

September 20, 2011

BOARD OF FIRE COMMISSIONERS  
FILE NO. BFC 11-141

Date: September 12, 2011  
To: Board of Fire Commissioners  
From: Stephen Miller, Independent Assessor  
Subject: RECONSIDERATION OF POLICY STATEMENT REGARDING ACCESS TO  
RECORDS, FILES AND INFORMATION BY THE OFFICE OF THE  
INDEPENDENT ASSESSOR

FINAL ACTION:	<input type="checkbox"/> Approved	<input type="checkbox"/> Approved w/Corrections	<input type="checkbox"/> Withdrawn
	<input type="checkbox"/> Denied	<input type="checkbox"/> Received & Filed	<input type="checkbox"/> Other

**Recommendations:**

The Office of the Independent Assessor previously adopted a Policy Statement Regarding Access to Records, Files and Information. After further consideration it is recommended the Board of Fire Commissioners receive and file the Policy Statement.

There is no recommendation to approve or adopt the Independent Assessor's Policy Statement because the Fire Commission has already adopted its own *Policies and Authority of the Independent Assessor* requiring all Fire Department employees to cooperate with the Independent Assessor and provide access to all Fire Department information.

**CAUTION AND WARNING**

Los Angeles City Charter section 271 says the City Attorney shall be the legal advisor to the City, and to all City boards, departments, officers and entities. This report raises issues about some of the legal advice and services provided by the City Attorney and explains the reasoning behind following the City Attorney's formal published opinions and a published decision of the Court of Appeal instead of the City Attorney's August 23, 2010 advice in adopting a Policy Statement.

**Background:**

On July 7, 2011, the Office of the Independent Assessor adopted a Policy Statement Regarding Access to Records, Files and Information by the Office of the Independent Assessor (Policy Statement). The Policy Statement was presented to the Board of Fire Commissioners at its July 19, 2011 meeting with a recommendation that it be received and filed. (There was no recommendation that the Fire Commission adopt or approve the Policy Statement.) The Fire

Commission's general counsel urged that it be rejected on the basis of an August 23, 2010 advice memorandum from the City Attorney and advised the Independent Assessor had no authority to adopt office policies.

During the July 19, 2011 meeting, the Fire Commission gave the City Attorney's Office sixty (60) days to answer eleven (11) questions concerning the August 23, 2010 advice memorandum that were included in BFC 11-104. The Fire Commission said the matter would be continued and placed on the Commission's September 20, 2011 meeting agenda in order to give the City Attorney more time to answer the questions.

The City Attorney's Office has not answered the eleven (11) questions, and has not answered written questions sent to the City Attorney on January 18, 2011, by the Commission's subcommittee appointed to discuss these issues in private with the City Attorney's Office. The City Attorney's Office has not addressed the concerns set forth in the written analysis from this office the City Attorney's Office, received on December 15, 2010, and has not discussed the issues with either the Independent Assessor or the Commission's subcommittee since saying they would do so on May 11, 2010, August 17, 2010, and September 21, 2010.

To properly fulfill my City Charter-mandated power and duty to audit, assess and review how the Fire Department handles misconduct complaints in compliance with the law and in accordance with 1) the City Charter; 2) the voters' intent when creating the Independent Assessor position; 3) the Independent Assessor's class specification approved by the Civil Service Commission on March 12, 2009; and 4) the instructions of the Fire Commission I must personally and clearly understand my authority, and the authority of my subordinates, to access Department information. I must also have a clear understanding of my authority in order to properly direct the work of and instruct subordinate staff I appoint to assist in carrying out these duties.

On December 21, 2009, former Fire Chief Millage Peaks informed me that the City Attorney had been invited to comment on my authority to access Department personnel files. I noted the inability to access personnel files was an impediment in conducting the *Assessment of the Department's Disciplinary Process and Professional Standards Division (Assessment)*, in connection with fourteen (14) specific items.

Needing to know the limits of my authority to access personnel files in order to carry out my Charter-mandated powers and duties without violating the law, and given the extended delay in receiving advice about my right to access Department information, I read the City Attorney's formal and published opinions that are available in the City Attorney's law library;<sup>1</sup> reviewed the records and files of the Fire Commission; listened to the recorded City Council and City Council committee debates and discussions; reviewed relevant City Council files and reports; read the official sample ballot, including ballot arguments related to the Independent Assessor's position amendment; and engaged in other research on my own. Out of an abundance of caution, I also consulted with noted oversight experts as well as Dean and Distinguished Professor of Law Erwin Chemerinsky, who previously served as Chair of the Elected Los Angeles Charter Reform Commission.

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<sup>1</sup> Formal City Attorney opinions are available to the public and it appears that they are intended to be relied on in the future when similar issues are analyzed, much like published opinions of the California Attorney General. Informal advice memoranda appear to be provided by the City Attorney to a particular client, board or official.

Given my research, review and analysis, I have reasonable cause to believe the August 23, 2010 advice memorandum concerning the Independent Assessor's authority to access Department information is poorly researched and poorly reasoned. I also have reasonable cause to believe the failure and refusal to answer questions concerning the advice set forth in the August 23, 2010 memorandum, or even discuss it with me or Fire Commissioners, is not reasonable or acceptable. City Charter section 271 says the City Attorney shall be the legal advisor to all City boards and by failing and refusing to answer questions from the Fire Commission; the City Attorney is failing and refusing to provide advice as required.

The crux of the problem is that the City Attorney's Office is extremely angry that my *Assessment* criticized some work by some attorneys in the City Attorney's Office. Therefore, it appears the City Attorney's Office wants to limit, to the greatest extent possible, my access to information that might serve as a basis for further criticism. I do not believe the City Attorney seeks to limit my positive comments about legal services.

It is no accident that the City Attorney advised former Fire Chief Peaks to limit the Independent Assessor's involvement in Fire Department discipline meetings for the first time eight (8) days after my *Assessment* was formally presented to the Fire Commission on April 13, 2010. During these discipline meetings members of the Department's management discuss how to handle misconduct complaints, investigations of misconduct complaints and the discipline to be imposed for misconduct.

Attorneys from the City Attorney's Office attend discipline meetings. The City Attorney's Office raised no concerns or objections about Bea Lopez (the Commission's former personnel analyst) or me attending Department discipline meetings in the two (2) years before publication of my *Assessment*. If it was improper for Fire Commission employees to attend Fire Department discipline meetings where highly confidential and personal information was discussed, the attorneys attending such meetings should have raised timely objections instead of waiting two (2) years, until after publication of a report criticizing some work by some attorneys.

