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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

COUNSEL'S REQUEST FOR DISMISSAL OF CASE OR
PROVISION OF DEFENSE FOR LORAINÉ CHAPIN

INTRODUCTION

In a complaint filed March 21, 2006 and amended April 5, 2006, the City of San Diego sued former Deputy City Attorney Loraine Chapin, who later served as general counsel for the San Diego City Employees' Retirement System (SDCERS). The lawsuit alleges Ms. Chapin improperly used her position as a deputy city attorney to influence government decisions to create a general counsel position at SDCERS for herself. The lawsuit alleges Ms. Chapin violated Government Code section 1090, which prohibits self-dealing by public officials. It further alleges that Ms. Chapin breached fiduciary duties in her role as counsel for SDCERS by improperly advocating for the purchase of service credits for the retirement administrator. Finally, the complaint seeks related declaratory relief and damages. (*See*, First Amended Complaint, San Diego Superior Court Case No. GIC 863096, attached as exhibit 1.¹)

On April 11, 2006, attorney Steven M. Strauss of Cooley Godward wrote Council President Scott Peters to advise that he is representing Ms. Chapin in the action. Mr. Strauss demanded that the City Council: (1) direct the City Attorney to dismiss the pending lawsuit, or (2) if the Council does not do so, vote to provide a defense for Ms. Chapin under California Government Code section 995.² (A copy of Mr. Strauss' letter is attached as exhibit 2.) This report discusses the City's obligations to provide a defense and the exceptions to those obligations.

¹ The Chapin complaint is provided to the Council without its 35 attached exhibits (each referenced in the complaint). This office will make the exhibits available to the Council for review at its meeting on this matter.

² Although a request made under Government Code section 995 ordinarily requires a response within 20 days, the letter sent to Council President Peters was contingent upon prior council action to consider directing the City Attorney to dismiss the lawsuit. Moreover, Ms. Chapin's counsel has been in discussions with Council President Peters' office to schedule a later docketing of this item. Based upon this, Council discussion of the request remains timely.

DISCUSSION

I. Procedural History of the Chapin Case

As set forth above, the City Attorney's Office filed the original complaint against Ms. Chapin on March 21, 2006. On April 5, 2006, the City Attorney's Office filed a First Amended Complaint, which is the operative pleading.

The lawsuit claims that Ms. Chapin, through a series of legal memorandums, emails and other actions, advocated creating an "independent" general counsel position for SDCERS. (See Complaint, ¶ 8.) The lawsuit alleges Ms. Chapin engaged in unlawful self-dealing by using her government position to create a new job for herself. The SDCERS Board approved the creation of the new position and then offered it to Chapin, who accepted. Ms. Chapin quit the City Attorney's Office and took the new position with SDCERS, gaining a substantial increase in compensation. *Id.* The complaint seeks damages including salary, benefits or other compensation received by Ms. Chapin.

Ms. Chapin has filed two motions designed to dismiss the complaint.

First, Ms. Chapin has filed a demurrer (a motion seeking dismissal of the case if the complaint fails to state facts sufficient to allege a cause of action). Ms. Chapin's motion contends the complaint does not allege facts sufficient to state a cause of action and also is time-barred, because it is based upon events that occurred between 1996 and 1999. Ms. Chapin contends the actions fall outside the four-year statute of limitations for breach of fiduciary duty and violations of Government Code section 1090.

Second, Ms. Chapin has filed a motion to strike the complaint in all or in part on grounds its filing was not authorized by the City Council and thus its filing violates the City Charter.

The City Attorney's Office will oppose both motions, in papers due to be filed with the court after the date of this Report. The City Attorney's Office will substantively address each of the legal arguments raised, including its authority to bring the lawsuit under City Charter section 40. The City Attorney's Office will also address the timeliness of the lawsuit. With regard to the statute of limitations, the complaint alleges that the "City brought this action within four years of discovery of the underlying facts giving rise to the causes of action" and brought it "within four years of the date of the last overt act alleged." (Complaint, ¶ 53.)³

The motions presently are scheduled to be fully briefed as of July 7, 2006 and to be heard by the Honorable Linda Quinn on July 14, 2006 at 1:30 p.m.

A federal criminal case also is proceeding against Ms. Chapin. (See Indictment in *U.S. v. Saathoff, et al.*, exhibit 3 to this Report and discussed in Section III below.) However, the matter

³ If the Council wishes to review the City's opposition papers, the City Attorney can provide copies to the Council to supplement this Report after the briefs are filed.

before the City Council involves only the civil case filed by the City Attorney's Office. As set forth below, a Government Code section 995 demand involves only civil actions or proceedings.⁴

II. The SDCERS Defense and Indemnity Resolution Does Not Apply to Ms. Chapin.

The claims against Ms. Chapin involve her employment both as a deputy city attorney for the City Attorney's Office and as general counsel for SDCERS, a City department. Although the City Council has previously passed resolutions related to defense and indemnity related to SDCERS, those resolutions related only to "past, present, and future board members" of SDCERS and not to its employees. (See R-297335, passed November 18, 2002 to provide defense and indemnity of "all past, present, and future board members" of SDCERS; and its subsequent repeal, as to any acts or omissions by board members occurring after April 18, 2006.)

III. The City Attorney Seeks to Disqualify Ms. Chapin's Counsel.

Council members should also be aware that the City has a motion pending to disqualify Cooley Godward from representing Ms. Chapin in the federal criminal case against Ms. Chapin. The criminal indictment alleges Ms. Chapin committed acts of wire and mail fraud related to her employment as SDCERS' general counsel. (See exhibit 3.)

