

CONFIDENTIAL/ATTORNEY-CLIENT PRIVILEGED DOCUMENT

Date: April 6, 2018
To: Mayor and Members of Council
Harry Black, City Manager
From: Paula Boggs Muething, City Solicitor *PM*
Subject: City Solicitor's Representation of City Officials

This memorandum addresses the City Manager's request for outside counsel. This request relates to Motion #201800618 (the "Motion") dated April 4, 2018, which outlined a "work plan" for two members of Council for "the gathering of facts about claims of misconduct by the City Manager." During Council debate, Council also requested the City Solicitor's opinion on City-funded outside counsel to represent the City Manager during the fact-finding sessions and response phase contemplated by the Motion. The City Manager has requested that this office retain the firm of Tobias, Torchia & Simon as outside counsel to represent his interests.

Summary

The City Manager's request for outside counsel requires analysis of the City Solicitor's Office's representation of the City and City officials. The City Solicitor's Office represents the City, and its duty under the Charter and Ohio law is to the municipal corporation. The City Solicitor's Office represents City officials in their official capacities as representatives of the City. The City Solicitor's Office does not represent City officials in claims outside the scope of their official duties such as, for example, defense of personal misconduct or in an action by an official against the municipal corporation. Accordingly, the City Solicitor's Office represents the City Manager when the interests of the municipal corporation are implicated. If the City Solicitor's Office determines a conflict of interest exists, then it will engage outside counsel to defend the City Manager in his official capacity.

If a City official wants counsel to represent the official's personal interests, that official would ordinarily retain and pay for that personal counsel. If Council determines there is a proper public purpose to pay for the City Manager to retain that personal representation, it may appropriate funds for that purpose.

Background

The Motion presents three phases during which legal counsel may participate. First, there is a fact-finding phase that involves Councilmembers Mann and Dennard collecting the statements of witnesses, which will be videotaped and transcribed and presented to the public. Second, there is a response phase during which the City Manager has the opportunity to review the transcripts and prepare his own statement. The final phase encompasses any lawsuits or other legal claims that result from prior phases or any relevant Council action. In each phase, participation by legal counsel, not necessarily the City Solicitor's Office, is appropriate.

There are three general categories of legal claims that could arise from the implementation of the Motion. First, claims may be brought by current or former City employees against the City and/or its officials arising out of conduct that occurred within the scope of the City Manager's official duties ("Official Misconduct Claims"). Second, claims may be brought by current or former City employees arising out of conduct manifestly outside the scope of the City Manager's official duties ("Personal Misconduct Claims"). Third, there claims may be brought by the City Manager against the City and/or its officials ("City-Adverse Claims"). The Charter and the law of Ohio provide that the City Solicitor's Office defends the City and its officials in Official Misconduct Claims. Charter, Article IV, Section 5; O.R.C. 2744.07. However, the City Solicitor's Office is prohibited from defending Personal Misconduct Claims or representing the City Manager in City-Adverse Claims for the reasons explained in more detail below. Further the City Solicitor's Office is prohibited from representing individual City officials for purposes of advising or defending their individual employment interests.

Council Authority to Evaluate the City Manager

The fact-finding process outlined in the Motion constitutes the Council's oversight and evaluation of the City Manager. This process allows the Council to gather information and data it will use in its evaluation of the Manager for consideration and possible action to occur at a public session with the entire Council body.¹

Council's authority to establish the fact-finding process set forth in the Motion comes from Article IV, Section 1 of the Charter, which provides that the City Manager serves "at the pleasure of the mayor and the council." Under Article IV, the City Manager "shall report to the Mayor and the Council," "it being the intention of this charter to vest all authority and fix all responsibility for any such suspension or removal in the mayor and the council." Charter, Article IV, Sections 1, 2.

¹ The public session contemplated by the Council Motion is not the Article IV, Section 1 hearing provided for in the City Charter.

