


CITY MANAGER'S OFFICE MEMORANDUM
#11-2019

DATE: February 25, 2019

TO: Honorable Mayor Carol Dodge and City Council Members

FROM: Heather Geyer, City Manager 

SUBJECT: CIRSA Training for Municipal Officials

PURPOSE

Sam Light, General Counsel for the Colorado Risk Sharing Agency (CIRSA), one of the City's insurance carriers will be conducting a training for City Council titled, "Suggestions for Success (and Avoiding the Risk of Liability) for Municipal Officials."

BACKGROUND

It is a best practice to conduct regular training with elected officials. This type of training assists the City fulfilling requirements that are part of our annual property/casualty audit conducted by CIRSA. Proactive training such as this one results in credits that is factored into our annual premium.

STAFF RECOMMENDATION

The purpose of this presentation is for informational purposes.

BUDGET/TIME IMPLICATIONS

This training is provided as part of our insurance coverage with CIRSA.

STAFF REFERENCE

Heather Geyer, City Manager, hgeyer@northglenn.org, 303.450.8706.

ATTACHMENTS

1. CIRSA Training Powerpoint Presentation
2. CIRSA Training – E-mail Suggestions for Elected & Appointed Officials



Suggestions for Success (and Avoiding the Risk of Liability) for Municipal Officials

Sam Light, CIRSA General Counsel



Introduction

Speaker Bio

Sam Light is General Counsel for the Colorado Intergovernmental Risk Sharing Agency (CIRSA). Previously Mr. Light was a partner with the Denver law firm of Light | Kelly, P.C., specializing in municipal and other public entity law, insurance law and defense of public entities and elected officials. Sam is a frequent speaker on municipal law and has practiced in Colorado since 1993.

Introduction

Colorado Intergovernmental Risk Sharing Agency

- Public entity self-insurance pool for property, liability, and workers' compensation coverages.
- Formed by in 1982 by 18 municipalities pursuant to CML study committee recommendations.
- Not an insurance company, but an entity created by IGA of our members.
- Total membership today stands at 275 member municipalities & affiliated entities:
 - 270 are members of the PC pool
 - 144 are members of WC pool
- CIRSA views pre-claim assistance and proactive approaches as critical member services – is a win-win



Introduction

Presentation Overview

- Suggestions for Good Governance – Best Practices.
- Are based on my years as a public entity attorney and observing the ways in which elected and appointed bodies and their members can get into or stay out of trouble from a liability standpoint.
- Presentation is a training resource only; is not intended as legal advice on any specific, pending issues.
- In case of any inconsistency between author's remarks and views of your City Attorney...your Attorney's views prevail!

Suggestion One:

Recognize the Change in Roles

- Being a public official means your role has changed:
 - Citizen-official
 - Outsider-insider
 - Critic-representative
 - Single-issue focus – broader policy focus

Suggestion One:

Recognize the Change in Roles

- When you took office, you took an oath to uphold constitution, laws, and City charter and ordinances. What does that oath embody?
- A commitment to respect the boundaries and allocations of responsibility set by law.
- A commitment to lawful conduct, including constitutional requirements such as providing “due process” and following criteria in making decisions.
- A commitment to ethical practices.
- A commitment to professional courtesy and respect for one another’s divergent viewpoints and styles?

Suggestion One:

Recognize the Change in Roles

- Whatever your role may have been to the City previously, you are now all elected leaders – guardians – stewards – of the City.
- The protection of the City's interests and assets is perhaps your most critical function now.
- The guiding principle in decision making should always be, “what is the right thing for the City?”

Suggestion One:

Recognize the Change in Roles

- You may have sought public office because you were dissatisfied with status quo.
- However, hanging on to an “outsider” perspective can be destructive:
 - When you were elected or appointed, you became the ultimate insider...the “outsider” perspective no longer fits.
 - Misunderstanding your role can increase the risk of liability for the City and you.