The City contends that Cooley Godward has a conflict of interest that should preclude its representation of Ms. Chapin. Cooley Godward previously was engaged to represent the City of San Diego before the U.S. Attorney's Office and the U.S. Department of Justice regarding potential violations of securities laws and related matters.

The pending motion in the criminal case is scheduled to be fully briefed as of July 7, 2006 and to be heard July 19, 2006. The City Attorney's Office expects to file a similar motion to disqualify Ms. Chapin's counsel in the pending civil action.

IV. The Duty to Provide a Defense Pursuant to California Government Code Section 995

California Government Code section 995 requires that the City provide a defense to any civil action or proceeding brought against a former employee in his or her official or individual capacity on account of an act or omission in the scope of employment by the City. California Government Code section 995 provides, in relevant part:

Except as otherwise provided in Section 995.2 and 995.4, upon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on

⁴ The City Attorney's Office also has learned that Ms. Chapin filed a claim against the City with Risk Management on June 7, 2006 related in part to her dismissal without prejudice from another civil pension case. Her counsel's demand concerns only the civil action addressed in this Report.

account of an act or omission in the scope of his employment as an employee of the public entity. . .

Ms. Chapin is a former employee who has requested that the City provide a defense in a lawsuit related to her employment at the City, both as an employee of the City Attorney's Office and as an employee of SDCERS, a City department. Thus, Ms. Chapin would be entitled to a defense by the City unless an exception under California Government section 995.2 or 995.4 is found to be applicable in this circumstance.

California Government Code section 995.2(a) provides that a public entity may refuse to provide for the defense in an action brought against an employee or former employee if the public entity determines that: (1) the act or omission was not within the scope of employment; (2) the employee or former employee acted or failed to act because of actual fraud, corruption, or actual malice; or (3) the defense of the action by the public entity would create a conflict of interest between the public entity and the employee or former employee. Upon an employee's request for a defense, the public entity must, within 20 days, inform the employee or former employee whether it will or will not provide a defense, and the reason for the refusal to provide a defense. Cal. Gov't Code § 995.2(b).⁵

California Government Code section 995.4 provides that a public entity may, but is not required to, provide for the defense of: (a) an action brought by the public entity to remove, suspend, or otherwise penalize its own employee or former employee; or (b) an action or proceeding brought by the public entity against its own employee or former employee as an individual and not in his official capacity.

Both sections 995.2(a) and 995.4 may apply here. In either case, the City Council has the discretion to make a determination regarding the existence, or lack thereof, of these factors. If the City Council determines that these factors were present in the Chapin case, then this exception to California Government Code section 995 allows the City Council to refrain from providing a defense to Ms. Chapin.

The City may refuse to provide a defense under California Government Code section 995.2(a)(3) if doing so would create a conflict of interest between the public entity and the former employee. Because the City is the plaintiff in the action against a former employee, an inherent conflict of interest exists.⁶ As stated in *Stewart v. City of Pismo Beach*, 35 Cal. App. 4th 1600, 1606 (1995), "it is unreasonable to require a public entity to finance litigation directed against it." When there is an actual conflict between a public entity and its employees "the

⁵ See footnote 2 regarding the timeliness of the "20-day" request.

⁶ In *City of Redondo Beach v. Alice DeLong*, 123 Cal. App. 3d 1035 (1981), the court found that the City had no duty under California Government Code section 995.2 or 995.4 to provide DeLong, the City Treasurer, with an attorney or to pay her legal fees in the City's action for a writ of mandamus to compel DeLong to perform her duties. *Id.* at 1043.

public entity need not provide any defense whatsoever.” *City of Huntington Beach v. Petersen Law Firm*, 95 Cal. App. 4th 562, 567 (2002).

Similarly, California Government Code section 995.4 permits a public agency to refuse to provide a defense in an action or proceeding brought by the public entity against its own former employee as an individual and not in his official capacity. “This obviously constitutes a conflict of interest of such magnitude that the entity should not be compelled to litigate, in effect, against itself.” California Government Tort Liability Practice § 4.25 (4th ed. 2004). Accordingly, the City has the discretion to refuse to provide a defense to Ms. Chapin under these circumstances.

CONCLUSION

Ms. Chapin first seeks the Council’s substantive review of the litigation against her and demands that it direct the City Attorney to dismiss the claims. Should the Council disagree, Ms. Chapin then requests that the City Council consider providing her with a defense to the claims under Government Code section 995. Ms. Chapin seeks a defense as a former employee because the claims relate to her employment as a deputy city attorney for the City Attorney’s Office and as general counsel of SDCERS, a City department.

Generally, the City must provide a defense to its employees for actions occurring within the scope of their employment. However, California Government Code sections 995.2 and 995.4 provide exceptions to the general rule, including an exception if there is an actual conflict between a public entity and its former employee (i.e., if the City is suing the employee, as here). If the City Council determines that Ms. Chapin acted because of actual fraud or corruption in taking actions that created her new position at SDCERS, or if the Council determines there is a conflict of interest between the City and Ms. Chapin in this litigation, then the Council may refuse to provide her with a defense.

Finally, the Council should be aware that the City has brought a pending motion to disqualify Cooley Godward as Ms. Chapin’s counsel in a federal, criminal case related to her employment as SDCERS’ general counsel. The motion contends Cooley Godward has a conflict of interest precluding its representation of Ms. Chapin because it previously represented the City of San Diego. The City Attorney’s Office anticipates filing a similar motion to disqualify Ms. Chapin’s counsel in the civil lawsuit at issue here.

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney