

**CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
LEGAL OPINION # 07-012**

TO: Larry Spring, Chief Financial Officer
FROM: Jorge L. Fernandez, City Attorney JSB
DATE: May 29, 2007
RE: Investigation of potential conflict of interest violation - authority of Auditor General

You have asked the following questions:

1. **WHETHER THE AUDITING FUNCTIONS OF THE AUDITOR GENERAL AUTHORIZED BY MIAMI CHARTER SECTION 48 INCLUDE CONDUCTING LEGAL ANALYSIS OR ISSUING LEGAL OPINIONS?**

The answer to your question is in the negative.

2. **WHETHER THE DUTIES OF THE AUDITOR GENERAL SPECIFIED BY MIAMI CHARTER SECTION 48, INCLUDE CONDUCTING INVESTIGATIONS OF BUSINESS TRANSACTIONS ENTERED INTO BY CITY EMPLOYEES OR CITY BOARD MEMBERS AND ISSUING OPINIONS OR CONCLUSIONS AS TO WHETHER SUCH EMPLOYEE OR BOARD MEMBER VIOLATED THE CODE OF ETHICS GOVERNING PUBLIC OFFICERS AND EMPLOYEES?**

The answer to your question is in the negative.

BACKGROUND INFORMATION

We are in receipt of a Legal Services Request wherein on behalf of the administration you are asking this office to issue a Legal Opinion in response to a request made to your office by the Office of the Independent Auditor General (Audit Memo). The Audit Memo, dated May 8, 2007, contains *observation #1*, and *observation #2*, pertaining to an ongoing audit of the City's housing program. Specifically, the *observations* briefly describe several financial transactions involving City funding of affordable housing developments and expressly raises the issue of a *potential conflict of interest* or the *appearance of conflict of interest* with respect to the

conduct of individual City employees and City board members who participated in those particular transactions.

DISCUSSION

1. Under the provisions of the Miami City Charter the duties, responsibility and powers of the Independent Auditor General (IAG) do not include conducting legal analysis or rendering legal opinions because the City Attorney is empowered by the Charter to serve as the legal advisor, attorney and counsel for the City and for all officers and departments.

The power and authority of the City of Miami and its elected and appointed officers is expressly provided for in the Charter of the City of Miami. As to the City of Miami, the City Commission constitutes the legislative body, with the power to adopt laws and to regulate. The Commission has broad home rule powers under Article VIII, Section 2(b) of the Florida Constitution, and Section 166.021(4), Florida Statutes (2006).

Specifically, Miami Charter Section 3 states that the City of Miami shall have the governmental, corporate, and proprietary powers to enable it to conduct municipal government, perform municipal functions and render municipal services and may exercise any power for municipal purposes, except when expressly prohibited by law. On the other hand, the powers of a municipal office or officer are restricted to those expressly established by in the charter. The Office of Independent Auditor General (IAG) is established in Sec. 48 of the Miami Charter. See also Sections 2-526, and 2-531 of the Miami Code. The express purpose of the IAG is to provide the City Commission with independent oversight of audit and analytical functions of the City. In order to fulfill these responsibilities the IAG is granted the power and authority to:

- (1) Examine city audit functions and accounting systems, provide budget and legislative analysis, conduct financial, operational, compliance, single act and performance audits of city government, officials, and independent agencies, with reports submitted to the city commission as deemed necessary by the IAG or as may be required by the city commission, from time to time, and copied to the administration.
- (2) Have free and unrestricted access to city government employees, officials, records and reports and where appropriate, require all branches, departments, agencies and officials of city government to provide oral and written reports and to produce documents, files and other records.
- (3) Render assistance to external auditors retained by the city commission. Such assistance shall be limited to special audits or limited examinations ordered by the city commission.

The responsibility of the IAG is *expressly limited* to providing oversight of the audit and analytical functions of the City. The powers that are granted to the IAG are *expressly limited* to examining City audit functions and accounting systems, providing budget and legislative analysis, conducting single acts and performance audits of City government, officials and

independent agencies concerning financial, operational, and compliance. The responsibility of the IAG to provide oversight of audit and analytical functions of the City does not include the power to issue legal opinions. That authority is reserved elsewhere in the Charter.

Under the City, Charter the City Attorney serves as the legal advisor of and attorney and counsel for the City, and for all officers and departments thereof in matters relating to their official duties. Additionally, the Charter recognizes that as the legal advisor for the City, the Mayor, City Commission, the City Manager, the director of any department, or *any officer* or board not included within a department, may require the opinion of the City Attorney upon any question of law involving their respective powers and duties. Accordingly, in performing oversight of audit and analytical functions of the City, the IAG must defer to the City Attorney as it concerns legal review or legal interpretation of ordinances, regulations, laws or contracts.

