



Office of Mayor Charlie Hales
City of Portland

January 17, 2013

INTEROFFICE MEMORANDUM

TO: Yung Ouyang, City Budget Office
Commissioner Nick Fish
Commissioner Amanda Fritz
Commissioner Steve Novick
Commissioner Dan Saltzman
Auditor LaVonne Griffin-Valade

FROM: Mayor Charlie Hales

SUBJECT: Office of the City Attorney FY 2012-13 Winter Supplemental

Attached is the City Attorney's Office's Winter Supplemental Budget Report for FY2012-13. The office requires budget adjustments due to the implementation Settlement Agreement with the federal government arising from its investigation of the Portland Police Bureau's use of force.

To keep costs as low as possible, the office is requesting 1.0 FTE attorney for the remainder of FY12-13 with no additional funding for staff support. FY13-14 and beyond will require one additional attorney with staff support at an annual cost of approximately \$227,000. The City Attorney may need to request additional attorney or paralegal FTEs if workload demands increase. The alternative is to hire outside counsel which will cost the City substantially more money.

In addition to legal services, the Settlement Agreement requires the creation of a Compliance Officer/Community Liaison (COCL) to oversee implementation of the Agreement and report back to the City and DOJ. At the present time it is anticipated that the COCL will be hired by way of a PTE contract that will be managed by the City Attorney's Office. The costs for this contract are currently estimated at \$230,000 annually.

Please see attached memo from Jim Van Dyke for additional details.

Encls.

c. James H. Van Dyke
Crystine Jividen

BUDGET AMENDMENT REQUEST

Office of City Attorney

PERIOD Winter BuMP

FISCAL YEAR FY 2012-13

AT_003 - City Atty DOJ Costs

Prior to FY11, the City Attorney's Office had two attorneys assigned to provide general legal advice to the Portland Police Bureau (PPB). Due to budget cuts at PPB, one attorney position was eliminated in FY11. Notwithstanding the budget cuts, the legal service needs continued. The City Attorney's Office has dedicated additional resources to the PPB at the expense of other City legal work and higher outside counsel costs. The legal needs of the PPB are increasing and the level of funding is inadequate.

The City Attorney's Office anticipates the need for two to three additional full-time attorneys to handle the implementation of the Settlement Agreement with the federal government: 1) a labor and employment attorney to handle personnel and increased bargaining issues; 2) an attorney to assist PPB with its general implementation of the Settlement Agreement and to coordinate with the federal government; and 3) an attorney to handle the increased workload from the Auditor's office stemming from its accelerated investigation timeline.

The list of specific anticipated legal needs is lengthy but in general, attorneys will provide legal advice to help accomplish requirements of the Settlement Agreement in areas including, but not limited to, review of: use of force policies and reports, compliance audits, training, mental health initiatives, crisis intervention, employee information systems, officer accountability, collective bargaining, and enforcement issues.

To keep costs as low as possible, the office is requesting 1.0 FTE Attorney for the remainder of FY13 with no additional staff support. FY 13/14 and beyond will require one additional attorney with staff support at an annual cost of approximately \$227,000. The City Attorney may need to request additional attorney or paralegal FTEs if workload demands. The alternative is to hire outside counsel which will cost the City substantially more money.

In addition to legal services, the Settlement Agreement requires the creation of a Compliance Officer/Community Liaison (COCL), to oversee implementation of the Agreement and report back to the City and DOJ. At the present time it is anticipated that the COCL will be hired by way of a PTE contract that will be managed by the City Attorney's Office. The costs for this contract are currently estimated at \$230,000 annually.

Dollar Amount: \$147,540

Type: New Request

Resources: General Fund Discretionary



CITY OF
PORTLAND, OREGON
OFFICE OF THE CITY ATTORNEY

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January 14, 2013

INTEROFFICE MEMORANDUM

TO: Andrew Scott
Financial Planning Manager
City Budget Office, B106/R1300

FROM: James H. Van Dyke
City Attorney

SUBJECT: Legal Funding of DOJ Settlement Agreement

This memorandum responds to your request to provide information regarding the request of this office for an additional attorney in light of the Settlement Agreement with the federal government arising from its investigation of the Portland Police Bureau's use of force.

Below I have provided some context for our request. In summary, the City Attorney's Office is currently understaffed when it comes to providing advice and legal services to PPB. That understaffing is reflected in delayed legal work for other parts of the City and the City's use of outside counsel.

Following a description of the current service levels, I have set forth requirements of the Settlement Agreement and our analysis of the need for legal services to help the City meet those requirements.