The Motion's fact-finding process does not create a formal complaint or grievance process for employees, nor does it provide for the adjudication of employee complaints. Statements regarding alleged misconduct by the City Manager are solely to assist Council in its evaluation and do not constitute an administrative or legal complaint against the City or City Manager. Employees seeking a remedy or recourse for alleged City Manager misconduct must pursue other avenues to address their concerns such as lawsuits, union-led grievances, EEOC claims, or other actions. The Motion explicitly prohibits the fact-finding participants – Councilmembers Dennard and Mann – from providing or reaching conclusions or opinions: “conclusions about the implications of these transcripts and what actions, if any, are appropriate therefrom rest in the hands of the members of council.”

Attorney Participation in the Fact-Finding Phase

The Motion explicitly prohibits any active role for attorneys during the fact-finding process. The Motion states that attorneys may not ask questions or object, they may only observe. Thus, the fact-finding process established by the Motion is the exercise of Council's Charter right to evaluate the City Manager's performance; it is not a court proceeding, quasi-judicial hearing, or other action that would typically trigger the participation of the City Solicitor's Office to defend the City and its officials.

In general, the City Solicitor's Office does not participate in performance evaluations of any employees outside the Law Department; nor do City attorneys observe or participate in interviews during departmental climate assessments. The vast majority of interviews regarding internal employee complaints, grievances, or disputes are administered by the City's Human Resources Department with little or no City attorney involvement until such time as there is a threat of legal action against the City. The City Solicitor's Office provides representation to its enumerated clients: “the mayor, council, officers and boards of the city” (Charter Article IV, Section 5) in their official capacities, but the duty to represent an official is subservient to the duty to represent the interests of the municipal corporation. Thus, the Charter requires that the City Solicitor's ultimate duty is to protect the municipal corporation's interests in all claims brought against it. This duty does not extend to protect and defend an individual officer's personal employment status. To the extent the City Solicitor represents individual officers or constituent parts of the City, it is because their actions are on behalf of the municipal corporation. Likewise, the City Solicitor's Office sometimes advises City officials regarding best practices in performance of their official duties in order to protect the municipal corporation from liability by ensuring that its officials act in accordance with the law.

However, the Motion specifically allows for the presence of an attorney in the fact-finding process for both the City Manager and any employee who decides to participate in the fact-finding process. While this is not appropriately a member of the City Solicitor's Office, as our office does not provide personal employment representation for any City employee or City official, it is an appropriate role for a personal attorney.

Attorney Participation in the City Manager Response Phase

The second phase set forth in the Motion provides an opportunity for the City Manager to review the transcripts and videos collected during the fact-finding process and develop a response in a written document or statement. During this City Manager review phase, it is appropriate for the City Solicitor's Office to provide advice and counsel to the City Manager regarding his response. The scope of the advice and counsel is limited to defending against any potential claims against the City that may arise from the fact-finding process. This is distinct from what may be the personal interests of the City Manager to protect his employment status. While in some instances, the interests of the City and the City Manager may align, the City Solicitor's Office may not represent the City Manager when those interests are adverse.

Council has asked whether the potential for members of the City Solicitor's Office to individually participate in the fact-finding process renders the City Solicitor or individual members of the office conflicted for purposes of providing advice and counsel to the City Manager. A conflicts analysis is fact specific and cannot occur until after the fact-finding process is complete. As always, the City Solicitor's Office and its members will perform its Charter mandated duties in accordance with the Ohio Rules of Professional Conduct and will be mindful of potential conflicts.

There are two relevant sources for the duty to defend the City and its officials in lawsuits: the Charter and O.R.C. 2744.07. The Charter states that "[t]he solicitor shall serve the mayor, council, officers and boards of the city as legal counsel and attorney, and shall represent the city in all proceedings in court." Charter, Article IV, Section 5. Additionally, O.R.C. 2744.07 provides:

[A] political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding which contains an allegation for damages for injury, death, or loss to person or property caused by an act or omission of the employee in connection with a governmental or proprietary function. The political subdivision has the duty to defend the employee if the act or omission occurred while the

employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities.

