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| DATE: | July 27, 2016 |
| TO: | Clark County Council |
| FROM: | Christopher Horne, Chief Civil Deputy |
| SUBJECT: | Request for Public Scrutiny of Complaints Against or Claims Regarding Counselor David Madore |

I. ISSUE

May Counselor David Madore require that all meetings, in which his past actions are the subject, be held in public?

II. SUMMARY

As a member of the Clark County Council, Councilor Madore's actions cannot be analyzed in a vacuum. Comments or complaints about Councilor Madore may implicate the rights of third parties, including whistleblowers, who are entitled to protection under RCW 42.41.030(7). Moreover, public discussion regarding the actions of one counselor may increase Clark County's liability in the event of litigation. Even if the discussion does not harm third parties or cause a direct liability for the County, to the extent Clark County's image is tarnished as a result, the Council may wish to balance the pros and cons of public discussion and the waiver of the attorney-client privilege when considering matters protected under RCW 42.30.110, or for which it may seek legal advice under RCW 36.27.020(3).

In one area, the wishes of a public officer control whether a public hearing is required. Under RCW 42.30.110:

(1) Nothing contained in this chapter may be construed to prevent a governing body from holding an executive session during a regular or special meeting:

* * *

f. To receive and evaluate complaints or charges brought against a public officer or employee. However, upon the request of such officer or employee, a public hearing or a

meeting open to the public shall be conducted upon such complaint or charge.

III. ANALYSIS

At the outset, it is clear that all meetings of the County Council are open and public and all persons are permitted to attend any meetings of the governing body, except as otherwise provided. The legislature sought to balance the rights of the public to be present and have the opportunity to observe and participate in government with the government's obligation to protect confidential communications where revealing those confidences would cause liability or the public interest would suffer. Those exceptions were codified in RCW 42.30.110.

Pertinent to the issues facing the Council are subsections 42.30.110(1) regarding:

- (f) Complaints or charges brought against a public officer or employee. However, upon request of such officer or employee, a public hearing or a meeting, open to the public shall be conducted upon such complaint or charge; and
- (i) Discussions with: Legal counsel representing the agency matters related to agency enforcement actions or to discuss with legal counsel representing the agency in litigation or potential litigation to which the agency, the governing body or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in adverse legal or financial consequences to the agency.

The phrase, "public officer", in subsection (f) is not defined, however, public office is defined in Title 42 at RCW 42.17A.005 (39) to include county elective offices. The phrase, "potential litigation", broadly includes litigation that an agency reasonably believes may be commenced and includes litigation or legal risks of a proposed action or current practice that the agency has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence to the agency. *See, RCW 42.30.110(1)(i)(i) and (ii)*. Therefore, County Councilors are public officers and potential litigation is broadly defined to include future actions that may be commenced against the County.

Discussions of actual or potential litigation risks, based on a proposed action or current practice.

As noted above, the Open Public Meetings Act exempts from its requirements discussions with legal counsel regarding litigation or potential litigation where the County or one of the members of its governing body is or is likely to become a party when knowledge of the discussion is likely to have an adverse legal or financial consequence for the County. While the Clark County Prosecutor's Office acts as a legal advisor to all County officers (RCW 36.27.020(2)), it is the legal representative of the County and represents it in all civil and criminal proceedings, in which the County may be a party (RCW 36.27.020(3)). Because the

Prosecutor's Office represents the County and the County acts through its governing body, in all pertinent respects; it is County Council that is the client as the governing body of Clark County.

The attorney-client privilege that exists between the Prosecuting Attorney's Office and its County client is protected by RCW 5.60.060. Application of the attorney-client privilege to artificial persons, such as corporations, political subdivisions and municipal corporations, has been considered by the courts and the court has recognized that the attorney-client privilege extended to corporate clients in *Youngs v. PeaceHealth*, 179 Wn.2d 65, 645, 316 P.3d 1035 (2014) and *Upjohn Co. v. United States*, 449 U.S. 383, 386, 101 S. Ct. 677, 66 L.Ed.2d 584 (1981). The client in this particular case is the County Council, as the governing body of Clark County. The attorney-client privilege belongs to the client and can only be waived by the Council. See, *State v. Sullivan*, 60 Wn.2d 214, 217, 373 P.2d 474 (1962).

County Council takes action based on a determination of a majority of the Council. It is this same majority that is required to waive the attorney-client privilege. While courts across the country have split on whether a single corporate client (or County Councilor) may waive the attorney-client privilege, (*Attorney-Client Privilege in the Corporate Context: Can Corporate Officers Waive the Corporation's Privilege?*, Lingo, Jessica; Tennessee Business Litigation Newsletter, December 2012) the rationale supporting waiver appears to be more of a practical than legal determination.

Assuming the Council chooses to forego executive session, there are significant risks in discussing issues of actual or potential County liability in a public setting. First, such information may act as an admission on behalf of the County and, certainly, increase the potential for County liability. Even if the Council starts on a "narrow path" skirting the legal pitfalls, it may be difficult to stay on the path once the discussion heats up.

Other considerations weight against open discussion of liability issues. In a public setting, the DPA would have to choose between participation and protection of the attorney-client privilege. Discussion of alternatives and the legal implications of the alternatives might not occur. If our office chose not to give full and fair advice to its client and, this inaction would impair the Council's ability to receive effective legal advice. The result may be either a bad or incomplete decision. Alternately, if the Council chose to hold a public meeting on an issue of liability and seek legal advice, the waiver of the attorney-client privilege may impact other related confidential communications on the same subject.¹ *Seattle Northwest Securities Corp. v. SDG Holding Co., Inc.*, 61 Wn. App. 725, 812 P.2d 488 (1991). As a consequence, it is the province of the majority of the Council to determine whether a waiver of the attorney-client privilege should occur and whether to go into executive session; it is not the right of any individual Council member.

In addition, open discussion of certain issues may impact the rights of third parties. For example, under RCW 42.41.030(7), whistleblowers are entitled to the confidential investigation

¹ To the extent that city disclosed some attorney-client communications before or during litigation, it waived the exemption under Public Records Act (PRA). *Zink v. City of Mesa*, 162 Wn. App. 688, 256 P.3d 384 (2011).

of their complaints. Certainly, it would be improper to hold open discussions regarding such matters.

Discussions avoiding actual and potential liability of the County and not implicating the rights of protected third parties.

Not all discussions that are protected under RCW 42.30.110 involve potential liability to Clark County. Certain discussions regarding complaints or charges against a public officer may be held in executive session, unless a contrary request is made by the affected public officer. Specifically, RCW 42.30.110(1) (f) provides that:

Upon the request of such officer or employee, a public hearing or meeting open to the public shall be conducted upon such complaint or charge

As applied to the current issues, a single Councilor may request the airing of complaints in public; in such instance, discussion of liability issues should be bifurcated. While this operation may require a delicate balance and some risk to the County, state law does provide protection for subjects of complaints or charges under the Open Public Meetings Act.

CH/tk