The City Attorney's August 23, 2010 advice memorandum, the failure to answer questions about the advice and the failure to even discuss the advice places me in a very difficult position as I attempt to comply with the City Charter, voter intent, my class specification and the Fire Commission's directives. Although I chose not to accept the August 23, 2010 advice in preparing my office policy regarding access, I am complying with a published Court of Appeal decision involving a City of Los Angeles commission similar to the Fire Commission, and formal City Attorney Opinion 2006:1, dated May 9, 2006; neither of which was cited in the August 23, 2010 memorandum. These authorities are cited in the City Attorney's May 16, 2011 advice memorandum that says the Fire Chief's functions of discharging and suspending Department employees are "subject to review and corrective instruction from the Fire Commission." This May 16, 2011 advice from the City Attorney completely contradicts the August 23, 2010 advice but is entirely consistent with the City Attorney's formal opinions for the last 60 years (that I am also following).

I do have a legal and ethical duty to exercise reasonable, responsible and professional judgment in the exercise of my duties. (The Independent Assessor's class specification says a law degree is highly desired but not required.) As the City Attorney represented to the Superior Court in its declaratory relief action against the City Controller, the City Attorney expects compliance with its formal opinions, and that voter intent as articulated in ballot materials is decisive. Again, instead of following the August 23, 2010 advice, I have decided to follow the advice set forth in the City Attorney's formal opinions dating back to at least 1946, a published

and controlling decision of the Court of Appeal, what appears to be the voters' intent in creating the position of Independent Assessor, May 16, 2011 advice from the City Attorney and I am further guided by the City Attorney's representations to the Superior Court in the declaratory relief action brought against the Controller.

Unfortunately, the City Attorney confuses the role of legal advisor with that of an employer, apparently believing legal advice is tantamount to a legal directive. The City Attorney seems to contend the authorization to provide legal advice means no one may discuss, question, criticize or disagree with the advice, even among ourselves, and for anyone to do so, amounts to some type of illegality or impropriety. The City Attorney, unfortunately, seems to conclude that the authority to give legal advice provides some type of immunity from discussion, criticism, disagreement or questions, which it does not.

The City Attorney's threats to report me to the California State Bar and that I will not be defended or indemnified in a lawsuit should I fail to follow their advice are misguided, inappropriate and only intended to prevent me from fully performing my duties. I have a duty and obligation to provide the Board of Fire Commissioners with my best professional analysis whether or not the City Attorney likes or agrees with that analysis.

**Summary:**

I have reasonable cause to believe the City Attorney's August 23, 2010 advice is erroneous, does not disclose or discuss critical information as required, and that members of the City Attorney's Office have unreasonably and intentionally failed and refused to properly communicate with Fire Commissioners and the Independent Assessor concerning the authority of the Commission and the Independent Assessor to access Fire Department information.

**City Attorney's Prior Representations Regarding Ethics and Legal Duties:**

On November 19, 2008, the City Attorney's Office filed a complaint for declaratory and injunctive relief requesting a judicial interpretation of the Los Angeles City Charter in the Los Angeles County Superior Court, (*The City of Los Angeles v. Los Angeles City Controller, Laura N. Chick*, Case No. BC402345). The City Attorney's Office represented the following, among other things, to the Superior Court in that litigation:

1. In paragraph 29, the complaint says the City Attorney has an ethical and legal duty when providing legal advice to its client, the municipality and its officials, including advice interpreting the City's Charter, to give advice that is legally accurate in the City Attorney's best professional judgment pursuant to *California Business and Professions Code* section 6068 and Rule 3-110 of the *California Rules of Professional Responsibility*;
2. In paragraph 17, the complaint says the Controller knew full well that the City Attorney's Office would **act consistently** with a City Attorney's **formal** opinion; and
3. In paragraph 138, the complaint says the Court should **give deference to the City Attorney's interpretation of the City Charter** as expressed in a **formal** City Attorney Opinion because the opinions of city attorneys in interpreting charter provisions are entitled to "great weight."

Although not mentioned by the City Attorney in the declaratory relief action, one of an attorney's basic functions is to provide advice. (*Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1683-84.) Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client's objectives. (*Ibid.*) The **duty to communicate**

with clients includes disclosing all facts and circumstances necessary to enable a client to make free and intelligent decisions regarding the subject matter. (*Lysick v. Walcolm* (1968) 258 Cal.App.2d 136, 147.)

The Ninth Circuit noted an apparent dereliction of duty to the court when an attorney failed to disclose legal authority known to him that was directly adverse to the position the attorney was advocating. (*Southern Pacific Transportation Co. v. P.U.C.*, 716 F.2d 1285 (9th Cir. 1993).) The Ninth Circuit also noted that the Southern Pacific attorney who failed to cite adverse legal authority was the very attorney who represented a party in the case he failed to cite.

While noting the ABA Model Rules of Professional Conduct had not been adopted in California, the court in *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, said:

"[L]awyers *should* reveal cases and statutes of the controlling jurisdiction that the court needs to be aware of in order to intelligently rule on the matter. It is good ethics *and* good tactics to identify the adverse authorities, even though not directly adverse, and then argue why they are distinguishable or unsound. The court will appreciate the candor of the lawyer and will be more inclined to follow the lawyer's argument." (*Id.* at p. 82, emphasis in original.)

At least one court has noticed an increasing and disturbing tendency of counsel to alter argumentative course 180 degrees to suit the prevailing wind of expediency. (*Prudential Property and Casualty Insurance Co. v. Superior Court* (1995) 36 Cal.App.4th 275, 278.)

