



TO: City Council
FROM: The City Attorney's Office
DATE: August 17, 2018
SUBJECT: City Council and Settlement Authority

I. Background

On March 21, 2016, the City Attorney's Office provided legal guidance on consensus direction and executive sessions and settlements. Council has waived attorney-client privilege on both of these legal opinions.

The City Charter does not directly address whether the legislative or executive branch has authority to settle pending or potential claims against the City of Colorado Springs ("City").¹ The City Code authorizes the City Attorney or the Risk Manager to settle claims up to \$50,000 and, with the approval of the Claims Review Board, up to \$100,000, so long as the money has been generally "appropriated and is available." City Code §§ 1.2.406, 1.5.503(B), and 1.5.506(B). The City Attorney has authority to settle litigation for an amount over \$100,000 "with the prior approval of City Council." City Code §§ 1.5.503(B) and 1.5.506(B).

Currently, the City Attorney's Office seeks Council approval to settle claims in amounts over \$100,000 by: (1) receiving direction via informal consensus from Council in a closed executive session prior to engaging in settlement discussions; or (2) receiving direction from Council in a closed executive session after a tentative settlement has been reached. Both of these approaches comply with the City's Open Meetings Law ("City's OML"),² which permits closed executive sessions to determine "positions relative to matters that may be subject to negotiations; developing strategy for negotiations; and instructing negotiators." City Charter Appendix § 24-6-402(4)(e).

Council has expressed an interest in more "transparency" of settlement amounts over \$100,000. It is the opinion of the City Attorney's Office that both public disclosure of the amount of settlement authority prior to or during negotiations with adverse parties, or public discussion by Council regarding the merits of a particular matter, are not in the best legal interests of the City.

¹ City Charter § 4-40(g) states that "[t]he Mayor shall see that all terms and conditions imposed in favor of the City or its inhabitants in any contract or franchise are faithfully kept and performed, and upon knowledge of any violation thereof to report the same to the City Attorney, who is hereby required to take such proceedings as may be necessary to enforce the same." Under this provision, it appears the Mayor has full authority to authorize settlement of all contract and franchise claims on behalf of the municipal government.

² Despite numerous erroneous media statements, the City is not subject to the State Open Meetings Law. City Charter § 3-60(d).

Public disclosure of settlement authority prior to final settlement will almost certainly increase the amount of taxpayer money required to settle claims against the City. Public discussion of the merits of pending cases may hinder the ability of the City to settle claims and/or lead to additional claims against the City.

Council asked the City Attorney's Office to articulate options to increase transparency of settlement amounts over \$100,000. To that end, the City Attorney previously agreed to include amounts paid on completed settlements in the Quarterly Reports to City Council. Additional options are set forth below.

II. Options

A. Revise the City of Colorado Springs Rules and Procedures of City Council ("Council Rules")

Council Rule 2-5 sets forth the procedures for Executive Sessions. A section could be added to include procedures for settlement of claims in excess of \$100,000, to read as follows:

Proposed Council Rule 2-5(B) Settlement of Claims

- 1) City Council has authority to authorize the City Attorney to "settle claims for an amount not to exceed the maximum liability limits under the Colorado Governmental Immunity Act for claims which lie or could lie in tort regardless of the nature of the action which is brought by the claimant, and for any other amounts which the City Council deems appropriate with respect to claims arising under Federal law." City Code § 1.5.503(B)(3).
- 2) The City Attorney has authority to settle claims over one hundred thousand dollars (\$100,000.00) with the prior approval of City Council. City Code §§ 1.2.406 and 1.5.506(B).
- 3) The City Attorney, in his/her discretion, may choose one of the following procedures to receive instruction from City Council regarding settlement negotiation of claims against the City where the settlement amount is anticipated to exceed \$100,000:
 - a. The City Attorney may request a closed executive session pursuant to the City's Open Meetings Law to discuss settlement of a claim or claims prior to engaging in formal settlement negotiations. At the conclusion of the closed executive session, City Council will, in an open meeting, vote to approve the instruction given to the City Attorney in the closed executive session. City Council shall only reference the case by case number and shall not publicly disclose the amount of settlement authority in excess of \$100,000 until and unless the matter is finally settled in full. In addition, City Council shall not publicly discuss the facts or circumstances surrounding the matter or the merits of the case until and unless final written settlement of the matter is reached or a final non-appealable judgment is entered.
 - b. The City Attorney may request a closed executive session pursuant to the City's Open Meetings Law to discuss settlement of a claim or claims after a tentative settlement is reached by the parties, contingent only upon City Council approval of the amount in excess of \$100,000. At the conclusion of the closed

executive session, City Council will, during an open meeting, vote to approve or disapprove the settlement amount. City Council may, in its discretion, publicly disclose the name of the case at issue and/or the amount of settlement. However, City Council shall not publicly discuss the facts or circumstances surrounding the underlying matter or the merits of the case until and unless final written settlement of the matter is reached or a final non-appealable judgment is entered.

The City Attorney's Office recommends this option because it provides flexibility to future Councils to revise the process of settlement authority based on the best legal interests of the City at that time. In addition, this option gives the City Attorney the ability to settle a case contingent on Council approval. Settlement contingent on Council approval avoids the possibility that an opposing party will have prior notice that the City is willing to settle for an amount over \$100,000.

B. Revise the Council Rules

City Council could revise its Rules and only adopt one of the procedures proposed in Option A, above.

C. Revise the City Code

Option 1:

The City Code could be revised to include some or all of the provisions proposed in Option A, above. This approach would require amendments to Chapter 1, Article 5, Part 5 of the City Code. The Mayor would have veto authority over any such City Code changes. City Charter § 3-70(e).

Option 2:

Council could amend the City Code provisions to increase the City Attorney's and/or Risk Manager's authority to settle matters for an increased amount beyond \$100,000. The City Code amendment could require a closed executive session with Council to discuss or notify Council of settlement beyond the increased settlement amount threshold, with public disclosure after the closed executive session; however, Council approval would not be necessary up to the new threshold.

D. Notify Council of Settlements

The City Attorney's Office could notify Council of cases which have settlement for amounts in excess of \$100,000 more frequently than the Quarterly Report to City Council.