Suggestion One:

Recognize the Change in Roles

- “Outsider” perspective can also greatly reduce your own effectiveness:
 - You are now part of a collective decision-making body.
 - Each individual has a fraction of the power of the body, but that power can’t be exercised alone. Under law, the power and authority belongs to the Council itself.
 - Success in your position can’t happen without collaboration and consensus-building: Think and act as “We” not “I”.

Suggestion One:

The Role – Good Governance is Part of the Job

- As elected leaders, part of your oath and “job duties” is good leadership which, at root, is based both practically and legally on a few core concepts:
- Openness & Transparency (open meetings/records laws);
- Fundamental Fairness (due process);
- Predictability (following applicable laws, charter & ordinances); and
- Mutuality of Respect.

Suggestion Two:

Avoid “outside the scope” and “willful and wanton” conduct

- You have personal protection from liability under the Governmental Immunity Act (GIA) only if you are “within the scope of employment” and not acting “willfully and wantonly.”
- Concept of “scope of employment” applies to everyone - elected & appointed officials, employees, and authorized volunteers.
- Means everyone needs to know and respect their “job description.”
- Conduct that is “outside the scope” or “willful and wanton” can create liability and result in a loss of governmental immunity.

Suggestion Two:

Avoid “outside the scope” and “willful and wanton” conduct

- Can also result in loss of insurance coverage. Public official liability policies provide for your defense and pay judgments where required.
- But, these policies follow “course and scope” and “willful and wanton” concepts. That is, they extend coverage to elected and appointed officials “in their capacity as such” (or similar) and have provisions excluding coverage where liability is based on willful & wanton conduct, fraud, ill-gotten gain or malicious acts.
- Insurers must look to the allegations to assess coverage. If allegations are of willful and wanton or other bad conduct, the insurer may not cover, or cover under a reservation of rights.
- PEL policies do not insure against punitive damages.

Suggestion Two:

Avoid “outside the scope” and “willful and wanton” conduct

- Understand “job description” & stay within it.
- Before acting, particularly if purporting to act individually on behalf of the City, ask whether you have authority to act.
- Recognize that elected officials act primarily as a BODY, and exercise responsibilities mainly by VOTING in a PUBLIC MEETING.
- If you are doing anything other than that ... make sure you are properly authorized.

Suggestion Two:

Avoid “outside the scope” and “willful and wanton” conduct

- “We” ... not “I”! If you find yourself about to act in terms of “I” rather than “we” ...that’s a red flag.
- Be particularly cautious once the Council has voted on a matter.
- If you feel there is a need to change a decision, use proper channels.
- Recognize some decisions cannot be undone without liability (whether based on contract principles, vested rights, estoppel or other legal theories).

Suggestion Two:

Roles & Liability Risks

- Why is understanding & respecting the role—i.e., “role discipline”—a liability issue; some real life examples:
- An elected official directs or gets involved in a personnel decision entrusted to the manager or a department head.
- An elected official interferes with a routine item that is staff ‘s responsibility.
- Warning signs: “He/she/they did what?!” & “Can they do that?!”

Suggestion Three:

Honor Transparency

- Transparency is a basic expectation for public entities.
- Citizens take interest in the goings-on of the City, how/when those goings-on are discussed, and the opportunities afforded to them to listen in on/participate in the discussion.
- A lack of transparency can cause massive trust and credibility issues, and potential claims/disputes over compliance.

Suggestion Three:

Honor Transparency – Colorado Open Meetings Law

- Open Meetings Law (OML) applies to all meetings of the governing body, boards, commissions, committees, etc.
- Applies to 3 or more or a quorum, whichever is less. (So, for Council, rule is three even though Council has nine members.)
- Requires discussion of public business take place at meetings open to the public and, if action will be taken or a quorum will be present, there must also be timely notice given—agenda posted at least 24 hours in advance.
- Allows executive sessions only for limited purposes. Make sure your executive session procedures are set up to comply with the law and protect confidential information.

