

# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** RICHARD DOYLE  
City Attorney

**SUBJECT:** Proposed Ordinance Granting  
the Independent Police Auditor  
Contract Authority to Select an  
Alternate IPA in Conflict of  
Interest Cases

**DATE:** October 28, 2009

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## **RECOMMENDATION**

Approve an ordinance amending Chapter 8.04 of Title 8 of the San Jose Municipal Code to add a new Section 8.04.030 allowing and granting the Independent Police Auditor (IPA) the limited contract authority to appoint an alternate IPA to assume the IPA's duties and responsibilities related to the auditing of Internal Affairs investigations of complaints when the IPA has a conflict of interest warranting disqualification of the IPA's Office.

## **OUTCOME**

Approval of the proposed ordinance would give the IPA contract authority for the limited purpose of securing the services of an alternate IPA to perform the IPA's auditing function of reviewing citizen complaint investigations by the Internal Affairs Unit in circumstances where the IPA has a conflict of interest that warrants disqualification of entire Office.

## **BACKGROUND**

The selection process for a new IPA earlier this year highlighted the possibility that the IPA could have a conflict of interest related to the performance of the IPA's function of auditing complaint investigations, and that in some rare instances the conflict could warrant disqualification of not only the IPA but the entire Office. The Office of the IPA subsequently prepared an internal written policy on checking for conflicts of interest that in large part formalized what had been an informal policy and practice. The written policy would allow most financial conflicts and personal conflicts of the IPA and IPA employees to be handled by disqualifying the conflicted individual from participation in the audit and creating a wall around that individual to prevent the transmission of information about the audit to him or her. But the written policy also recognizes that in limited cases, the conflict may be so significant (i.e., where the complainant or a subject officer is an immediate family member of the IPA) that the entire Office of the IPA

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should be disqualified. While such a situation has not previously arisen, to the knowledge of IPA staff, the possibility of such circumstances and the need for a mechanism to deal with that development has become evident. A copy of the IPA Conflict of Interest Policy is attached to this memo.

### **ANALYSIS**

The Office of the IPA is not only mandated in the Charter and Municipal Code to be neutral and independent, but the Office's effectiveness is also uniquely dependent on maintaining the community's trust that it is neutral and independent. The Office of the IPA is also a small office staffed by the IPA, and Assistant IPA, three analysts and one office specialist.

The key function of the Office of the IPA that could be impacted by a conflict of interest is the auditing of Internal Affairs investigations of citizen complaints. While most potential conflicts of interest can and should be handled by disqualifying the conflicted employee only, in rare cases a conflict involving the IPA may be so significant that it could reasonably and objectively be construed as tainting the neutrality of the entire Office, particularly given the size of the Office. Such a conflict may exist where the complaining party or the police officer who is the subject of the complaint is an immediate family member of the IPA.

Section 1.04.080 of the Municipal Code generally allows the IPA to delegate the IPA's functions to a deputy or designee. However, the IPA currently has no contract authority under the Municipal Code. The grant of limited contract authority to allow the IPA to secure the services of an alternate IPA to handle audits when the Office of the IPA should be disqualified is consistent with the Charter and would provide the means for audits to be conducted by a neutral party.

The proposed ordinance would specifically allow the IPA to designate an alternate IPA to conduct audits when a conflict of interest of the IPA disqualifies the entire Office and would provide the IPA with the limited contract authority up to \$250,000 to do so. The alternate IPA would have all of the duties and responsibilities of the IPA set forth in the Municipal Code with respect to the conduct of audits, including but not limited to the duty to maintain the confidentiality of all police records and information reviewed.

### **PUBLIC OUTREACH/INTEREST**

This memorandum and the proposed ordinance are posted on the City's website for the Council Agenda of November 10, 2009.

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**COORDINATION**

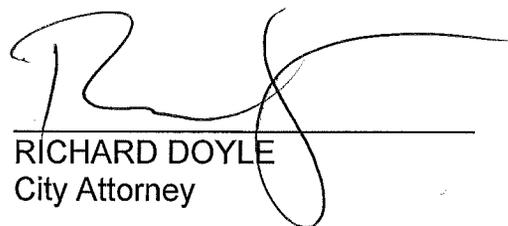
This memo has been coordinated with the Office of the Independent Police Auditor.

**BUDGET**

If the Council approves the recommended ordinance the Independent Police Auditor will need a designated budget to contract with an alternate IPA without delay in those cases where the entire Office is disqualified.

**CEQA**

Not a Project.

  
RICHARD DOYLE  
City Attorney

Attachment

cc: Debra Figone  
Shivaun Nurre

For questions please contact Ed Moran, Assistant City Attorney (408) 535-1920

## City of San Jose

### Office of the Independent Police Auditor

#### Conflict of Interest Policy

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#### PURPOSE AND SCOPE

The purpose of this Policy is to set forth the internal process of the Office of the Independent Police Auditor (IPA) for checking for and handling conflicts of interest in the auditing of Internal Affairs investigations of citizen complaints filed against San Jose Police Department officers.

#### DEFINITIONS

- **Close Friend:** A person who is considered a close personal friend by the IPA or IPA employee. The determination of whether a person is a Close Friend will be in the discretion of the IPA or IPA employee.
- **Complainant:** The individual or individuals who filed the citizen complaint that is the subject of the Internal Affairs investigation.
- **Domestic Partner:** A domestic partner recognized by any California government entity.
- **Family Member:** A spouse, domestic partner, child, stepchild, parent, or sibling.
- **Material Witness:** A person whose credibility and description of the incident are critical to the investigation analysis.
- **Relative:** A grandparent, grandchild, uncle, aunt, cousin, nephew, niece, father-in-law, mother-in-law, brother-in-law, sister-in-law, daughter-in-law, or son-in-law and any equivalent relatives of a domestic partner.
- **Subject Officer:** An officer against whom allegations have been made in the citizen complaint and for whom findings were made in the Internal Affairs investigation.