In summary, the City may actually need an additional two to three attorneys as a result of the increased workload we anticipate from the Settlement Agreement: 1) a labor and employment attorney to handle personnel and increased bargaining issues; 2) an attorney to help PPB with its general implementation of the Settlement Agreement and to coordinate with the federal government; and 3) an attorney to handle the increased workload from the Auditor's office stemming from its accelerated investigation timeline.

A. CONTEXT FOR CURRENT REQUEST

The City Attorney's Office has only 1.0 FTE dedicated to general advice issues to PPB. I have not had the time since this request was made to determine what other equivalent City Attorney's Offices provide in this regard. It obviously could not be less than 1.0 FTE. That level of service is undoubtedly inadequate and requires a lot of "off the cuff" advice in order to keep up with a large request for service.

In addition, a number of other attorneys spend time on PPB matters, particularly in regard to collective bargaining issues, general labor and employment matters and grievances.

The City Attorney's Office also provides legal services for the Auditor's office. Currently that attorney is a permanent part-time employee at approximately .75 FTE. This attorney provides legal advice to IPR and staffs the Citizen's Review Committee.

In FY 2009/10, the City Attorney's Office had two attorneys assigned to PPB. During that year, the office spent 3.04 FTEs on PPB matters. (That time does not include representation of PPB in court or in defending officers against whom complaints have been filed in court, because that time is billed to Risk Management and paid through the Risk Fund.) At the end of that fiscal year, PPB terminated an Interagency Agreement that funded one of the two attorney positions. That led to a reduction of one attorney FTE in the City Attorney's Office.

Although the City Attorney's office staff was reduced by 1.0 FTE devoted to PPB work, PPB work has continued unabated. By FY 2012/13 the time spent toward PPB matters was 3.2 FTEs. This flow of PPB work has required other attorneys in the office to pick up PPB work at the expense of the work of other bureaus and has required us to hire outside counsel due to insufficient staffing. The work of outside counsel is in addition to the 3.2 FTE time stated above.

For example, outside counsel billings on the Frashour matter were approximately \$800,000. It would have been less expensive for the City Attorney's Office to hire another attorney to perform labor and employment work and to undertake the Frashour case than to hire outside counsel. For that cost, this office could have engaged an attorney for more than three years and that attorney could have handled matters other than Frashour for the City. Although our office does not expect a case exactly like Frashour every year, I anticipate that other cases will arise that will lead to the same result. If that is correct the need for outside counsel likely will arise again in the future.

In summary, before implementation of the DOJ Settlement Agreement the City Attorney's Office incurred a 1.0 FTE reduction of persons devoted to PPB work, but since that time has seen a .8 FTE increase in PPB related work. As a result, other work has received lower priority and outside counsel has been hired at additional expense. It is helpful to understand the requirements of the DOJ Settlement Agreement in that context.

B. SETTLEMENT AGREEMENT REQUIREMENTS

The need for legal services is best understood in the context of the requirements of the DOJ Settlement Agreement.

Force Policies

1. Review of Force Policies

Our office will need to review new force and TASER policies. This work is underway. Agreement, ¶¶ 66 – 68.

2. Review of Force Reports

PPB is required to draft timely use of force reports. We anticipate our office will need to review the reports to see if they contain sufficient information and provide advice as to improvements to be made. ¶ 70.

3. Supervisory Responsibilities

PPB supervisors are required to carry out force investigation oversight and develop a checklist for review. The City Attorney's Office anticipates reviewing the checklist and revising it over time if it appears necessary. ¶ 72.

4. Disciplinary Actions for Supervisors

PPB supervisors are subject to discipline for failure to adequately complete "After Action Reports" regarding the use of force. The City Attorney's Office anticipates being asked for legal advice regarding the discipline to be imposed on supervisors. ¶ 73(d).

5. Disciplinary Actions for Officers

If use of force is outside of policy, discipline will be imposed. The City Attorney's Office anticipates being asked for legal advice regarding the discipline to be imposed on officers. ¶ 73(e).

6. Proposed Changes in PPB Policy

The Settlement Agreement requires establishment of an "Inspector" position, who will gather data on use of force and report to the Training Advisory Council. ¶ 74. The City Attorney's Office anticipates having to provide legal advice to the Inspector.

7. Compliance Audits for Officers

The Settlement Agreement requires that the Inspector, together with the Compliance Officer/Community Liaison (COCL) audit force reports. The City Attorney's Office

anticipates needing to review the audit reports to properly advise the Chief of Police regarding possible changes to the use of force policy. ¶ 75.

8. Compliance Audits for Supervisors

The Settlement Agreement requires the Inspector to audit force reports to determine whether supervisors are performing their duties as required. ¶ 76. The City Attorney's Office anticipates having to review the audits and providing legal advice regarding possible changes to how supervisors perform their work.