Suggestion Three:

Honor Transparency – Colorado Open Meetings Law

- How can you break faith with the OML? Let's count some ways...
 - Three or more members Councilmembers hold “meetings before the meetings” to sort things out.
 - You hold executive sessions for purposes not listed in the OML, or your executive sessions veer “off topic.”
 - Using e-mail as a substitute for a meeting. Recognize that non-meeting communications (e-mail, texts, social media) can raise legal issues. See Handout.

Suggestion Four:

Run Great Meetings!

- How you run your meetings and interact with interested parties at your meetings can greatly impact your effectiveness and liability risks.
- Recognize that certain liability risks—in particular civil rights claims—can be exacerbated by “bad facts” that suggest (or are perceived to be based upon) retaliatory or reactive conduct. Thus,
 - Use courtesy, tact, and diplomacy in interactions, especially in public settings.
 - Understand your words/actions “stick” to you as government officials and have power and impact.

Suggestion Four:

Run Great Meetings!

- Use and expect civility; avoid reactive, inflammatory, and off-topics comments (applies to all settings/participants but particularly true for quasi-judicial hearings—can look (and be) bad on a transcript!)
- Maintain a level of formality; e.g., recognition by presiding officer, direct comments to Council, consistency in public comment periods.
- Have a plan for dealing with disruptions--but don't suppress the content of protected speech!
- When it comes to decision-making, deliberate and use the “rule of why”—helps build a record, trust and understanding, and consequently can reduce potential for disputes & challenges.

Suggestion Five:

Put Ethics First

- In Colorado, ethics scandals are rare – but happen from time to time.
- Ethical misjudgments greatly undermine public confidence in public bodies, and appearances of conflicts can be just as damaging as actual conflicts.
- Can result in criminal and civil liability.
- There is often a “personal benefit” exclusion from public officials liability coverage.

Suggestion Five:

Put Ethics First

- The theme that runs through codes of ethics is: It is not permissible to gain a personal benefit by virtue of holding public office.
- Main rule – Conflicts of Interest: Disclose any conflict situation, don't vote; and don't influence others.
- Don't disclose or use any confidential information for personal benefit.
- Decline any gifts that seem to be connected to your service (and abide by gift rules).

Suggestion Six:

Be Cautious in Administrative Matters

- Inappropriate involvement in administrative matters by members of the governing body, collectively or individually, can:
 - Undermine the structure of the body or organization.
 - Waste resources.
 - Be a backwards step in City evolution.
 - Increase the risk of liability for yourself.

Suggestion Six:

Be Cautious in Administrative Matters

- Understand and observe “role discipline” between policy and administrative matters.
- The Council Role - help establish the policy or vision for the City as a whole; help set overall goals and priorities; make specific decisions that are Council’s prerogative; BUT, leave details and execution to City Manager and staff.
- The City Staff’s Role – Manage and accomplish the work as defined by the policy making bodies, within the City’s established parameters.

Suggestion Six:

Be Cautious in Administrative Matters

- Council Powers and Responsibilities:
 - Enact local legislation
 - Adopt the city's budget – control of the finances
 - Determine policies for the city
 - Appoint City Manager, Clerk, Attorney & Municipal judge
 - Appoint members of various Boards and Commissions
 - Represent the City on various area, regional and state boards and organizations

Suggestion Six:

Be Cautious in Administrative Matters

- The legislative-administrative distinction is particularly important in personnel matters.
- The Council has an appropriate role – but should focus on “big picture” issues:
 - Approval of personnel rules promulgated by Manager.
 - Personnel budget and salaries/pay plan (Code 2-2-3(d)).
 - Selection and supervision of the Council’s “direct reports,” (and “advise and approval” for department head removal).
 - Overall City goals and priorities.

Suggestion Six:

Be Cautious in Administrative Matters

- But, your involvement in these “big picture” issues must not devolve into:
- Selection, evaluation, or disciplinary matters involving a specific individual who is not a direct report.
- Becoming an individual “HR Manager” – if folks are inappropriately inserting themselves into, or are bypassing, the chain of command, how can the City return to the proper chain of command?

