

Portland, Oregon

FINANCIAL IMPACT and PUBLIC INVOLVEMENT STATEMENT For Council Action Items

(Deliver original to Financial Planning Division. Retain copy.)

1. Name of Initiator City Attorney Jim Van Dyke on behalf of the Police Commissioner, the Bureau of Human Resources and the Portland Police Bureau		2. Telephone No. 503-823-4047	3. Bureau/Office/Dept. Office of City Attorney
4a. To be filed (hearing date): 2/13/13	4b. Calendar (Check One) Regular <input type="checkbox"/> Consent <input checked="" type="checkbox"/> 4/5ths <input type="checkbox"/>		5. Date Submitted to Commissioner's office and FPD Budget Analyst: 2-7-13
6a. Financial Impact Section: <input checked="" type="checkbox"/> Financial impact section completed		6b. Public Involvement Section: <input checked="" type="checkbox"/> Public involvement section completed	

1) Legislation Title:

Authorize the Director of the Bureau of Human Resources, with the concurrence of the City Attorney, to commence legal proceedings to protect the City's interests and rights under state collective bargaining law in connection with an investigation and resulting lawsuit filed by the United States Department of Justice ("USDOJ") regarding police practices.

2) Purpose of the Proposed Legislation:

Authorize City Attorney to file complaints as needed to protect the City's interests under state collective bargaining law.

3) Which area(s) of the city are affected by this Council item? (Check all that apply—areas are based on formal neighborhood coalition boundaries)?

- | | | | |
|--|------------------------------------|------------------------------------|--------------------------------|
| <input checked="" type="checkbox"/> City-wide/Regional | <input type="checkbox"/> Northeast | <input type="checkbox"/> Northwest | <input type="checkbox"/> North |
| <input type="checkbox"/> Central Northeast | <input type="checkbox"/> Southeast | <input type="checkbox"/> Southwest | <input type="checkbox"/> East |
| <input type="checkbox"/> Central City | | | |

FINANCIAL IMPACT**4) Revenue: Will this legislation generate or reduce current or future revenue coming to the City? If so, by how much? If so, please identify the source.**

No.

5) **Expense:** What are the costs to the City as a result of this legislation? What is the source of funding for the expense? *(Please include costs in the current fiscal year as well as costs in future years. If the action is related to a grant or contract please include the local contribution or match required. If there is a project estimate, please identify the level of confidence.)*

No costs - internal City Attorney costs.

6) **Staffing Requirements:**

- Will any positions be created, eliminated or re-classified in the current year as a result of this legislation? *(If new positions are created please include whether they will be part-time, full-time, limited term, or permanent positions. If the position is limited term please indicate the end of the term.)*

No.

- Will positions be created or eliminated in future years as a result of this legislation?

No.

(Complete the following section only if an amendment to the budget is proposed.)

7) **Change in Appropriations** *(If the accompanying ordinance amends the budget please reflect the dollar amount to be appropriated by this legislation. Include the appropriate cost elements that are to be loaded by accounting. Indicate "new" in Fund Center column if new center needs to be created. Use additional space if needed.)*

Fund	Fund Center	Commitment Item	Functional Area	Funded Program	Grant	Sponsored Program	Amount

[Proceed to Public Involvement Section — REQUIRED as of July 1, 2011]

PUBLIC INVOLVEMENT

8) Was public involvement included in the development of this Council item (e.g. ordinance, resolution, or report)? Please check the appropriate box below:

☐ YES: Please proceed to Question #9.

☒ NO: Please, explain why below; and proceed to Question #10.

9) If "YES," please answer the following questions:

a) What impacts are anticipated in the community from this proposed Council item?

b) Which community and business groups, under-represented groups, organizations, external government entities, and other interested parties were involved in this effort, and when and how were they involved?

c) How did public involvement shape the outcome of this Council item?

d) Who designed and implemented the public involvement related to this Council item?

e) Primary contact for more information on this public involvement process (name, title, phone, email):

10) Is any future public involvement anticipated or necessary for this Council item? Please describe why or why not.

The public certainly has an interest in this Council item, because it relates to the US Department of Justice investigation into police practices, and in particular, use of force. The rights that this Council item is intended to protect are the City's rights as a public employer under state bargaining law.

