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City Attorney

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## PROCEDURES AND GUIDELINES FOR ISSUING CITY ATTORNEY OPINIONS

In this memorandum, we summarize the policy of the City Attorney's Office for issuing legal advice, particularly written opinions. Written opinions include advice to our clients that we give by formal memorandum or letter, and less formal means of communication such as email.

The San Francisco Charter vests in the elected City Attorney the authority and duty to act as the City's independent legal advisor. A central mission of the City Attorney's Office is to provide the highest quality legal advice to the City and County of San Francisco. One of the enumerated duties of the City Attorney under Section 6.102 of the Charter is "upon request, to provide advice or written opinion to any officer, department head or board, commission or other unit of government of the City and County." The following procedures and guidelines reflect the City Attorney's commitment to fulfill this duty by making sure the advice this Office delivers is well considered, objective, consistent and clear. Another goal is to make sure our advice is responsive and helpful to our clients, including giving options to address legal issues and reduce or avoid legal risk where possible. If you have any questions about this memorandum, please feel free to contact the Chief Assistant City Attorney.

### I. PROCEDURES FOR CONFIDENTIAL OPINIONS

Approval by the City Attorney. The City Attorney must approve any significant legal opinion before it is issued. A significant legal opinion is any form of substantive advice—whether in writing or oral, formal or informal—that (i) presents a new question of law, including an interpretation of the City's Charter, Municipal Codes or other local, state or federal statutes, (ii) presents a matter of significant precedent, (iii) reverses or changes past advice from the City Attorney's Office, or (iv) involves a subject of public controversy.

Cautionary Memoranda. When the Board of Supervisors is considering proposed legislation that would present significant legal issues if a person were to challenge it in court, the City Attorney's Office will issue a confidential opinion to the Board and Mayor regarding the legal risks and options moving forward. We describe legal risk in cautionary memoranda in terms of the substantive risk of a plaintiff prevailing in a facial or as-applied challenge to an ordinance, and often we also address the practical risk of a plaintiff filing a lawsuit. In both instances, we describe the risk on a five point scale: (1) very high; (2) high; (3) medium; (4) low; and (5) very low. In appropriate instances, we may include an estimate of the cost of defending the legislation, including through appeal, and any liability the City could have for attorneys' fees.

**Memorandum**

November 25, 2024  
Page 2

- (1) Delivering Cautionary Memoranda. The Office's first step when issuing written confidential cautionary memoranda is to provide the memorandum to the sponsor (or sponsors) of the legislation, before the legislation is introduced at the Board of Supervisors. Once the legislation has been introduced and within a reasonable time before a committee of the Board considers the proposed legislation, the Office will deliver the same substantive advice (after taking into account any applicable amendments to the proposed legislation) to each member of the Board and the Mayor.
- (2) Waiver of the Attorney-Client Privilege. For confidential cautionary memoranda, the privilege may be waived only if all the recipients in the "To" line of the memorandum agree to waive the privilege. That means once we have issued a confidential cautionary memorandum addressed to the Mayor and the Board, the Board, acting as a body, and the Mayor must both agree to waive the privilege. Until we issue the confidential cautionary memorandum to the Board and Mayor, the sponsor(s) could waive the privilege. But we ask that any recipients of confidential advice who wish to provide a copy of the memorandum or otherwise disclose the advice to a third party, and therefore waive the privilege, consult with us before doing so. And we discourage them from disclosing the advice if doing so could harm the City's interests, especially when not all of the City's highest policy members have participated in making that decision. City officials who are listed in the "CC" line of a cautionary memorandum do not have authority to waive the privilege. For more information regarding confidentiality and the attorney-client privilege, please see Tab 17 of this binder.
- (3) Amendments to the Underlying Legislation. If the underlying legislation is amended in response to advice of this Office or in a way that materially changes the substance of our advice, our Office will prepare an updated cautionary memorandum.

**III. PROCEDURES FOR ISSUING PUBLIC OPINIONS**

- Approval by the City Attorney. In the interests of transparency and accountability, the City Attorney's policy is to make written opinions publicly accessible whenever it is appropriate to do so. The City Attorney will decide on a case-by-case basis which opinions the office will make public. Factors that the City Attorney may consider in determining which opinions to make public include the willingness of the client commission, department, or official to make the opinion public; the significance of the issue for good government or public information; and its precedential significance. In addition to City Attorney opinions that meet the above criteria for making them public, we may post other opinions on the City Attorney website that are important for the public to know.