Suggestion Six:

Be Cautious in Administrative Matters

Remember Your Code:

2-2-12: The Council shall concern itself with the administrative service solely and directly through the City Manager, and neither the Council, its members, nor committees shall either dictate the appointment or direct or interfere with the work of any office or employee under the City Manager.

2-3-6: The Council and its members shall deal with that portion of the administrative service for which the City Manager is responsible solely through the City Manager, and neither the Council nor any member thereof shall give orders to any subordinate officer or employee of the City either publicly or privately.

Suggestion Six:

When dealing with staff – speak with one voice

- Each governing body is made up of individuals, each with different goals and priorities; however, it is not a group of nine bosses. Therefore, resolve to speak with one voice to your direct reports.
- There is but one Council and it should commit to act as one. It alone can—and should—carry the burden of sorting out and reconciling the goals and priorities of its members with the goal of establishing a singular set of goals, priorities and directions to staff.
- This can be done even if there are strong differences of opinion or a split vote...And doing so provides for clarity, credibility and accountability in the direction you provide to the City Manager.

Suggestion Seven:

Use Your Power Wisely and Humanely

- As a Council, commit to a “no surprises” approach with one another and staff.
- Use your Manager as a resource to help you do well, and look good while doing it.
- Commit to act as “we” and not “I,” to build strong Council relationships.
- Develop and embrace your agenda as a Council.
- Recognize you set the tone for the whole organization in terms of the treatment of employees, citizens, and the business community.
- And, always keep in mind that you are the stewards of the your City’s best interests and assets.

Conclusion

And thank you for your public service!

And for the opportunity to present.

CIRSA TRAINING - E-MAIL SUGGESTIONS FOR ELECTED & APPOINTED OFFICIALS

Prepared By Sam Light, CIRSA General Counsel

The use of e-mail by elected or appointed officials to discuss public business raises issues under both the Colorado Open Meetings Law (“OML”), C.R.S. § 24-6-401 et seq., and the Colorado Open Records Law (“CORA”), C.R.S. § 24-72-201 et seq. The OML recognizes that discussions by e-mail can trigger notice and openness requirements. Specifically, the OML provides that any meeting of a quorum or three or more members of a local public body (whichever is less) at which public business is discussed or at which formal action may occur must be open to the public. Also, the meeting must be preceded by proper notice if a quorum will be present or any action will be taken. A meeting can include a discussion that occurs by phone or e-mail.

Additionally, CORA recognizes that public records can include e-mails of elected and appointed officials where the communications involve City/Town business or public funds and are made, maintained or kept by the City/Town as part of its operations. Under CORA e-mails may be public records even if they do not trigger open meetings rules. Based on these rules, the following are suggested e-mail “dos and don’ts:”

E-mail – Okay to Do

- Have a one-on-one discussion with another council/board member.
- Respond to constituent e-mails consistent with “role discipline.”
- Correspond directly with City/Town staff.
- Copy other council/board members or staff on an e-mail as long as it is “fyi” and not “morphed” into a platform for council/board policy discussions.
- E-mail to other council/board members “fyi” information, such as updates on carrying out decisions made at prior public meetings, or on topics of current interest.
- If applicable, use City/Town-assigned e-mail address and device when possible.
- **But, in all the above, never use e-mail to discuss pending quasi-judicial matters.**

E-mail – Don’ts

- Do not use e-mail (or similar technology) to discuss policy among more than two members, whether simultaneous and/or serial or not.
- Do not use e-mail as a substitute for open public meeting discourse.
- Do not use e-mail as a substitute for taking any official action.
- Do not use e-mail to discuss any pending quasi-judicial matter.
- Do not “reply to all” on e-mails sent to more than two council/board members, excepting only e-mails that clearly have no policy purpose (e.g., “fyi” e-mails).
- Do not send messages that discuss both personal matter and public business.