**The City Attorney failed to disclose or discuss information about ballot arguments and voters' intent:**

The City Attorney's August 23, 2010 advice memorandum addressed to the Fire Commission and to the Independent Assessor failed to disclose or discuss **ballot arguments or the critical role ballot arguments play in determining the voters' intent** to provide the Independent Assessor with the authority to access confidential information. I have reasonable cause to believe the failure to disclose and discuss **ballot arguments and voter intent** was intentional and the failure to disclose or discuss effectively prevents the Fire Commission and the Independent Assessor from making free and intelligent decisions regarding the right to access Fire Department information under the City Charter for the following reasons:

1. In paragraph 6 of its declaratory relief action against the Controller, the City Attorney's Office previously represented to the Superior Court that **voter intent is decisive**.
2. In paragraph 7 of its declaratory relief action against the Controller, the City Attorney's Office previously represented to the Superior Court that **ballot materials** are entitled to the **greatest weight**.
3. In paragraph 71 of its declaratory relief action against the Controller, the City Attorney's Office previously represented to the Superior Court that "courts may assume the **ballot materials reflected the voters' intent** in passing the new charter." (Emphasis added.)
4. In paragraph 70 of its declaratory relief action against the Controller, the City Attorney's Office represented to the Superior Court that "the court's primary goal in engaging in statutory construction is: 'to give effect to the **intent of the voters** adopting it ... constru[ing] the words from the **perspective of the voters**, attributing the usual,

ordinary and commonsense meaning to them; [courts] do not interpret them in a technical sense or as terms of art.” (Emphasis added.)

5. The Official Sample Ballot for the March 3, 2009 election, which proposed creating the position of Independent Assessor, asked voters to determine whether the Charter should be amended to empower the appointment of:

“[A]n Independent Assessor who shall be responsible for auditing, assessing and reviewing the Fire Department’s **handling of complaints** against sworn and civilian employees.” (Emphasis added.)

6. The Official Sample Ballot for the March 3, 2009 election included the following arguments in favor of creating the position of Independent Assessor:

“Recently, however, local juries have imposed several multi-million-dollar verdicts in lawsuits challenging conduct in our fire stations. Professional conduct in the fire service is essential, and we must work to prevent unnecessary costs to City taxpayers.

“Following an audit and recommendations by the City Controller, the Fire Commission and Fire Chief have been working with firefighters, City staff and community leaders to create a new Professional Standards Division. This office will strengthen our Fire Department by improving conditions at stations throughout the City and by ensuring the public continues to receive the highest quality service.

“The experience of our exemplary Police Department demonstrates that an independent monitor is essential in maintaining the highest professional standards. The Police Commission’s independent Inspector General has worked successfully to increase confidence in our Police Department for over a decade.

“Measure A will permit the Fire Commission to hire and supervise an Independent Assessor, who will monitor the Fire Department’s efforts to implement discipline in an appropriate and consistent manner. The Assessor’s independence from the department chain of command will ensure confidence from the public and among firefighters that professional standards are established and enforced in a fair and evenhanded way.

“The Fire Chief, Fire Commission, firefighters, and elected City leaders all support this measure to create a position of Independent Assessor.

“Support continued high professional standards in the Fire Department. Prevent taxpayer dollars from going to pay costly courtroom verdicts. Support Measure A.”

7. The Official Sample Ballot for the March 3, 2009 election presented the following additional arguments in favor of creating the position of Independent Assessor:

“Measure A is not about whether an Independent Assessor or similar position is necessary, but about whether the person in this critical oversight role should be independent from the Fire Department chain of command.

"Experience with the Los Angeles Police Department's Inspector General has shown that an independent official helps ensure a rigorous and successful program to secure and maintain high professional and ethical standards. Independence also boosts citizens' confidence in the performance and on-the-job climate of the Fire Department. This in turn reduces the City's exposure to legal challenges and litigations costs.

"Support independent oversight. Vote 'yes' on Measure A." (Emphasis in original.)

In addition to failing to disclose or discuss the importance of **voters' intent**, the City Attorney's August 23, 2010 advice also failed to disclose or discuss the following advice it provided on January 6, 1997, concerning **voters' intent** and the **voters' perspective** in connection with the Police Commission's Inspector General's accessing information when auditing, investigating and overseeing the **handling of complaints** of misconduct in the Police Department:

"It is a common maxim of jurisprudence that '[o]ne who grants a thing is presumed to grant also whatever is essential to its use.' Civil Code section 3522. The people of Los Angeles have granted the IG responsibility to oversee the investigation and adjudication of misconduct within the Department subject to any limitations imposed by the Board. To fulfill this mandate it is presumed that the IG has ... all powers essential to the fulfillment of that responsibility. Thus, the IG may review and copy any internal misconduct investigation whether it be criminal or administrative in nature and regardless of the personnel involved. In auditing any internal investigation, the IG may require the cooperation of any Department employee(s), conduct interviews and obtain documents and things necessary to a thorough investigation." (City Attorney's January 6, 1997 advice letter to Inspector General Katherine Mader at pp. 1-2.)

I have reasonable cause to believe the failure to disclose and discuss the City Attorney's January 6, 1997 advice, and the reference to *California Civil Code* section 3522, in the August 23, 2010 advice memorandum was **intentional** because I brought this advice letter to the attention of the City Attorney's Office in an email dated May 11, 2010, three months before the August 23, 2010 memorandum was provided to the Fire Commission and to me.

**The City Attorney's Office falsely stated that the Commission has no role in personnel actions or discipline of Department employees and failed to disclose or discuss known information:**

The City Attorney's August 23, 2010 informal advice memorandum addressed to the Board of Fire Commissioners and to the Independent Assessor said the Independent Assessor did not have access to private personnel records of Fire Department employees because Fire Commissioners do not have access to such information because the Fire Commission has "**no role in personnel actions or discipline of Department employees.**" (Emphasis added.) I have reasonable cause to believe this statement is intentionally false, and the City Attorney intentionally failed to disclose or discuss the existence of contradictory information known to the City Attorney's Office, for the following reasons:

1. Meeting agendas and minutes show the City Attorney's Office advised members of the Fire Commission's Personnel Committee to hold and actually attended closed session meetings **to discuss public employee discipline, dismissal and release** on June 23, 2006, August 31, 2006, October 13, 2006, April 20, 2007, September 24, 2007, January 25, 2008 and April 25, 2008; all **before** the informal August 23, 2010 advice was sent to the Fire Commission and to the Independent Assessor.

