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BERKELEY CITY AUDITOR

ACTION CALENDAR
June 4, 2024

To: Honorable Mayor and Members of the City Council

From: Jenny Wong, City Auditor

Subject: Amendments to Berkeley's Municipal Code Chapter 2.24

RECOMMENDATION
Adopt first reading of an ordinance amending City Auditor's Office (BMC Chapter 2.24) authority and scope of work to formally establish the City Auditor's authority to receive and refer reports of fraud, waste, or abuse as well as investigate those reports and any reports of retaliation against whistleblowers.

FISCAL IMPACTS OF RECOMMENDATION
While there are no direct fiscal impacts associated with the amendments and additions suggested, a whistleblower program could reduce the impacts to city finances associated with undetected fraud in the City. Additionally, providing adequate whistleblower protections can increase the likelihood of whistleblowers coming forward with reports of fraud, waste, or abuse, and therefore increasing the likelihood of detecting and deterring fraud, waste, or abuse.

CURRENT SITUATION AND ITS EFFECTS
These recommended amendments will formally establish the City Auditor's authority to receive and refer reports of fraud, waste, or abuse as well as investigate those reports and any reports of retaliation against whistleblowers. The amendments also provide the City Auditor with the authority to recommend corrective actions in response to investigations and follow up on those recommendations. The City Council previously adopted a resolution on June 6th, 2023 to support and endorse the City Auditor's plan to implement a Whistleblower Program.[1]

BACKGROUND
State legislation encourages Cities to specifically focus on fraud, waste, or abuse of city resources through whistleblower programs led by City Auditors. In 2009, California Government Code Section 53087.6[2] went into effect, which enabled local government auditors to establish whistleblower programs and to provide whistleblower protections. Local auditors are authorized under Section 53087.6 to create whistleblower programs with the approval of their respective legislative bodies, and have discretion in how to operate their programs.

California cities with established whistleblower programs within auditor's offices include Oakland, San Francisco, Sacramento, San Diego, and Long Beach, with information publicly available. Each program was formally established through updates to charter and/or municipal

[1] City Council Meeting, June 3rd, 2023
[2] California Government Code Section 53087.6

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code language, and contain the right to receive, refer, and investigate reports of fraud, waste and abuse. Additionally, all of these jurisdictions protect whistleblowers from retaliation in line with best practices, and have mechanisms in place to investigate reports of whistleblower AMENDMENTS TO BERKELEY'S MUNICIPAL CODE CHAPTER 2.24 TO ESTABLISH WHISTLEBLOWER PROGRAM AUTHORITYretaliation.

ENVIRONMENTAL SUSTAINABILITY
There are no identifiable environmental effects or opportunities associated with this report.

RATIONALE FOR RECOMMENDATION
The Auditor's Office is uniquely positioned to manage a whistleblower program. The Berkeley City Auditor maintains a level of structural independence well-suited for a whistleblower program, as they are elected by the public and do not report to the City Manager or Council. The City Auditor is well-positioned due to their role in providing objective information, like audits, on the operations of government programs and helping ensure full accountability to the public, among other reasons. By amending the BMC, this will formally provide the Auditor with the authority to commence this important work to detect and deter fraud, waste, or abuse of city resources. The proposed amendments will also update the BMC to align with California Government Code Section 53087.6 that establishes local auditors' authority to manage whistleblower programs and provide whistleblower protections.

CONTACT PERSON
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Attachments:
1: Amendments to BMC Chapter 2.24 Ordinance

ORDINANACE NO. X,XXX-N.S.

AMENDING BERKELEY MUNICIPAL CODE CHAPTER 2.24: CITY AUDITOR'S OFFICE

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Section 2.24.010 A is amended to read as follows:

2.24.010 Findings.

A. Public officials, government managers, and private citizens want and need to know not only whether government funds are handled properly and in compliance with laws and regulations, but also whether public programs are achieving the purposes for which they were authorized and funded, and whether they are doing so efficiently, effectively and equitably ~~economically~~.

Section 2. That Berkeley Municipal Code Section 2.24.010 C is amended to read as follows:

C. An independent auditing function can provide objective information, like audits, on the operations of government programs, assist managers in carrying out their responsibilities, and help ensure full accountability to the public.

Section 3. That Berkeley Municipal Code Section 2.24.010 N is amended to read as follows:

N. It is vital to the effectiveness of audit work that it be performed by staff who collectively possess sufficient professional proficiency, qualifications and skills, which may be demonstrated by obtaining relevant certifications such as a CIA (Certified Internal Auditor), CPA (Certified Public Accountant), CFE (Certified Fraud Examiner), degrees in relevant fields such as public policy, public administration, accounting, business administration, political science or related fields, or years of auditing experience, and the City Council may wish to consider taking such competencies and certifications into account in setting the salary for the Auditor and other audit staff.