Both sets of compliance reports require analysis of an officer's use of force, whether the officer's actions were consistent with training and policy, whether there was legal justification for the original stop and/or detention, to determine whether corrective action is required and to determine whether the use of force constituted misconduct. The City Attorney's Office anticipates being requested to provide legal advice regarding the legal justification for the original stop and/or detention, which may require interviewing the officers, reviewing documentation and talking to witnesses. ¶ 76.

9. Policy Reviews

The Inspector is required to audit a variety of things, including documentation of any training or policy deficiencies. ¶ 78(e). The City Attorneys Office anticipates having to provide legal advice to the Inspector regarding training and policy deficiencies.

Training

The City Attorney's Office assists PPB in training on its policies.

10. Additional Training

The new force policies will require assistance from our office for additional traditional training. PPB's Training Division is required to update its training plan annually. ¶ 80. The Division must implement a "needs assessment" regarding its training that takes into account concerns reflected in curt decisions. ¶ 80(g). The City Attorney's Office anticipates additional legal advice regarding this new training

11. Reports to DOJ

PPB's Training Division must report on its training to the federal DOJ twice a year. ¶ 83. The City Attorney's Office anticipates requests for legal advice concerning those reports.

12. Different Kinds of Training

PPB's Training Division is required to increase the use of "role-playing scenarios and interactive exercises" regarding the proper use of force. ¶ 85. They will be asked to describe situations in which a force event could lead to potential civil or criminal liability. The City Attorney's Office anticipates being asked for legal advice regarding the new training. ¶ 85a(iv).

Community Mental Health

13. Mental Health Initiatives

The DOJ Settlement Agreement anticipates "drop-off centers." ¶ 88. It also anticipates that Coordinated Care Organizations (CCO) will be in contact with PPB's Addictions and Behavioral Health Unit (ABHU), Fire and Rescue, BOEC and other City staff. ¶ 89. The Settlement Agreement contemplates increased sharing of information between those organizations. ¶ 89(a). The City Attorney's Office anticipates a request for legal services to determine what information may be legally shared pursuant to HIPPA and other privacy laws, to draft such agreements between the various organizations and to meet with attorneys for such other organizations as the agreements are crafted.

Crisis Intervention

14. ABHU

The Settlement Agreement requires the Addictions and Behavioral Health Unit (ABHU) to oversee the CIT (Crisis Intervention Team), the MCPT (Mobile Crisis Prevention Team) and the SCT (Service Coordination Team). ¶ 90. ABHU will manage the "lawful disclosure" of information between PPB and the County. ¶ 91.

The City Attorney's Office anticipates a need for legal services to help determine what is subject to "lawful disclosure" between these organizations.

15. ABHU Advisory Committee

An ABHU advisory committee will be created from a number of different local governments and advocacy groups. ¶ 93. The Committee will assist the City in development of various functions, including changes to policies, procedures and training. The City Attorney's Office anticipates having to provide legal advice and services to the City components of the Advisory Committee and to occasionally appear at meetings.

16. BOEC

The Settlement Agreement requires BOEC to implement a “Crisis-Triage” program. ¶ 112. The City Attorney’s Office anticipates needing to provide legal advice to BOEC regarding the creation of this program, to review the new policies that BOEC is required to prepare and to handle any employee related disputes that result from its implementation.

In addition, the City is required to train BOEC Dispatchers in Crisis-Triage. The City Attorney’s Office anticipates a request for legal services about that training. ¶ 113.

Employee Information System

17. Public Records

The Settlement Agreement requires PPB to enhance its employee information system to identify at-risk employees. ¶ 115. The City Attorney’s Office anticipates needing to provide legal advice about public records and confidentiality of the information on this system.

Officer Accountability

There is a portion of the Settlement Agreement entitled “Officer Accountability” that requires changes to PPB policies and procedures and the Auditor’s policy and procedure in regard to its Independent Police Review (IPR) functions.

We believe that implementation of this section will require more attorney resources to handle additional labor and employment issues that will arise during the course of the Settlement Agreement.

18. Expedited Review

The Settlement Agreement requires completion of all administrative investigations of officer misconduct within 180 days, a much faster time period than previously required. ¶ 120. Independent Police Review (IPR) has not completely thought through its need for increased legal services, but we anticipate the following:

a. Hearings

Because of the short timeline for appeal hearings, it is likely that in addition to the monthly regular meetings of the CRC, there will also be special meetings to hold hearings. It is reasonable to assume that there

may be two hearings a month rather than the current monthly occurrence.