2. Although the City Attorney's Office represented to the Superior Court in its declaratory relief action against City Controller Chick, that the Controller should have expected the City Attorney **would act in conformity with its formal opinion** (Lines 24 and 25 on page 5 of the declaratory relief action.), the City Attorney's Office repeatedly **failed to disclose or discuss numerous relevant formal City Attorney opinions** in its August 23, 2010 advice. I have reasonable cause to believe the August 23, 2010 advice is contradicted by every other relevant **formal** City Attorney opinion issued since at least 1946, none of which were cited in the August 2010 advice memorandum.
3. The informal August 23, 2010 advice memorandum failed to disclose or discuss the existence of or information contained in **formal City Attorney Opinion No. 2006:1**, dated May 9, 2006, involving the Board of Animal Services, which says, among other things:
  - a. As head of the Department, pursuant to Charter section 500, a Board (like the Board of Fire Commissioners) "is vested with the express authority to supervise, control, regulate and manage the Department, make and enforce all rules and regulations necessary for the exercise of the powers conferred upon the Department by the Charter, and provide instructions to the General Manager," pursuant to Charter section 506. (City Attorney Opinion No. 2006:1 at p. 2)
  - b. In addition to the powers enumerated in Charter section 506, a Board, such as the Fire Commission, "has the power pursuant to Charter section 509 to instruct the General Manager with respect to all matters that make up the duties and responsibilities of the General Manager." (*Ibid.*)
  - c. The General Manager, as the chief administrative officer of the Department (like the Fire Chief), is vested with the "power to appoint, discharge, suspend or transfer the Department's employees, and issue instructions to employees in line with their duties," among other things. "However, these powers are subject to the provisions of the Charter, the rules of the Department *and the instruction of the Board*, and so the Board, if it so desires, may instruct the General Manager regarding these tasks." (*Id.* at p. 3, emphasis in the original.)
  - d. A general manager, such as the Fire Chief, "may not disregard instructions of the Board that are consistent with applicable law," even though the Fire Commission does not appoint or remove the Fire Chief. (*Id.* at p. 5.)
  - e. The fact a Board does not appoint or remove the General Manager alone "does not diminish its authority as head of the Department." (*Ibid.*)
4. The August 23, 2010 advice memorandum failed to disclose or discuss the existence of or the information contained in **formal City Attorney Opinion No. 2000:3**, dated October 6, 2000, which says, among other things, that the Chief of Police administers the affairs of the department as its chief administrative officer and does so by following rules promulgated and instructions issued by the Commission, and instructing employees accordingly.

5. The August 23, 2010 advice memorandum failed to disclose or discuss the existence of or information contained in **formal City Attorney Opinion No. 99-7**, dated September 20, 1999, which says, among other things:
  - a. "The Commission and Chief share the management authority over the Police Department. The Commission is to supervise, control, regulate and manage the Department and does so by promulgating rules and issuing instructions to the Chief. The Chief is to administer the affairs of the Department and does so in accordance with Commission rules and instructions. **Thus, the Charter design for departments headed by boards**, such as the Police Department, **calls for joint management** under an arrangement by which the board and the chief administrative officer, while governing the same terrain, are assigned different tasks. The board promulgates rules for the department and instructs the chief administrative officer. The chief administrative officer follows such rules and instructions in directing department staff in conducting operations." (City Attorney Opinion No. 99-7 at pp. 5-6, emphasis added.)
  - b. "Though equipped with an Executive Director and staff, as a practical matter the Commission will have limited capability to engage in the active supervision of operations. Department operations are vast, and the Department operates around the clock. That such a degree of involvement will be the exception rather than the rule only underscores the point that the Commission fully has the power to do so. The Commission may issue precise directions to the Chief that are operational in their nature." (*Id.* at p. 10.)
6. The August 23, 2010 advice memorandum failed to disclose or discuss the existence of or information contained in *Patton v. Board of Harbor Commissioners* (1970) 13 Cal.App.3d 536, a **published decision** of the Court of Appeal that discusses the **ultimate authority** of a Los Angeles City commission like the Fire Commission. Like the Southern Pacific attorney who failed to cite adverse legal authority from a case he previously litigated, the City Attorney failed to disclose or discuss the *Patton* case in the August 23, 2010 advice memorandum after representing the Board of Harbor Commissioners in the *Patton* litigation.
7. The August 23, 2010 informal advice from the City Attorney failed to disclose or discuss that when interpreting Charter language that is now contained in Charter section 509, the Court of Appeal in the *Patton* case concluded a City of Los Angeles commission that heads a department has the **"ultimate" authority over discipline**. (*Id.* at pp. 542-43.)
8. On May 16, 2011, the City Attorney provided the Fire Commission and the Independent Assessor with an advice memorandum that says the Fire Chief's functions of discharging and suspending Department employees are subject to review and corrective instruction from the Fire Commission. This advice memorandum cited both **formal City Attorney Opinion No. 2006:1** and the **published** Court of Appeal decision in the ***Patton* case**. However, these authorities were not disclosed or discussed in the City Attorney's August 23, 2010 informal advice memorandum.
9. On June 28, 2011, the City Attorney's Office was provided with a June 21, 2011 opinion from Dean and Distinguished Professor of Law Erwin Chemerinsky, who previously served as Chair of the Elected Los Angeles Charter Reform Commission. The June 21, 2011 opinion from Dean Chemerinsky, contrary to the August 23, 2010 advice,

concluded that the Independent Assessor has access to personnel files, disciplinary records and investigative materials because Charter section 523 says the Independent Assessor shall have the same access to Fire Department information as the Board of Fire Commissioners, and as the managing head of the Department under Charter sections 500 and 506, the Fire Commission has access to all such information.

10. Dean Chemerinsky's June 21, 2011 opinion about the authority of the Fire Commission is consistent with **formal opinions** from the City Attorney's Office and the **published Court of Appeal decision** in the *Patton* case.
11. The City Attorney's August 23, 2010 advice failed to disclose or discuss the existence of or information contained in a **formal City Attorney Opinion, 33 Ops.L.A.City Atty 46**, that said:
  - a. It is an accepted rule of law that a public officer or board has not only the powers expressly enumerated by law, but also those implied powers which are necessary to the exercise of the powers expressly granted;
  - b. A commissioner has the implied duty to acquaint himself or herself with the subject matter of the powers and obligations of the Board of which he or she is a member;
  - c. This duty gives him or her the corresponding right to acquire knowledge of the operations, policies and methods of the department governed by the Board of which he or she is a member;
  - d. Such knowledge is essential to intelligent supervision by the Board over the department;
  - e. For the sole purpose of fulfilling his or her duty to acquire knowledge of the department, a Board member has the correlative right to inspect department operations and records; and
  - f. There may be times where accurate knowledge of the department's affairs cannot be acquired in any other manner. (33 Ops.L.A.City Atty 46 at pp. 3-4.)
12. The City Attorney's August 23, 2010 advice failed to disclose or discuss the existence of or information contained in **formal City Attorney Report No. R99.0021**, dated January 25, 1999, which informed the City Council that as head of the Police Department, the Police Commission "may access all information available to the Department." (City Attorney Report No. R99.0021 at p. 11.)
13. I have reasonable cause to believe the failure to disclose or discuss formal City Attorney Report No. R99.0021 in the August 23, 2010 advice memorandum was **intentional** because I brought this report to the attention of the City Attorney's Office in an email dated May 11, 2010, three months before the August 23, 2010 advice was provided to the Fire Commission and to the Independent Assessor.
14. The City Attorney's informal August 23, 2010 advice failed to disclose or discuss the existence of or information contained in **formal City Attorney Report No. R99-0302**, dated September 30, 1999, which informed the City Council's Public Safety Committee

