



June 20, 2016

SENT VIA EMAIL AND U.S. MAIL

Jayleen Schell
Human Resources Manager
City of Englewood, Colorado
1000 Englewood Parkway
Englewood, Colorado 80110-2373

RE: Question Concerning Process for Considering Candidates for City Attorney Position

Dear Ms. Schell:

You requested our opinion concerning the following question:

May the City of Englewood lawfully conduct an executive session pursuant to the Colorado Open Meetings Law (C.R.S. § 24-6-401 *et seq.*) to select a preferred candidate among a list of finalists for the position of City Attorney and, based on that selection, either: (1) devise a negotiation strategy to advise negotiators to explore the acceptable terms and conditions of an employment relationship with the preferred candidate; or (2) invite the selected candidate into the executive session to negotiate the terms and conditions of an employment relationship acceptable to both the candidate and the City?

It is our opinion that an executive session can be conducted for these purposes provided that:

1. There are no specific limitations contained in the City of Englewood City Charter or City ordinances that expressly prohibit executive session discussions for considering or selecting a candidate for the position of the City Attorney;¹ and
2. The final appointment of the City Attorney is conducted in an open public meeting.

The Colorado Open Meetings Law ("COML") authorizes executive sessions for a limited number of topics and purposes. One lawfully authorized purpose for an executive session is:

¹ Within the time constraints imposed for issuance of this opinion, a simple review of the Englewood City Charter and its Municipal Code was undertaken from the versions available publicly on the City's website. That review did not disclose any provisions limiting the availability of executive sessions or governing the selection of the City Attorney.

"Determining positions relative to matters that may be subject to negotiations; developing strategy for negotiations; and instructing negotiators."

C.R.S. § 24-6-402(4)(e)(I). Each of the elements of the COML's authorization for the conduct of an executive session for negotiation is met in the instance of determining whether to extend an employment offer to one or more candidates for the position of city attorney. Whether the City chooses to select the preferred candidate and devise the negotiation strategy in executive session to be implemented outside of such session or actually engage in the negotiations with a selected candidate during executive session does not change the analysis.

First, the ultimate selection of a city attorney is clearly "a matter that may be subject to negotiations" pursuant to C.R.S. § 24-6-402(4)(e)(I). As with any executive level position, the selection ultimately will be made only if the municipality is able to negotiate and reach mutual agreement with one of the candidates. Therefore, the Council should be free to discuss experience, salary history, and other relevant factors of the candidate pool to determine with whom they desire to negotiate and to determine the offer terms.

Moreover and at a minimum, the Englewood Home Rule Charter (Article IX, Part 1, § 64) requires that the City Council establish a salary for an attorney with a minimum of five (5) years' experience. In practice, salaries are established based on the City Council's opinion of the relative experience and qualifications of a candidate. Depending on the City Council's collective opinion of each candidate, the terms and conditions of salary and benefits will vary and are necessarily matters subject to negotiation with the candidate(s) selected for negotiation and possible appointment. The Council may hold an executive session to review the candidate list, choose the preferred candidate(s) and either: (a) instruct negotiators to contact the selected preferred candidate with an offer; or (b) invite the preferred candidates into an executive session to negotiate the terms of a possible employment relationship. The terms of the employment relationship is a matter subject to negotiations whether it is only to outline the terms of the negotiation or to actually engage in the negotiation of the terms.

Second, the issue of selection of a preferred candidate with whom to negotiate involves "develop[ing] strategies for negotiation" and is an allowable executive session subject matter. In order to reasonably approach one or more candidates for the position of city attorney, the City Council will be required to compare qualifications and develop a strategy that will best achieve the City Council's collective goal in retaining a new city attorney while meeting both budgetary goals and the need for experience that will best serve the municipality. It is entirely reasonable that the City Council will have a preferred candidate subject to such candidate accepting a specific salary at or below a Council-established maximum amount and/or a specifically designated benefit package. Should such negotiation and offer to the preferred candidate prove unsuccessful, it is entirely reasonable for the Council to determine a strategy for negotiating with a second preferred candidate and extending a different salary and benefit package to such candidate. These types of determinations are within the authorization of C.R.S. § 24-6-402(4)(e)(I).

Third, negotiations with the preferred candidates may entail Council providing direction to one or more persons to engage the candidates and extend and discuss the City Council's offers with selected candidates. Obviously, accomplishing these actions will require the City Council to

"instruct negotiators" on whom to negotiate with and on what terms, and such instruction is an authorized subject for confidential executive session pursuant to C.R.S. § 24-6-402(4)(e)(I).²

There is a purpose and wisdom imbedded in C.R.S. § 24-6-402(4)(e)(I) and the authorization to conduct an executive session for purposes of negotiation strategy. In reaching a decision on how to best negotiate with candidates, and even in actually negotiating with a candidate if that is the process that Council chooses, the City Council will invariably engage in frank discussions of the relative strengths and weaknesses of candidates, identify acceptable salary limitations and maximums that can or will be paid based on those strengths and weaknesses, and discuss other sensitive matters which will be or will eventually be subject to negotiations. The evident purpose of an executive session is to allow such frank and sensitive discussion to be undertaken in a confidential setting.

The wisdom of an executive session is reflected in the need to protect information from public disclosure that could substantially harm the municipality's interests. For example, if the City Council were to declare publicly that there is only one candidate worthy of negotiation, or were to publicly declare that the City was willing to pay up to a maximum of \$200,000 for a specific candidate or for the position generally, the disclosure of that information would potentially place the municipality at a disadvantage in later negotiations. As another example, if the City Council were to disclose that the candidate eventually selected was the second or even third best choice and the candidate did not have the support or backing of several City Council members, such public disclosure would undermine the public's confidence in the new city attorney and potentially impact the working relationships of the new attorney and the City Council members. By allowing these discussions and negotiation strategy to be kept confidential through an executive session, the municipality best protects its fiduciary and bargaining positions, the taxpayers' funds, and the public's confidence in government.

It is necessary to recognize and respect that negotiations are merely preliminary steps to final action. Following identification of the person(s) with whom to negotiate, devising negotiation strategy and/or entering into negotiations, the City Council will be likely be presented with mutually acceptable terms and conditions reached through negotiation. The municipality's formal and final acceptance of these terms and conditions – most likely through approval of an employment agreement – must be a matter of public record and conducted in a public meeting. The negotiations, and the executive session which permits the determination of negotiation strategy, are not to be used for rendering final decisions but only for exploring the potential for reaching a mutual agreement.

² It is also important to note that the statutory authorization for executive session for "determining positions relative to" and "developing strategy for negotiations" specifically does not apply to meetings of a school board during which negotiations for *collective employment contracts* are being discussed. But this statutory provision concerning executive sessions specifically recognizes that, as to school boards, negotiations of an *individual employee contract* may be the subject of an executive session. Although not determinative, this statutory authorization for school board contracts evidences a recognition in the law and the underlying policy that individual employment agreement negotiations are appropriate to take place in executive session. C.R.S. §24-6-402(4)(e)(II)(B).

Should you require additional advice regarding this question or opinion, please do not hesitate to contact us.

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Robert C. Widner
Maureen H. Juran
Widner Juran LLP