Both sources of law limit the duties and obligations of the City Solicitor to advising City officials regarding actions that occur within the scope of their employment. When City officials act outside the scope of their employment, they cease to be "officers" under the Charter. Additionally, when City officials act manifestly outside the scope of employment or official responsibilities, the City has no duty to defend those actions in court. Ohio Revised Code 2744.07 provides an additional limitation to the City Solicitor's duty to defend: should "a civil action or proceeding be initiated by or on behalf of" the City against an employee, the City has no duty to defend the employee.

The formal duty to defend pursuant to O.R.C. 2744.07 is not implicated during the City Manager response phase as it is not a "civil action or proceeding" in "state or federal court." Nonetheless, the City Solicitor's Office provides advice to City officials when it anticipates a potential for litigation for Official Misconduct Claims. Such advice normally consists of a review of facts, an assessment of what types of claims a plaintiff could bring, the likelihood of success on those claims, and the level of risk the City might have to pay damages.

If the City Solicitor's Office determines the claims are based on actions by an employee that were manifestly outside the scope of employment or official responsibilities (Personal Misconduct Claims), the Office will notify the employee of that fact, inform the employee that the City Solicitor's Office cannot defend him or her, and advise the employee to obtain an attorney at the employee's own cost. The City Solicitor cannot advise any employee about the viability of their claims against the municipal corporation or other City officials who are acting in the scope of their employment (City-Adverse Claims).

At the completion of the fact-finding process and during the City Manager response phase, the City Solicitor's Office will conduct a legal review of the transcripts. This legal review will analyze the potential for Official Misconduct Claims, Personal Misconduct Claims, and City-Adverse Claims. Consistent with the duties and limitations outlined above regarding Official Misconduct Claims, the City Solicitor's Office will advise the City Manager concerning the potential for such claims to arise from the fact-finding process. Similarly, the office is available to assist the City Manager in drafting a written response to any Official Misconduct Claims. As discussed in more detail below, in the event of a conflict, the City Solicitor's Office will delegate its role with regard to all or some Official Misconduct Claims to outside counsel.

If the City Solicitor's Office's review reveals potential for Personal Misconduct Claims (those that are manifestly outside of scope of official duties), it will recommend the City Manager obtain private legal counsel to defend against such claims. The City Solicitor's Office may not provide any legal advice to the City Manager concerning potential City-Adverse Claims.

At this time, the City Solicitor's Office does not know the identities of any individuals who will choose to participate in the fact-finding process. However, the Office is aware that there has been public discussion about the potential that members of the Law Department, including the City Solicitor, may participate. If that is the case, the City Solicitor's Office will promptly engage in a conflict of interest analysis and inform all affected parties of its determination, including whether any attorneys in the office could properly provide the City Manager advice.²

If such a conflict of interest arises that disqualifies the attorneys in the City Solicitor's Office, the City Solicitor will seek an appropriation in order to engage outside counsel to advise the City Manager. Under this scenario, the City Solicitor's Office would establish ethical walls or take other necessary measures to prevent conflicts of interest. In addition, the City Solicitor's Office would consult with the City Manager in the selection of qualified outside counsel. The selected outside counsel would enter into a contract with the City and would step into the shoes of the City Solicitor, such that the scope of the representation would be only that which is permitted under the Charter. This outside counsel hired as a substitute for the City Solicitor could not advise as to concerns or questions regarding personal employment status and would be prohibited from providing any advice and counsel regarding potential claims against the City or its officials.

The City Manager may want his *personal* interests represented during the response phase and if any Personal Misconduct Claims arise, he may require personal legal representation. Similarly, the City Manager may want representation to consider whether he has a claim against the City or City officials in the event he believes he is unlawfully harmed by the City through this process (a City-Adverse Claim). Any such representation would be exclusively for the benefit of the City Manager as an individual, not as the City Manager in his official capacity. A personal attorney engaged to defend against Personal Misconduct Claims or City-Adverse Claims is not required by the Charter and would typically be at the expense of the individual City official.