that "[t]he Commission, as head of the Police Department, has access to everything within the control of the Department." (City Attorney Report No. R99-0302 at p. 4.)

15. Before I published the *Assessment of the Fire Department's Disciplinary Process and Professional Standards Division (Assessment)* on March 27, 2010, I attended some of the Fire Department's confidential discipline meetings with the Fire Chief, the Department's Professional Standards Division and attorneys from the City Attorney's Office. Confidential and personal information about misconduct complaints, how such complaints are handled by the Fire Department, the status of investigations and disciplinary decisions were discussed at these meetings. I am also aware that Ms. Lopez previously attended these meetings on behalf of the Fire Commission since approximately January 2008. I have reasonable cause to believe the City Attorney has an ethical and legal duty to object to anyone attending Department discipline meetings if they are not authorized to do so. I have reasonable cause to believe the City Attorney failed to object to either Ms. Lopez or me attending the discipline meetings on behalf of the Fire Commission for the two years prior to April 21, 2010, which was eight (8) days after the Commission's formal receipt of my *Assessment* that criticized some work performed by some of the attorneys in the City Attorney's Office.
16. On December 15, 2009, the Fire Commission discussed and adopted the *Policies and Authority of the Independent Assessor*, which stated Fire Department employees have an affirmative duty to cooperate with the Independent Assessor and to provide complete, unrestricted and prompt access to all Department records. The City Attorney's Office failed to advise the Fire Commission or the Independent Assessor that access was somehow limited when this policy was discussed and unanimously approved on December 15, 2009. I have reasonable cause to believe the City Attorney had an ethical and legal duty to object or provide advice if the Fire Commission and I were not authorized to have such access, and there were in fact no objections or advice provided at the time.

**The City Attorney falsely stated that the Fire Commission cannot meet in closed session to discuss private personnel records:**

The City Attorney's August 23, 2010 informal advice memorandum addressed to the Board of Fire Commissioners and to the Independent Assessor **says the Fire Commission cannot meet in closed session to discuss private personnel records** because the Fire Commission has no role in personnel actions or discipline of Department employees. I have reasonable cause to believe this statement is false because:

1. Meeting agendas and minutes reveal that the City Attorney's Office advised members of the Fire Commission's Personnel Committee to hold and actually attended **closed session** meetings, pursuant to the *Brown Act*, to discuss public employee discipline, dismissal and release on June 23, 2006, August 31, 2006, October 13, 2006, April 20, 2007, September 24, 2007, January 25, 2008 and April 25, 2008; all **before** the informal August 23, 2010 advice was sent to the Fire Commission and to the Independent Assessor.
2. The meeting agenda and minutes reveal that the City Attorney's Office advised members of the Fire Commission to hold and actually attended a **closed session** meeting pursuant to the *Brown Act* to discuss a personnel matter involving the Fire Chief's confidential performance evaluation on November 19, 2010, which was **after** the

August 23, 2010 informal advice memorandum was provided to the Fire Commission and to me.

3. On May 16, 2011, the City Attorney advised the Fire Commission and me that the Fire Chief's functions of discharging and suspending Department employees are subject to review and corrective instruction from the Fire Commission. A review of confidential investigation materials and disciplinary information for a particular employee by the Fire Commission may only take place in a **closed session** meeting.
4. It is not likely the City Attorney's Office believed it was accurate to say Fire Commissioners could not hold **closed sessions** to discuss discipline or personnel matters because the City Attorney repeatedly advised Fire Commissioners to hold such closed session meetings **after** publishing **formal City Attorney Opinion No. 2004:8**, dated August 4, 2004, which says willful violations of the *Brown Act* can result in criminal penalties as well as substantial civil penalties for violations, even if inadvertent.

**The City Attorney falsely stated that the Fire Commission has no oversight over the disciplinary process:**

The City Attorney's August 23, 2010 advice memorandum addressed to the Board of Fire Commissioners and to the Independent Assessor said Fire Commissioners have no **oversight over the Fire Department's disciplinary process**. I have reasonable cause to believe this statement was false because:

1. The Independent Assessor's class specification, approved on March 12, 2009, after a written review by the City Attorney says, among other things:
  - a. The Independent Assessor "assists the Board of Fire Commissioners in providing civilian **oversight by monitoring the disciplinary process** in the Los Angeles Fire Department (LAFD) and to ensure that investigations are conducted in a thorough, fair, and effective manner" (emphasis added);
  - b. The Independent Assessor "plans, assigns, organizes and directs the work and resources ... engaged in the **oversight** of the Los Angeles Fire Department's **internal disciplinary process** for sworn and civilian employees" (emphasis added);
  - c. The Independent Assessor "reviews investigations of complaints filed against Department employees to determine whether investigations are conducted fairly and comprehensively ... and to determine whether adjudication complies with Department policies and procedures;"
  - d. The Independent Assessor "conducts audits, including the annual audit, of the internal disciplinary system to identify trends and problems to ensure that **oversight** by the Board of Fire Commissioners is objective and comprehensive, and in compliance with recommendations" (emphasis added);
  - e. The Independent Assessor "audits the Professional Standards Division including EEO Section investigations to ensure thorough and unbiased adjudication and consistent disciplinary action;" and

- f. The Independent Assessor must have the knowledge and abilities to know “the difference between interviewing and interrogating, and the appropriate times to interview rather than interrogate, in order to ensure fairness when interacting with citizens and competence when evaluating interrogations from Professional Standards Division.”
2. The City Attorney’s Office provided a written review of the Independent Assessor’s class specification on December 15, 2008. I have reasonable cause to believe the City Attorney had an ethical and legal duty to object to or provide advice concerning anything contained in the class specification that was improper or beyond the authority of the Independent Assessor. I have reasonable cause to believe the City Attorney failed to raise concerns of any kind about the following when providing a written review of the class specification on December 15, 2008:
  - a. The **oversight roles** played by the Fire Commission and Independent Assessor as described by the class specification; or
  - b. The Independent Assessor’s **review of investigations** for the reasons set forth in and as described by the class specification.