2. The duties of the IAG specified by the Miami Charter do not include conducting investigations of business transactions entered into by City employees or City board members for purposes of issuing opinions or conclusions as to whether City employees or City board members violated the code of ethics governing public officers and employees. The State of Florida has created a Commission on Ethics whose duties it is to investigate violations of the code of ethics and to recommend appropriate action to the agency or official having the power to impose any penalties provided by state law. Likewise, as authorized by state law and mandated by the Miami-Dade County Charter, the County has established an independent Commission on Ethics and Public Trust which has the authority to review, interpret, render advisory opinions and enforce county and municipal code of ethics.

It is not within the IAG scope of authority to be *conducting investigations* and *issuing opinions* or expressing *conclusions* regarding the conduct of individual City employees and City board members with respect to violations of the code of ethics. The authority to conduct such investigations, make findings and recommend or impose penalties is vested in the two entities discussed below.

The Florida legislature recognizes that it is essential to the proper conduct and operation of government that public officials be independent and impartial and that public office or employment not be used for private gain other than the remuneration provided by law. In furtherance of this goal, the legislature adopted a comprehensive regulatory scheme that establishes standards for the conduct of public officials and employees and protects against situations where conflicts may exist. **Code Of Ethics For Public Officers and Employees Florida Statutes Sections 112.311-112.326 (the State Code of Ethics).** The Florida legislature has created a Commission on Ethics whose duties it is to investigate violations of the State Code of Ethics and to recommend appropriate action to the agency or official having the power to impose any penalties provided by state law.

Additionally, state law authorizes the governing body of any political subdivision in Florida to impose upon its own officers and employees additional or more stringent standards of conduct and disclosure requirements than those specified in the State Code of Ethics. Indeed, Miami-Dade County has adopted the "Miami-Dade County Conflict of Interest and Code of

Ethics Ordinance” that is applicable to all county personnel, as defined therein and constitutes a *minimum* standard of ethical conduct and behavior for all municipal officials and officers, autonomous personnel, quasi-judicial personnel, advisory personnel, departmental personnel and employees of municipalities in the county insofar as their individual relationships with their own municipal governments are concerned. **Miami-Dade County Sec. 2-11.1 Conflict of Interest and Code of Ethics Ordinance.**

The Miami-Dade County Charter provides for the establishment of an independent Commission on Ethics and Public Trust (the “Ethics Commission”) with the authority to review, interpret, render advisory opinions and enforce county and municipal code of ethics. **Miami-Dade County Code Sec. 2-1072.** The jurisdiction of the Ethics Commission extends to any person required to comply with county or municipal Code of Ethics Ordinance, and Conflict of Interest Ordinances. **Miami-Dade County Code Sec. 2-1068.**

CONCLUSION

The Audit Memo addressed to the Chief Financial Officer is expressly asking the Chief Financial Officer to confirm or clarify the auditors statement that:

1. “There is an appearance of conflicting interests” with respect to conduct of city employees in connection with their purchases of condo units for investment purposes rather than for use as their primary residences;
2. “There is an appearance of conflicting interests” with respect to members of the Downtown Development Authority in connection with funds obtained from the City for housing projects by such members.

In other words, the auditor has *in fact* made a preliminary finding of a potential violation of the Code of Ethics and seeks *confirmation or clarification* from the Chief Financial Officer. Based on the analysis provided above as to the scope of the IAG’s authority and the fact that such investigation is properly and exclusively within the jurisdiction of either the State Commission on Ethics or the Miami-Dade County Ethics Commission, it would be inappropriate for the Chief Financial Officer to confirm or clarify anything.

Also, where a complaint or request for an advisory opinion requires the interpretation of a particular ordinance within the jurisdiction of the Ethics Commission, the City Attorney may provide the Ethics Commission with a nonbinding legal opinion. **Miami-Dade County Code Sec. 2-1074.** However, it would not be proper for the City Attorney to issue a legal opinion finding that the conduct of a City employee or City board member constituted a conflict of interest or potential conflict of interest because that function is within the authority of the Ethics Commission.

Thus, based on the foregoing, it is recommended that your response to the Audit Memo should be limited to *confirmation or clarification* of “facts” pertaining to the business transaction(s) and avoid expressing any opinion as to the conduct of any individual City

employee or City board member. If the IAG, while performing an audit of a City program, detects a potential issue regarding the conduct of a City employee or City board member, he or she should notify the appropriate law enforcement agency or refer the matter to the State Commission on Ethics or the Miami-Dade County Ethics Commission.

PREPARED AND REVIEWED BY:

A handwritten signature in black ink, appearing to read "Julie O. Bru", is written over a horizontal line.

Julie O. Bru

Deputy City Attorney

c: Honorable Mayor and Members of the City Commission
Pedro G. Hernandez, City Manager
Victor I. Igwe, Auditor General