We anticipate that we will be asked to attend more of the monthly meetings than we have in the past and we will definitely be asked to attend special meetings for hearings. Finally, there is an expectation that more of the cases will go to City Council, which would require additional attorney staffing.

b. Implementation of New Requirements

Changes to the IPR process will require changes to City Code. Our office anticipates increased legal services to assist in code drafting and implementation advice.

c. Independent Investigations

IPR anticipates needing additional advice for work on independent investigations.

19. Collective Bargaining Issues

The Settlement Agreement requires the City to work with the Unions to implement changes in their collective bargaining agreements. We are being asked to assist in that regard. These issues are in addition to other bargaining issues that will arise.

PPA currently takes the position that many of the changes contemplated by the Settlement Agreement require bargaining, including changes to City force policy. The City disagrees and it is likely that various issues will have to be resolved by the State Employment Relations Board, requiring this office to brief and represent the City in those proceedings.

20. COCL (Compliance Officer/Community Liaison)

The Settlement Agreement requires the creation of a COCL, who oversees implementation of the Agreement and reports back to the City and DOJ. ¶ 158. At the present time it is anticipated that the COCL will be hired by way of a PTE contract that will be managed by the City Attorney's Office.

We anticipate legal work arising from drafting, editing, and establishing qualifications for the COCL and coordinating with Purchasing, the Mayor's Office, and designees from Council offices. In addition, we anticipate developing a selection process and researching independent contractor requirements under state law. We also may be asked to review applications for this position.

21. Consultation with US DOJ

Since the initiation of the investigation, the City's strategy was to be responsive to the federal government and develop positive working relationships, which has yielded good will and trust that the City is capable of meeting the terms of the DOJ Agreement without direct oversight from the DOJ.

We have spent many hours on the telephone with DOJ attorneys recently related to our revisions to our force policies and plans for training. Under the Settlement Agreement, the DOJ must approve the changes to the City's force policies. The DOJ may also require the COCL to conduct additional reviews of the City's implementation of this Agreement. ¶ 159.

Federal DOJ assigns multiple attorneys to this task. Because our office will handle both ongoing implementation questions as well as labor and employment issues we anticipate needing multiple attorneys in these status conference calls as well.

22. Document Production

The Settlement Agreement permits the COCL to have access to City documents, including attorney-client privileged communications. We anticipate being asked to review and identify documents being produced to the COCL and to identify privileged documents, since the COCL is directed not to disclose them without City Attorney approval. ¶ 164.

The Settlement Agreement also permits DOJ to have access to documents. ¶ 165. We anticipate a request for similar legal services when DOJ makes that request. DOJ is not entitled to attorney-client communications, but we must provide a "privilege log" of documents not produced, showing the author, recipient, date of production and general topic of the privileged communication.

23. DOJ Review

The Settlement Agreement requires PPB to send DOJ "new or revised polices, procedures, protocols, and training curricula regarding use of force, interactions with persons in mental health crisis and systems of accountability" as they are promulgated. ¶ 167.

We anticipate that the City Attorney's Office will be asked to review the procedures, protocols, training curricula, interactions and systems of accountability before they are sent to DOJ.

24. Semi-Annual Assessments

The Settlement Agreement requires the COCL to lead semi-annual qualitative and quantitative outcome assessments of the PPB's implementation. ¶ 170.

We anticipate that the City Attorney's Office will be asked to participate in these semi-annual assessments.

25. Two Year DOJ Review

The Settlement Agreement states that DOJ shall conduct a "comprehensive assessment" within two years of the Agreement's effective date. The Settlement Agreement contemplates that DOJ may "recommend modifications to the Agreement." ¶ 172.

The City Attorney's Office anticipates a request for legal services to work with DOJ as it conducts its assessment and to respond to requests to modify the Settlement Agreement. If the City decides modification is not required, the City and DOJ could end up in mediation to resolve the dispute and, if it is not resolved, the City Attorney's Office will need to represent the City in federal court regarding the issue.

Enforcement

26. Legal Proceedings

In the event that the City and DOJ disagree over the implementation of the Settlement Agreement, the City Attorney's Office anticipates representing the City in any mediation or federal court proceeding regarding those issues. That representation will require the services of two attorneys from this office.

In summary, the City Attorney's Office believes that implementation of the Settlement Agreement will require additional PPB work, increased labor and employment work, and increased work for the Auditor's office. The best guess is that two FTEs are probably required to fill this increased workload because the labor and employment work is substantially different than the PPB implementation work. Nevertheless, I have been informed that only one FTE is available and that even now, that FTE is at risk.

I strongly recommend the inclusion of at least one additional FTE for the City Attorney's Office. In my experience, preventative advice is more valuable, and less time consuming, than after-the-fact legal work.