**The City Attorney falsely stated that the Fire Chief has exclusive jurisdiction over the discipline of Department employees:**

The City Attorney’s August 23, 2010 informal advice memorandum addressed to the Board of Fire Commissioners and to the Independent Assessor said that in both the Fire and Police “Departments, the Chief Administrative Officer (i.e., the Police Chief or the Fire Chief) has **exclusive jurisdiction** over the appointment, discipline, and transfer of employees in the department. Charter Sections 509(b) and 574(c).” I have reasonable cause to believe this statement was intentionally false because:

1. What Charter section 509(b) actually says is, “[s]ubject to the provisions of the Charter, the rules of the department and the instruction of his or her board, the chief administrative officer of a department or bureau under the control and management of a board of commissioners, except the Police Department, shall: ... (b) appoint, discharge, suspend, or transfer the employees of the department ....” (Emphasis added.)
2. Charter section 574 only addresses the powers and duties of the Chief of Police, not the Fire Chief.
3. Charter section 571 only applies to the Police Commission, not the Fire Commission, and actually says, in relevant part: “(b) The Board of Police Commissioners shall have the power to: (1) issue instructions to the Chief of Police concerning the exercise of the authority conferred on the Chief of Police by the Charter, other than the disciplinary authority conferred by Section 1070.”
4. The August 23, 2010 advice memorandum failed to disclose or discuss the existence of or information contained in formal City Attorney Opinion No. 2006:1, dated May 9, 2006; formal City Attorney Opinion No. 2000:3, dated October 6, 2000; formal City Attorney Opinion No. 99-7, dated September 20, 1999; or the published Court of Appeal decision in *Patton v. Board of Harbor Commissioners* (all as previously set forth).

5. On May 16, 2011, the City Attorney's Office provided the Fire Commission and me with an advice memorandum that said the Fire Chief's functions of discharging and suspending Department employees are subject to review and corrective instruction from the Fire Commission, and expressly relied on formal City Attorney Opinion No. 2006:1 and the published decision in the *Patton* case to support this statement. The City Attorney failed to discuss or disclose these authorities in its August 23, 2010 advice memorandum.
6. On June 28, 2011, the City Attorney's Office was provided with a June 21, 2011 opinion from Dean and Distinguished Professor of Law Erwin Chemerinsky who previously served as Chair of the Elected Los Angeles Charter Reform Commission. The June 21, 2011 opinion from Dean Chemerinsky confirms that the Independent Assessor has access to personnel files, disciplinary records and investigative materials because Charter section 523 says the Independent Assessor shall have the same access to Fire Department information as the Board of Fire Commissioners, and as a managing head of the Department, pursuant to Charter section 500 and 506, the Fire Commission has access to all such information.

**The City Attorney falsely stated that the Personnel Department's report failed to indicate review of confidential records was required:**

The August 23, 2010 informal advice memorandum addressed to the Board of Fire Commissioners and to the Independent Assessor references both the Commission's Audit Action Plan and the Personnel Department's January 14, 2008 report contained in Council File No. 06-2959, and said: **"There is no indication either of these lengthy reports required review of confidential personnel records."** (Emphasis added.) I have reasonable cause to believe this statement was intentionally false because page seven from the Personnel Department's January 14, 2008 report proposing creation of the Independent Assessor position says:

"Regardless of what form oversight may take, access and flexibility are the two crucial elements this function needs to be successful. Unfettered access to complaint and disciplinary tracking systems, databases, files, members, investigations, management etc. is paramount because anything less would be an impediment. **To guarantee and preserve the requisite access, we strongly propose that such access be codified through ordinance or charter provision, such as Charter Section 573 that grants LAPD's Inspector General access to Department information.**" (Emphasis in the original.)

**The City Attorney falsely stated that investigative authority is required to obtain access to Fire Department information:**

The August 23, 2010 advice memorandum addressed to the Board of Fire Commissioners and to the Independent Assessor said that without **investigative authority** it is impermissible for the Independent Assessor to receive investigative material or information regarding confidential personnel or disciplinary matters, such as by attending Department meetings where those matters are discussed. I have reasonable cause to believe this statement was false for the following reasons, and in addition to those previously discussed:

1. **Formal City Attorney Report No. R99-0302** to the City Council's Public Safety Committee, dated September 30, 1999, analyzed the authority of the Police Commission's Inspector General to access information and the Inspector General's

investigative and audit authority. The City Attorney's August 23, 2010 advice memorandum failed to discuss or disclose formal City Attorney Report No. R99-0302.

- a. Formal City Attorney Report No. R99-0302 clearly says the Inspector General shall have the same access to information as the Police Commission, and that as head of the Police Department, the Commission has access to everything within the control of the Department.
  - b. Formal City Attorney Report No. R99-0302 fails to say, or even suggest, that investigative authority is a basis for or provides greater access to department information.
2. **Charter section 523** says the Independent Assessor "shall have the same access to Fire Department information as the Board of Fire Commissioners," and says nothing about access to Department information being dependent on investigative authority. Furthermore, this language duplicates that in Charter section 573 granting the Inspector General the same access as the Police Commission to department information. I have reasonable cause to believe that the Independent Assessor's access to information is solely dependent on the extent of the Fire Commission's access to Fire Department information.
  3. The City Attorney's Office has failed or refused to provide any statutory or case citations to support the statement that access to confidential personnel or disciplinary matters, including Department discipline meetings, depends on investigative authority.
  4. No attorney from the City Attorney's Office raised any objection to Fire Commission employees, either Ms. Lopez or myself, attending Department discipline meetings for approximately two years before publication of my *Assessment*.
  5. The *Assessment* contained information making it obvious that confidential investigative and disciplinary information had been reviewed and assessed in preparing the report. The City Attorney's Office reviewed the report before it was published and spoke to the Fire Commission on April 13, 2010, about the report. However, the City Attorney's Office failed to raise any concerns or objections about the obvious and extensive access to confidential information on or before April 13, 2010.