#### GUIDELINES

##### Disqualifying Conflicts of Interest

1. Financial conflicts

Under the Political Reform Act (PRA), no City officer or employee may participate in any City decision in which the individual has a financial interest as defined in the PRA. Such interests may include the following relationships: landlords, tenants, business partners, roommates, investment partners, etc. If the IPA or a subordinate IPA employee believes such a conflict may exist, he or she shall consult with the City Attorney's Office to conduct a PRA conflicts analysis. If the IPA or a subordinate IPA employee has a financial conflict of interest, the individual will be disqualified from conducting or participating in the audit.

## 2. Party bias conflicts

If the IPA or another IPA employee holds a bias for or against a particular Complainant, Material Witness, or Subject Officer that is sufficient to impair one's impartiality, or if based on reasonable and objective criteria, there is a serious risk of actual bias, that employee will be disqualified from conducting or participating in the audit. Sufficient risk of actual bias to warrant employee or office disqualification will be presumed in the following circumstances:

- If the IPA is a Family Member of the Complainant or Subject Officer, the Office will be disqualified from conducting the audit of the investigation connected to that Complainant or Subject Officer.
- If the IPA is a Family Member of a Material Witness, the IPA will be disqualified from conducting the audit of the investigation connected to that Material Witness.
- If another IPA employee is a Family Member of the Complainant, Material Witness, or Subject Officer, that employee will be disqualified from conducting or participating in the audit.
- If the IPA or another IPA employee is a Relative, former spouse, former Domestic Partner or Close Friend of the Complainant, Material Witness, or Subject Officer, that employee will be disqualified from conducting or participating in the audit.

In the event that the Office is disqualified from conducting the audit of the investigation, then the IPA shall appoint an alternate independent police auditor for the limited purpose of conducting the audit of the investigation for which the Office has been disqualified. In the event that the IPA or an IPA employee is disqualified, then the IPA or IPA employee, as is the case, will be removed from participation. The Office will maintain an "Audit Wall", as described below, in Employee Disqualification.

The table below summarizes the information in this section:

| WHO                      | CONNECTION  | TO WHOM   | RESULT                    | WHAT HAPPENS   |
|--------------------------|---|---|---------------------------|--|
| The IPA                  | Family Member   | Complainant or Subject Officer                    | Office disqualification   | Alternate auditor outside the IPA's Office is appointed.                     |
| The IPA                  | Family Member   | Material Witness                                  | IPA disqualification      | IPA delegates responsibility to another IPA employee. Audit Wall maintained. |
| An IPA employee          | Family Member   | Complainant, Subject Officer, or Material Witness | Employee disqualification | IPA employee removed from participation. Audit Wall maintained.              |
| The IPA or IPA employees | Relative  | Complainant, Subject Officer, or Material Witness | Employee disqualification | IPA or IPA employee removed from participation. Audit Wall maintained.       |
| The IPA or IPA employees | Close Friend  | Complainant, Subject Officer, or Material Witness | Employee disqualification | IPA or IPA employee removed from participation. Audit Wall maintained.       |
| The IPA or IPA employees | Former Spouse or Former Domestic Partner  | Complainant, Subject Officer, or Material Witness | Employee Disqualification | IPA or IPA employee removed from participation. Audit Wall maintained        |
| The IPA or IPA employees | Other bias for or against a Complainant, Subject Officer, or Material Witness that is sufficient to impair one's impartiality, or create a substantial risk of bias | Complainant, Subject Officer, or Material Witness | Employee disqualification | IPA or IPA employee removed from participation. Audit Wall maintained.       |
| The IPA or IPA employees | Financial conflict of interest under the Political Reform Act   |   | Employee disqualification | IPA or IPA employee removed from participation. Audit Wall maintained.       |

The list of disqualifying party bias conflicts above does not encompass all potential conflicts of interest. Employee disqualification will be required if other interests rising to a common law conflict of interest exist, and may be warranted if there is a strong appearance of a conflict that would reasonably undermine the public's confidence in the independence and neutrality of the Office in conducting an audit. The City Attorney's Office shall be consulted in determining whether a common law conflict of interest exists.

### **Conflicts Check Procedure**

Upon initial review of an audit assignment and prior to entering the audit form into the Office database, the assigned IPA employee shall conduct a conflict of interest check consistent with this Policy to ascertain whether for either the assigned IPA employee or the IPA (1) a financial conflict might exist, or (2) any of the disqualifying relationships exist between either the IPA or the assigned IPA employee and a Subject Officer, a Material Witness, or Complainant. If there is any question on the existence of a conflict, either the IPA or the assigned IPA employee should consult with the City Attorney's Office.

If a financial conflict or disqualifying relationship exists for the assigned IPA employee, the employee shall inform the Independent Police Auditor or Deputy Independent Police Auditor, and the audit shall be reassigned. If a financial conflict or disqualifying relationship exists for the IPA, then depending on the nature of the conflict, the IPA shall take the steps to disqualify the Office or to remove him or herself from participation in the matter.

### **Employee Disqualification**

A disqualified person may not conduct or participate in the audit or be present during the portion of any Office meeting during which the audit is discussed. The disqualified person shall refrain from discussing the substance of the audit with other IPA employees.

### **Office Disqualification**

If the Office is disqualified, the IPA will request that the audit be reassigned to an appropriate party within or outside the City organization. See above.