



OFFICE OF THE CITY ATTORNEY
City of Peoria • 8401 West Monroe Street
Peoria, Arizona 85345

CIVIL
PROSECUTOR

623-773-7330
623-773-7335

OPINION NO. 2010-01

TO: Carl Swenson
FROM: Stephen M. Kemp, City Attorney 
DATE: April 27, 2010
SUBJECT: Indemnification of City Employees

QUESTION: In light of the passage of SB 1070 and its approval by the Governor of Arizona, to what extent are City Employees indemnified against claims of residents for refusal to enforce the law based on its conflicts with federal constitutional and statutory law?

OPINION:

The City is specifically authorized to procure insurance to protect the City and its employees from liability. Article XIV, Section 3 of the Peoria City Charter provides:

Sec. 3. Liability insurance.

The council shall procure liability insurance covering the city and its officers, agents, employees, and members of boards and commissions while engaged in governmental or proprietary capacities. The premiums on such insurance shall be paid by the city. The council may elect to comply with the requirements of this section by participating in an intergovernmental agreement with other political subdivisions for joint purchasing of insurance or to pool retention of risks or to create a self insurance program for the payment of liability claims against the city.

Based on this Charter authorization, the City has adopted an indemnification ordinance, which is codified in Section 2-49, Peoria City Code (1992) and which provides:

Sec. 2-49. Claims Management; risk; defense and indemnifications.

(a) All of the protections and benefits conferred by this section shall be enjoyed by any present or former Mayor, Vice-Mayor and each and all of the present or former members of the city council, city

officers, municipal judges, city employees, including the city attorneys, any prosecuting attorneys, whether or not such attorneys are full-time employees or serving on a contract basis, and every one of the members of all city boards and commissions and subcommittees, which protected parties are referred to in this section individually as a "city officer" and collectively or jointly as "city officials."

(b) Any City officer and all city officials shall be entitled to be exonerated, indemnified and held harmless by the City from and against any liability or loss in any manner arising out of, or occasioned by, his or their service as a City officer or officials and based upon any claim by any third party that the City or such City officer or officials, by any action or failure to act, damaged the property or infringed the rights of the third party, or of any other persons on whose behalf the third party brings a claim or legal action. The coverage afforded by this subsection shall not apply in any case where indemnification is not permissible pursuant to any state statute or any determination that such indemnification would be contrary to public policy.

(c) Subject to the above-stated limitations, the right to indemnification provided for in subsection (a) of this section shall extend as well to any claim brought by, or on behalf of, the city to recover damages alleged to have been occasioned to it or any of its property by any act or failure to act of any City officer or officials.

(d) In any case where indemnification is required under the provisions of this section the City shall pay, on behalf of any City officer and all City officials, any money judgments, and shall perform the onerous provisions of any court order, which may be entered against him or them, when such judgments or orders have become final and are no longer appealable.

(e) In any case where any City officer or officials are, entitled to be exonerated, indemnified and held harmless pursuant to the provisions of this section the City shall protect and defend any City officer and all city officials from and against any litigation commenced against him or them, by engaging and compensating competent legal counsel to conduct his or their defense, and by paying all court costs, and any fees of opposing legal counsel, taxed or imposed by the court having jurisdiction.

(f) The City shall at all times procure insurance policies providing the maximum coverages and limits procurable at reasonable rates to protect its interests and to indemnify and protect all City officials and any City officer entitled to indemnification and protection under this section. Acceptance of coverage and undertaking of protection by any such insurance carrier shall be deemed to satisfy the requirements of this section on the part of the City. However, in any case or instance where an insurance carrier does not in fact accept coverage and defend any City officer or officials, or where the insurance policy limits are insufficient to cover any judgment entered against any City officer or officials or such insurance is not effective for any reason for such coverage, the City shall be bound by the provisions of this section to protect and indemnify pursuant to the provisions of this section.

(g) It shall be a precondition to the assertion of any claim for protection and indemnity under this section that any City officer or officials, after having been served with process commencing litigation against him or them, or after having received written notice of a possible claim alleged to be covered under the provisions of this section, shall promptly give notice of the pendency of such action, or the presentation of any such claim, to the City Clerk who shall in turn present such actual or potential claim to the city council, together with such city officer's or officials' request for indemnity and protection hereunder. It shall further be a precondition to coverage hereunder that a city officer or officials claiming the protection and benefits conferred by this section shall at all times, and in every way, cooperate fully with legal counsel appointed by the city to defend against any threatened or pending litigation under the provisions of subsection (e) of the section.

Senate Bill 1070, codified as Arizona Revised Statutes, Sec. 11-1051, provides that a person who is a legal resident of this state may bring an action against a city that implements a policy or practice that limits or restricts the enforcement of federal immigration laws. The provision provides for indemnification of law enforcement officers, except where they acted in bad faith.

As a Home Rule Charter City, Peoria is sovereign in its affairs and may enact provisions providing greater protections than state law, unless the state specifically preempts a Charter City's action. Therefore based on the provisions in the City's Charter, the City is empowered to enact indemnification legislation such as provided in Section 2-49 of the Peoria City Code (1992).

The City's indemnification provision includes the following pre-conditions to indemnification:

1. The employee must give prompt notice of the claim to the City Clerk and Claims Management.
2. The employee must request indemnification. For purposes of this provision, submission of the claim to claims management is deemed a request for indemnification.
3. The indemnification must not be against public policy, for example providing indemnification to an employee for fines and penalties arising out of a criminal conviction.
4. The employee must fully cooperate with the City Attorney's Office and any other legal counsel appointed by the City Attorney's Office to represent the City in this matter.

If a city employee or city official complies with these conditions, it is the position of this office that the city employee or city official will be entitled to indemnification for liability, costs, fees and penalties arising out of claims filed by residents of this state alleging that the City has adopted or an employee is implementing a practice or policy adopted by the City that restricts or limits the enforcement of federal immigration laws to less than the full extent permitted by federal law. Implicit in this position is that the City employee or City official's actions are in accordance with the established policies of the City and the legal advice provided by this office.

What indemnification means is that the City Attorney's Office will provide a complete legal defense for the employee in any litigation that is filed against the employee alleging claims that the employee has followed a policy or practice that restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law. Our Office may provide the legal representation through in-house attorneys or may appoint outside counsel to provide the representation. If, however unlikely, a lawsuit were to result in a court awarding costs, fees, or financial penalties against the employee, the City would pay all such amounts. The employee would incur no costs.

Should you have any further questions regarding indemnification, please contact this office.