**The City Attorney failed to disclose or discuss information at the July 19, 2011 Fire Commission meeting:**

At the Fire Commission's July 19, 2011 meeting, the City Attorney's Office urged the Commission to reject the Independent Assessor's Policy Statement concerning access to information on the basis of the August 23, 2010 advice without disclosing or discussing the information contained herein, despite having knowledge such information before that meeting. I have reasonable cause to believe the failure to disclose and discuss prior **formal City Attorney opinions and reports**, the published decision in the **Patton case** and the City Attorney's **May 16, 2011 advice** at the time of the July 19, 2011 discussion constitutes a failure to disclose facts and circumstances necessary to enable to the Fire Commission and me to make a free and intelligent decision.

**The City Attorney has intentionally failed to provide advice concerning a reasonable alternative to a Charter amendment:**

The City Attorney has repeatedly said during the course of this dispute that the "only" remedy is a "Charter amendment." I have reasonable cause to believe this statement intentionally fails to provide a more reasonable and less costly resolution to the dispute regarding access because the City Attorney's Office said in its lawsuit against the Controller that the correct way to resolve disputes about the interpretation of the City Charter is by way of a declaratory relief action. In fact, the City Attorney's Office criticized the Controller for choosing not to seek declaratory relief. Please see, for example, paragraph 32 of the City Attorney's declaratory relief complaint.

**Failures to communicate with the Fire Commission and Independent Assessor related to August 23, 2010 advice:**

I have reasonable cause to believe the City Attorney's Office has engaged in repeated refusals or failures to provide timely advice concerning access to Fire Department information, or communicate with and answer reasonable questions from Fire Commissioners and/or me in response to the advice set forth in the City Attorney's August 23, 2010 memorandum as follows:

1. On December 21, 2009, former Fire Chief Millage Peaks informed me by email that the City Attorney was invited to make comments concerning my right to access personnel files. The City Attorney's advice on the issue was not provided for eight (8) months.
2. At its meeting on April 13, 2010, the Fire Commission adopted a motion that directed the Fire Department to provide the Independent Assessor with immediate and unrestricted access to all Fire Department personnel and payroll records unless the City Attorney's Office could provide written advice citing a valid legal basis for not providing access in no more than thirty (30) days. The City Attorney's advice was not provided in the next 120 days.
3. On April 21, 2010, eight (8) days after an *Assessment* containing criticism of some legal services provided by some in the City Attorney's Office was formally presented to the Fire Commission, the City Attorney's Office cautioned the Fire Chief to limit the Independent Assessor's involvement in the Department's discipline meetings for the first time. The City Attorney's Office did not communicate this advice to the Office of the Independent Assessor until two weeks later on May 6, 2010, when City Attorney management directed a subordinate to provide the advice to me.
4. On May 11, 2010, the City Attorney's Office sent an email saying their opinion concerning the Independent Assessor's access to information "will be released this week and our Office will be available to discuss and meet with you and/or the Commission President along with perhaps one other Commissioner." The advice was not provided until August 23, 2010, and the City Attorney's Office has failed or refused to discuss the advice as represented on May 11, 2010. The City Attorney's Office has failed or refused to discuss concerns or answer questions about the August 23, 2010 advice in the more than a year since it was released.
5. At the August 17, 2010 meeting, the City Attorney said Fire Commissioners could discuss and ask questions about the City Attorney's legal advice but that it was something that the public had the right to observe. Meaningful discussions about the August 23, 2010 advice have not taken place with either the Fire Commissioners or the Independent Assessor, and questions concerning the advice have not been answered despite the City Attorney's August 17, 2010 representation.

6. On September 21, 2010, the City Attorney proposed meeting with a subcommittee of the Commission to discuss the legal advice in private rather than having a public discussion in open session. The Commission appointed a subcommittee at the City Attorney's request and said the Fire Chief and the Independent Assessor were to participate in the private discussion. The City Attorney's Office said it would coordinate scheduling the meeting. A meeting was not promptly scheduled.
7. On September 27, 2010, the Commission's executive assistant asked the City Attorney's Office if the private meeting had been scheduled. Other than being told on September 28, 2010, "Not yet, Linda Evans, assistant to Pete Echeverria will coordinate the setting of the meeting," the meeting was not scheduled.
8. On November 15, 2010, the City Attorney's Office sent an email to Fire Commission President Genethia Hudley-Hayes, with a copy to Mr. Echeverria that said, in part: "I believe Pete's secretary is coordinating a meeting." However, the meeting was not scheduled.
9. On December 15, 2010, the Mayor's Office provided the City Attorney's Office with my extensive written analysis of the August 23, 2010 advice, which raised substantially all of the points previously discussed in this report. The City Attorney has failed or refused to discuss this analysis with me at any time.
10. On January 18, 2011, four months after the City Attorney's Office proposed a private meeting; President Hudley-Hayes and Vice President Tolentino sent a letter to the City Attorney asking that the private meeting be scheduled. The City Attorney was also sent written questions about the August 23, 2010 advice with a request that the questions be answered in writing so the information could be shared with the rest of the Fire Commission. Although the private meeting took place on March 1, 2011, the City Attorney did not then and has not since answered any of the written questions, either orally or in writing.
11. The City Attorney's Office received Board Report No. 11-104 containing eleven (11) questions concerning the right to access Department information by the Fire Commission and the Independent Assessor before July 19, 2011. The City Attorney's Office did not provide answers to the questions at the July 19, 2011 meeting. At the July 19, 2011 meeting the Fire Commission provided the City Attorney's Office another sixty (60) days to answer the questions. The City Attorney's Office has failed to answer any of the questions since then. A copy of the questions is attached as Exhibit A.
12. The Fire Commission was told by its general counsel on July 19, 2011, that City Attorney Carmen Trutanich decides how he wants to run the Office of the City Attorney and how he wants to assign resources. The Commission was told that with respect to whether or not the City Attorney's Office is going to take further steps to respond specifically to the "litany of questions and analysis that has been presented" is something the City Attorney will determine.
13. On August 2, 2011, I sent written questions about the right to access Department information to Chief Deputy City Attorney Pete Echeverria, Senior Assistant City Attorney Zna Houston, Deputy City Attorney Vivienne Swanigan and Deputy City Attorney Janet Jackson. A copy of the questions is attached as Exhibit B. These questions have not been answered.