Section 4. That Berkeley Municipal Code Section 2.24.050 A is amended to read as follows:

2.24.050 Scope of audits.

A. The Auditor may conduct financial, performance, and other audits of all agencies, offices, boards, activities, and functions of the City of Berkeley to include but not be limited to the objectives of independently determining whether:

1. Activities and programs being implemented have been authorized by government charter or code, state law or applicable federal law or regulations;

2. Activities and programs are being conducted as prescribed by management/governing body to accomplish the objectives intended by government charter or code, state law or applicable federal law or regulations;

3. Activities or programs efficiently ~~and~~ , effectively, and equitably serve the purpose intended by government charter, code, state law or applicable federal law or regulations;

4. Activities and programs are being conducted and funds expended in compliance with applicable laws;

5. Payers of City taxes and fees are submitting accurate information and correct amounts; revenues are being properly collected, deposited and accounted for;

6. City contractors are providing ~~efficient and effective~~ services efficiently, effectively, and equitably to the City in compliance with the terms of their contracts;

7. City resources, including funds, property and personnel, are adequately safeguarded, controlled and used in a faithful, effective and efficient manner;

8. City financial and other reports are being provided that disclose fairly and fully all information that is required by law, that is necessary to ascertain the nature and scope of programs and activities and that is necessary to establish a proper basis for evaluating City programs and activities;

9. The City has adequate operating and administrative procedures and practices, systems of accounting, internal control systems, and internal management controls;

10. There are indications of fraud, abuse or illegal acts which need further investigation.

Section 5. That Berkeley Municipal Code Section 2.24.050 C is amended to read as follows:

C. Non-audit and Similar Services, Charter mandated non-audit services:

Government Auditing Standards make a distinction between audit services and non-audit services that auditors may perform. These are generally services that auditors are typically well qualified to perform, but which often do not result in a written audit report. Non-audit services work may be initiated by the Auditor or performed by the Auditor at the request of the City Manager and shall be performed to the extent mandated by the City Charter and consistent with the professional standards applicable to such non-audit work by auditors except where such work is expressly required by the City Charter. In order to continue to maintain independence, and in particular to avoid a situation in which auditors may in appearance or in fact be auditing their own work or making management decisions, Government Auditing Standards currently include requirements for careful consideration regarding when and how to conduct non audit services.

The Auditor shall perform any other non audit services required by the City Charter under Sections 61 and 65. ~~In compliance with these sections, the Auditor reviews, countersigns, numbers, and registers all city agreements (contracts) after the City Manager or designee has signed.~~ The Auditor is authorized to examine or review all City payments and payrolls before issuance and no payment may be made against any City contract until that contract is registered by the Auditor; the Auditor and the City Manager are co-signers on all City checks. Responsibility for reviewing, countersigning, numbering, and registering all city agreements (contracts) as well as performing municipal accounting and non-payroll payment (accounts payable) functions have been delegated to the Finance Department; however, the Auditor may review selected items before payment is approved. The Auditor also directs a Payroll Audit division, responsible for certain centralized payroll functions of the City's decentralized payroll system. (Ord. 6910-NS § 2 (part), 2006)

Section 6. That Berkeley Municipal Code Section 2.24.050 D is added to read as follows:

D. Whistleblower Program:

The Auditor shall administer a whistleblower program for the reporting of fraud, waste, or abuse of City resources. Subject to subsection (3), the Auditor may investigate and otherwise attempt to resolve reports submitted to the whistleblower program.

1) DEFINITIONS.

   a) For purposes of this section, "fraud, waste, or abuse" means any activity by a local agency or employee that is undertaken in the performance of the employee's official duties, including activities deemed to be outside the scope of their employment, that is in violation of any local, state, or federal law or regulation relating to corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, is economically wasteful, or involves gross misconduct.

b) "Whistleblower" is defined as an officer or employee who reports or otherwise brings to the attention of the City Auditor any information which, if true, would constitute fraud, waste, or abuse of City resources.

c) "Retaliation" is any adverse employment action, including discharge, discipline, or demotion.

d) "Adverse employment action" is defined as any employment action that has a detrimental and substantial effect on the terms, conditions, or privileges of a complainant's employment or requires the complainant to work in a discriminatorily hostile or abusive work environment. A change that is merely contrary to a complainant's interests or liking is insufficient.

e) "City" is defined as the City of Berkeley, its agencies, departments, boards, and commissions.

2) REPORTS. Any person may file a report for investigation with the City Auditor's whistleblower program alleging that a City officer or employee has engaged in fraud, waste, or abuse. Any City officer or employee who has received a report of fraud, waste, or abuse of city resources shall refer the report to the City Auditor's Office.

3) REFERRAL OF CERTAIN REPORTS. The Auditor shall refer the following reports to the appropriate government agency for review and possible investigation, including without limitation:

a) Those which another government agency is required by federal, state, or local law to adjudicate: To that agency;

b) Those which may be resolved through a grievance mechanism established by collective bargaining agreement or contract: To the official or agency designated in the agreement or contract;

c) Those which involve allegations of conduct which may constitute a violation of criminal law: To the District Attorney or other appropriate law enforcement agency;

d) Those which allege misconduct by a Berkeley police officer: The reporter will be provided information about how to file a complaint with the Office of the Director of Police Accountability and Berkeley Police Department;

e) Those which are subject to an existing, ongoing investigation by the District Attorney or City Attorney, where the applicable official or Commission states in writing that investigation by the Auditor would substantially impede or delay its own investigation of the matter: To the investigating office; and

f) Those which allege conduct that may constitute a violation of local campaign finance laws: To the Fair Campaign Practices Commission.

