § 2.20.240 E).

b. Bid Information

Contracts, contractors' bids, responses to RFPs and all other records or communications between the city and persons or firms seeking City contracts are subject to disclosure immediately following bid closure. (OMC § 2.20.240 E).

c. Financial Information

Disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification of a contract or other benefit is subject to disclosure once the City awards the person or organization a contract or benefit. (OMC § 2.20.240 E).

d. Budget Information

Budgets for the City, Redevelopment Agency and the Port Department, that have been provided to a majority of the Council, Redevelopment Agency or Board of Port Commissioners, or their standing committees, are subject to disclosure. This includes all bills, claims, invoices, vouchers or other records of payment obligation as well as records of actual disbursements showing the amount paid, the payee and the purpose for which payment is made. (OMC §2.20.240 F).

IV. Conclusion

In conclusion, we found no case law or statute that exempts from the disclosure requirements of the Public Records Act or the City of Oakland Sunshine Ordinance records that the City Auditor prepares, uses, owns or retains. Because there is no categorical exemption for Auditor's records, they must be disclosed unless they are

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covered by one of the exemption categories provided by the Public Records Act and City of Oakland Sunshine Ordinance.

A case-by-case analysis is necessary to determine whether a particular document is exempt from disclosure. Accordingly, it is important that you consult with the City Attorney when you receive a public records request to determine whether the records are exempt or must be disclosed.

JOHN A. RUSSO
City Attorney

By:
TRACY CHRISS
Deputy City Attorney

TAC:ke

cc: John Russo, City Attorney

To: Roland Smith, City Auditor
From: Tracy Chriss, Deputy City Attorney
Re: Disclosure of Records That the City
Auditor Prepares, Owns, Uses or Retains
Date: April 28, 2003

bcc: Barbara Parker
Vicki Laden
Mark Morodomi
Michelle Abney

ASSEMBLY BILL

No. 2318

Introduced by Assembly Member Hancock

February 19, 2004

An act to add Section 36525 to the Government Code, relating to cities.

LEGISLATIVE COUNSEL'S DIGEST

AB 2318, as introduced, Hancock. Cities: city auditor.

Existing law prohibits the State Auditor from destroying any papers or memoranda used to support a completed audit sooner than 3 years after the audit is released to the public and provides that all documents pertaining to its work are public records subject to disclosure under the California Public Records Act except for specified items that are to remain confidential, including personal papers and correspondence of any person providing assistance to the State Auditor when that person has requested confidentiality, documents relating to any audit not completed, and documents not used in support of any report resulting from the audit.

This bill would apply these provisions to a city auditor and would also include financial data to the list of specified documents that a city auditor is required to keep confidential. By imposing new duties on local officials, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide

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Exhibit 2

and other procedures for claims whose statewide costs exceed \$1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 36525 is added to the Government
2 Code, to read:

3 36525. A city auditor may not destroy any papers or
4 memoranda used to support a completed audit sooner than three
5 years after the audit report is released to the public. All books,
6 papers, records, and correspondence of the auditor pertaining to its
7 work are public records subject to Chapter 3.5 (commencing with
8 Section 6250) of Division 7 of Title 1 and shall be filed at any of
9 the regularly maintained offices of the auditor, except that none of
10 the following items or papers of which these items are a part may
11 be released to the public by the auditor, or his or her employees:

12 (a) Personal papers, financial data, and correspondence of any
13 person or entity providing assistance to or cooperating with the
14 auditor when that person or entity has requested in writing that his
15 or her papers, data, and correspondence be kept private and
16 confidential. Those papers, data, and correspondence shall
17 become public records if the written request is withdrawn or upon
18 the order of the auditor.

19 (b) Papers, correspondence, memoranda, financial data, or any
20 substantive information pertaining to any audit not completed.

21 (c) Papers, correspondence, financial data, or memoranda
22 pertaining to any audit that has been completed, which papers,
23 correspondence, or memoranda are not used in support of any
24 report resulting from the audit.

25 SEC. 2. Notwithstanding Section 17610 of the Government
26 Code, if the Commission on State Mandates determines that this
27 act contains costs mandated by the state, reimbursement to local
28 agencies and school districts for those costs shall be made pursuant
29 to Part 7 (commencing with Section 17500) of Division 4 of Title

1 2 of the Government Code. If the statewide cost of the claim for
2 reimbursement does not exceed one million dollars (\$1,000,000),
3 reimbursement shall be made from the State Mandates Claims
4 Fund.

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OAKLAND CITY COUNCIL

OFFICE OF THE CITY CLERK
CITY OF OAKLAND

RESOLUTION No. _____ C.M.S.

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INTRODUCED BY COUNCILMEMBER _____

TAC

RESOLUTION IN SUPPORT OF ASSEMBLY BILL NO. 2318, A PROPOSAL TO AMEND THE GOVERNMENT CODE FOR THE PURPOSE OF ALLOWING THE CITY AUDITOR, IN CONFORMITY WITH RULES APPLICABLE TO THE STATE AUDITOR, TO EXEMPT FROM DISCLOSURE CERTAIN INFORMATION OTHERWISE MADE AVAILABLE TO THE PUBLIC UNDER THE CALIFORNIA PUBLIC RECORDS ACT

WHEREAS, the City Auditor has a Charter mandated requirement to perform audits on behalf of the City of Oakland; and

WHEREAS, this requires the Auditor to obtain and analyze a variety of evidence, some of which is subject to disclosure under the California Public Records Act; and

WHEREAS, this information includes documents that may be sufficiently sensitive, proprietary, or misleading as to be harmful to the person or entity providing the information if it is disclosed to the public; and

WHEREAS, the California Legislature recognized the need for the State Auditor to exempt certain information made available to the public under the California Public Records Act by enacting California Government Code Section 8545;

WHEREAS, these additional exemptions enhance the productivity of the Office of the State Auditor; and

WHEREAS, it is in the interest of the City of Oakland to have similar protections extended to the Office of the City Auditor thereby enhancing the City Auditor's ability to perform his job; and

WHEREAS, these protections would allow the auditor to exempt the following information from disclosure:

- (a) personal papers, financial data, and correspondence of any person or entity providing assistance to or cooperating with the auditor when that person or entity has requested in writing that his or her papers, data, and correspondence be kept private and confidential; and

- (b) papers, correspondence, memoranda, financial data, or any substantive information pertaining to any audit not completed; and
- (c) papers, correspondence, financial data, or memoranda pertaining to any audit that has been completed, which papers, correspondence, or memoranda are not used in support of any report resulting from the audit; now, therefore be it,

RESOLVED: That the City Council does hereby endorse and support the adoption of California Assembly Bill No. 2318 thereby extending the above-referenced exemptions to the Office of the City Auditor.

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In Council, Oakland, California, _____

ORACOUNCIL

Passed By The Following Vote:

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AYES- BROOKS, BRUNNER, CHANG, NADEL, QUAN, REID, WAN AND
PRESIDENT DE LA FUENTE

NOES-

ABSENT-

ABSTENTION-

**RULES & LEGISLATION
CMTE**
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ATTEST: _____

CEDA FLOYD
City Clerk and Clerk of the Council
of the City of Oakland, California