14. On August 8, 2011, the City Attorney's Office was asked to provide a copy of any written advice the City Attorney's Office had provided to former Fire Chief Peaks and/or the Fire Department concerning the Independent Assessor's access to Fire Department information aside from the April 21, 2010 email and August 23, 2010 advice memorandum. This would include any advice or opinions that address the liability or legality of the Fire Chief, or others in the Fire Department, permitting access to Fire Department information by the Independent Assessor. The City Attorney's Office has not responded to the request.

**Failure to provide advice related to adopting office policies:**

At the July 19, 2011 meeting the City Attorney's Office said for the first time that the Independent Assessor does not have the authority to adopt internal office policies. Prior to the July 19, 2011 meeting, the City Attorney was given an opportunity to review and comment on the draft Policy Statement and the draft Board Report (BFC 11-104). In a July 6, 2011 letter, the City Attorney acknowledged having "the opportunity to review" the report. Although other comments were made about the draft report submitted to the City Attorney's Office for review, the City Attorney failed to say that the Independent Assessor does not have the power to establish internal office policies.

Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client's objectives. (*Nichols, supra*, 15 Cal.App.4th at pp. 1683-84.) In addition to failing to indicate the Independent Assessor is without the power to adopt policies for my own office when reviewing the draft materials submitted for review before the July 19, 2011 meeting, the City Attorney has provided no authority to support the contention that the Independent Assessor may not establish internal office policies governing the conduct of subordinates.

Charter section 523(e) says the Independent Assessor shall have the power and duty to appoint, discharge, discipline, transfer and issue instructions to employees under his or her direction. The Independent Assessor's class specification, which was the subject of a December 15, 2008 written review by the City Attorney and approved by the Civil Service Commission on March 12, 2009, says the Independent Assessor:

- Plans, assigns, organizes and directs the work and resources of professional and clerical personnel engaged in the oversight of the Fire Department's internal disciplinary process;
- Is responsible for the strict observance of confidentiality; and
- Applies job-related criteria in selecting, orienting, assigning, training, counseling, evaluating and disciplining subordinates.

A few written and some unwritten policy statements, audit tools and training materials have been developed so far concerning such things as access to records, confidentiality, the use of audit criteria and fact checking of audits, assessments and reviews. As the office and its staff grow, more formalization in these areas will naturally take place.

One of the major reasons a formal policy concerning access to Department information was adopted was because the City Attorney's August 23, 2010 advice contradicts its own formal opinions, its May 16, 2011 advice, the Court of Appeal's published decision in the *Patton* case,

the Fire Commission's December 15, 2009 policy statement and former Fire Chief Peaks' July 14, 2010 memorandum regarding access. The City Attorney's Office has failed and refused to resolve, explain or even discuss these conflicts. In developing formal internal office policies, the policies of other offices, such as the Police Commission's Office of the Inspector General, have been reviewed and are of considerable assistance.

It is acknowledged, recognized and agreed that the Independent Assessor has no authority to adopt policies governing the conduct of the Fire Chief, the Fire Chief's subordinates or the Fire Department as a whole. However, that is largely irrelevant because the Fire Commission, which does have such power, unanimously adopted a formal policy stating that all "Fire Department employees have an affirmative duty to cooperate with the Independent Assessor and to provide complete, unrestricted and prompt access to inspect and/or copy all Department physical and electronic records accessible to the Board." Adoption of this Department policy occurred on December 15, 2009, without objection or contradictory advice from the City Attorney at the time it was discussed and approved. On July 14, 2010, former Chief Peaks issued a memorandum reminding his subordinates of that affirmative duty.

**Fiscal Impact:**

None.

**Conclusion:**

I clearly understand the City Attorney is the legal advisor for the City, the Fire Commission and for me. However, I have reasonable cause to believe some members of the City Attorney's Office have: failed or refused to engage in appropriate and required client communications; and failed or refused to disclose and/or discuss all facts, circumstances and prior formal published opinions and decisions as required of attorneys which are necessary to enable the Fire Commissioners and the Independent Assessor to make free and informed decisions.

On May 11, 2010, the City Attorney's Office told me they would discuss their advice concerning my authority to access Department information once it was issued. On August 17, 2010, the City Attorney told the Fire Commission that its advice could be discussed and questions could be asked, but the discussion had to take place in public. On September 21, 2010, the City Attorney invited a private discussion of these issues. On December 15, 2010, the City Attorney received my written analysis of the August 23, 2010 advice that raised significant issues, most of which are mentioned in this report. On January 18, 2011, the City Attorney received written questions concerning the advice. On July 19, 2011, the City Attorney was provided another sixty (60) days to answer eleven (11) questions about access to Fire Department information. On August 2, 2011, I sent written questions to the City Attorney's Office about its legal advice. On August 8, 2011, the City Attorney was requested to provide a copy of any advice that had been provided already to the former Fire Chief or the Department concerning access to information that is in addition to what has been provided to the Commission and me.

However, and thus far, attempts to discuss the legal authority of the Fire Commission and the Independent Assessor to access Fire Department information, ask questions about the City Attorney's August 23, 2010 advice or discuss concerns about the issues have only resulted in the following:

- A failure or refusal to answer questions, respond to or discuss concerns;

- Insistence that the Fire Commission and the Independent Assessor follow the August 23, 2010 advice despite contradictory advice or opinions from the City Attorney and a binding published decision from the Court of Appeal;
- Threats that a complaint will be filed against me with the State Bar of California; and
- Threats that the City will not defend or indemnify me in the event I am sued should I fail to conduct myself in conformity with the August 23, 2010 advice.

As was done with the City Controller to resolve that dispute, a declaratory relief action should be filed seeking an interpretation of the Los Angeles City Charter as it pertains to the authority of the Fire Commission and Independent Assessor to access all Fire Department information. If the August 23, 2010 advice is accurate, pursuing a declaratory relief action would serve the best interests of the Los Angeles City taxpayers because a declaratory action is more expedient and less costly than another Charter amendment.