² This office has consistently advised that the Ohio Rule of Professional Conduct 1.11, pursuant to the mandates of the City Charter, requires that the City Solicitor's Office provide representation in circumstances that are ordinarily not permissible under the Ohio Rules of Professional Conduct. That analysis remains unchanged. Because the potential conflict at issue here involves a personal, as opposed to a professional, conflict a different analysis is required.

Attorney Participation in Lawsuits Arising Out of the Motion Process or Underlying Facts

As explained above, the City Solicitor's Office represents and defends the City Manager in any Official Misconduct Claim against the City. Charter, Article IV, Section 5; O.R.C. 2744.07. The City Solicitor's Office will evaluate each claim on its merits. If there is a conflict of interest implicated, the City Solicitor's Office would advise and take appropriate steps to obtain outside counsel. In all other instances, the City Solicitor's Office would not represent the City Manager.

Potential Appropriations by Council

During Council discussion of the Motion, some Members indicated that they would support appropriating funds in order to cover the costs of an attorney for the City Manager. The City Manager requested Steve Simon of Tobias, Torchia & Simon as his designated counsel. There are two options for City Council:

- (1) After the completion of the fact-finding process, should the City Solicitor's Office determine that a conflict of interest exists that requires outside counsel, Council can make an appropriation to fund the City Solicitor's retention of outside counsel for the limited purpose of representing the City Manager's interests in his official capacity; or
- (2) Upon a finding of a proper public purpose, Council could take immediate steps to appropriate a compensation payment to the City Manager that he could use to hire his own personal attorney to represent his interests throughout the various processes identified in the Motion.

Mr. Simon is currently representing the City Manager on matters in which he is adverse to the City, namely the negotiation of a potential severance package. Engaging Mr. Simon to represent the City Manager in his official capacity would be a conflict of interest under Ohio Rule of Professional Conduct 1.7(a)(1), which prohibits the representation of a client that is directly adverse to another client. Even outside counsel can only engage in the type of representations permissible under the Charter. Pursuant to the terms of the Charter, any outside counsel becomes an assistant City Solicitor for purposes of a limited engagement. If Mr. Simon were to step into the role of the City Solicitor, he would be representing the interests of the City as well as the personal interests of the City Manager. In order to represent both, both clients would need to provide informed consent in writing to waive this conflict. Prof. Cond. R. 1.7(b). Additionally, Mr. Simon could not use information gained in this process in a later proceeding that is adverse to the City's interests. See Prof.

Cond. R. 1.8(b). These conflicts would impute upon the other members of Mr. Simon's firm.

There are also practical difficulties to consider. If retained by the City to represent the City Manager's official interests while simultaneously representing him personally, Mr. Simon would need to segregate his time. This may be impossible to accomplish. Furthermore, the attorney-client privilege between Mr. Simon and the City Manager would not be a privilege personal to the City Manager and would not extend beyond his employment with the City of Cincinnati. The attorney-client privilege belongs to the office of the City Manager and the City of Cincinnati, and could be waived by a successor City Manager. Similarly, the City would be entitled to all work product and communications promulgated during the course of the representation.

Because of the conflict of interest, the risk to the municipal corporation, and the practical difficulties of such representation, the City Solicitor's Office would not hire Mr. Simon as outside counsel. We would consult with the City Manager to hire other counsel that would be satisfactory. Nothing about this analysis affects the ability of Mr. Simon to continue representing the City Manager's personal interests.

In order to appropriate funds to cover the costs of a personal attorney to represent the City Manager, Council would be required to pass an ordinance that describes the public purpose served by expending public funds to pay for the City Manager's personal attorney to represent him. Such an appropriation is not without risk. A citizen with standing could file a taxpayer action challenging the expenditure of public funds for a personal attorney. Despite the risks, this office will prepare an appropriating ordinance upon request of the City Manager or any elected official.

Conclusion

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If you have any questions, please feel free to contact me directly.