4) CONTRACTING OUT INVESTIGATIONS. The City Auditor has the authority to enter into contracts for investigative services when appropriate due to conflicts of interest or need for specialized expertise, as determined by the City Auditor. In such cases, the City Auditor may refer investigation work in whole or in part to a contractor under the management of the City Auditor.

5) TRACKING AND INVESTIGATING. The Auditor shall receive, track, and review reports made or referred to the whistleblower program. An investigation may include all steps that the Auditor deems appropriate, including the review of the report and any documentary or other evidence provided with it, the gathering of any other relevant documents from any City department or other source, and interviews of the complainant and other persons with relevant information.

6) FURNISHING FALSE OR MISLEADING INFORMATION; DUTY TO COOPERATE. When making or filing a report pursuant to this Chapter or participating in an investigation conducted by the City Auditor, or an agent of the Auditor, as authorized under this Chapter, City officers and employees may not knowingly and intentionally furnish false or fraudulent evidence, documents, or information, misrepresent any material facts, or conceal any evidence, documents, or information for the purpose of misleading any officer or employees or any of their agents. In conducting investigations pursuant to this Chapter, pursuant to the Auditor's authority under Charter Section 61, the Auditor shall have unrestricted access to employees, officials, records, and reports, and as necessary, require all branches, departments, and officials of government to produce documents, files, and other records and information. INFORMATION PROVIDED UNDER PENALTY OF PERJURY. In those instances, in which the Auditor deems it appropriate, the Auditor may require that persons making reports or providing information swear to the truth of their statements by taking an oath administered by the Auditor, or an agent of the Auditor, or through written declarations made under penalty of perjury under the laws of the State of California.

7) REFERRAL AND RECOMMENDATION BY AUDITOR. The Auditor may refer the fraud, waste, or abuse report to a City department for investigation, either before conducting an initial investigation or after doing so and may recommend that a City department take specific action based on the Auditor's initial investigation. Within such time as the Auditor shall

specify, the City department shall report to the Auditor in writing the results of the department's investigation and any action that the department has taken in response to a recommendation by the Auditor that the department take specific action.

8) RETALIATION. Any officer or employee who believes that they have been subject to an adverse employment action as a result of being a whistleblower or participating in a whistleblower investigation may file a complaint of retaliation with the City Auditor within one hundred and eighty (180) days of the alleged retaliation. The City Auditor shall thereupon investigate the complaint. If the Office of the City Auditor is named in the complaint, the complaint shall be directed to the City Attorney for investigation. Any officer or employee who receive a complaint alleging retaliation under this chapter must keep the complaint confidential and immediately assist the complainant by referring the complainant to the City Auditor and documenting the referral in writing. Documentation must include the date and time of the referral and that the report was about retaliation. Any reports regarding retaliation are confidential and not subject to disclosure.

9) CONFIDENTIALITY.

   a) Any investigative audit conducted pursuant to this section shall be kept confidential, except to issue any report of an investigation that has been substantiated, or to release any findings resulting from a completed investigation that are deemed necessary to serve the interests of the public. In any event, the identity of the individual or individuals reporting the improper government activity, and the subject employee or employees shall be kept confidential, unless the disclosure is to a law enforcement agency that is conducting a criminal investigation.

   b) Notwithstanding paragraph (a), the Auditor may provide a copy of a substantiated report that includes the identities of the subject employee or employees and other pertinent information concerning the investigation to the appropriate appointing authority for disciplinary purposes. The substantiated report, any subsequent investigatory materials or information, and the disposition of any resulting disciplinary proceedings are subject to the confidentiality provisions of applicable local, state, and federal statutes, rules, and regulations.

Section 7. That Berkeley Municipal Code Section 2.24.110 is amended to read as follows:

2.24.110 Right to retain contract auditors, investigators, consultants and experts; Cooperation with City Manager.

A. The Auditor may obtain the services of Certified Public Accountants, qualified management consultants, investigators, or other professional experts necessary to perform the Auditor's duties within the Auditor's budget approved by the City Council. These expenses may be included in the Auditor's annual budget as part of the published annual audit plan, or may be substituted in case of position vacancies if needed to complete the audit plan on schedule. An audit that is performed by contract must be conducted by persons who have no financial interests in the affairs of the governmental unit or its officers. The use of such contracts will follow the City's normal contracting procedures.

B. The City Manager ~~is urged to~~ shall provide the Auditor with timely information about contemplated and ongoing ~~required or elective~~ audits, investigations, or similar consulting engagements to be performed by other external auditors or investigators, so that all auditors may comply with Government Auditing Standards concerning the coordination of audit work, and sharing of information regarding internal control concerns, and to avoid duplication of effort and ensure effective audit coverage. The Mayor is also urged to provide such information and opportunities for coordination with the public accounting firm selected for the City's annual financial statement audits. The Auditor may assist with the selection or oversight of this audit if requested to do so. (Ord. 6910-NS § 2 (part), 2006)