APPROPRIATION UNIT HEAD (Typed name and signature)



CITY OF
PORTLAND, OREGON
OFFICE OF THE CITY ATTORNEY

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Please print on a light color paper other than white for easy identification

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DATE: February 7, 2013

TO: Mayor Charlie Hales

FROM: Stephanie M. Harper, Deputy City Attorney

FOR MAYOR'S OFFICE USE ONLY

Reviewed by Bureau Liaison _____

RE: **RESOLUTION TITLE:** Authorize the Director of the Bureau of Human Resources, with the concurrence of the City Attorney, to commence legal proceedings to protect the City's interests and rights under state collective bargaining law in connection with an investigation and resulting lawsuit filed by the United States Department of Justice ("USDOJ") regarding police practices.

1. **INTENDED THURSDAY FILING DATE:** February 7, 2013
2. **REQUESTED COUNCIL AGENDA DATE:** February 13, 2013
3. **CONTACT NAME & NUMBER:** Deputy City Attorney Stephanie Harper 823-4060
4. **PLACE ON:** ☒ **CONSENT** _____ **REGULAR**
5. **BUDGET IMPACT STATEMENT ATTACHED:** ☒ **Y** _____ **N** _____ **N/A**
6. **(3) ORIGINAL COPIES OF CONTRACTS APPROVED AS TO FORM BY CITY ATTORNEY ATTACHED:** _____ **Yes** _____ **No** ☒ **N/A**

7. BACKGROUND/ANALYSIS

In November 2012 the Portland City Council approved an agreement ("USDOJ Agreement") between the City of Portland and the United States Department of Justice. The Agreement was to settle a lawsuit expected to be filed against the City regarding the USDOJ's conclusions that the City engaged in unconstitutional policing practices. In December 2012, the USDOJ filed its lawsuit in federal court. The City and USDOJ filed a joint motion requesting the court approve the Agreement. The motion to approve the settlement is pending.

In November 2012, the City had existing collective bargaining agreements with the Portland Police Association ("PPA") and the Portland Police Commanding Officers Association ("PPCOA"). These agreements are in effect through June 30, 2013. The USDOJ Agreement does not change or directly conflict with any provision in either collective bargaining agreement. The City as a public employer gave written notice under the state bargaining law requiring notice when a collective bargaining agreement is currently in effect (referred to as "mid-term" bargaining under ORS 243.698), to the PPA and the PPCOA about the USDOJ Agreement in November 2012. This written notice triggered a 14-day period for the labor organizations to

make a demand to bargain over mandatory subjects/impacts. Under state collective bargaining law, the City has a duty to give written notice and, if the Union makes a demand to bargain mandatory subjects, engage in good faith bargaining over those mandatory subjects for no more than 90 days. If no agreement is reached and the employer still intends to move forward with its mandatory proposal, then the parties must go to interest arbitration and the arbitrator is required to choose the offer of one side over the other (referred to as "last best offers"). The arbitrator is to apply statutory criteria in making that decision. (ORS 243.746).

The PPA has specifically said it has not made a demand to bargain by filing its grievance, but has also said it is not waiving any rights to bargain.

Resulting conversations and correspondence with the PPA reveal that one core issue exists that most likely cannot be worked out. The PPA asserts it has the right to bargain and reach agreement with the City over the content of the Police Bureau's use of force policies, and therefore the City cannot implement changes to its force policies or begin in-service training regarding revised force policies without first reaching agreement with the PPA.

There are two force policies - an overall force policy, referred to as Directive 1010.00, and an electronic control weapon (taser) policy, referred to as Directive 1051.00. The City has made modifications to its force policies as it has received feedback from the USDOJ, and provided the PPA drafts of the two policies as they have evolved for its review and comment.

The City is proposing to clarify in its overall force policy (1010.00) that in addition to meeting the constitutional standard, in a particular incident given all of the circumstances the officer demonstrated good judgment, used sound tactics, and:

- made decisions based on available force options reasonably calculated to resolve the confrontation safely and effectively, with as little reliance on force as practical;
- continually assessed the amount of force required, including the number of officers required to control a subject, and de-escalate as reasonable if levels of resistance increase;
- when confronting a person in mental health crisis, recognize and reasonably balance the governmental interest in providing care to the person.

In the City's perspective, these elements are not only required by the USDOJ Agreement but are key provisions needed by Police Bureau management to work with officers in managing force away from the constitutionally permitted upper limits.

The main point in dispute is that the PPA believes the force policy should contain one standard that involves no hindsight analysis of an officer's use of force. If the officer's decision to use force at the moment the officer decides to use force is reasonable in the totality of the circumstances from an objective officer perspective, the PPA believes that the City should defer to the officer's judgment call and authorize that force decision, unless the use of force is objectively unreasonable (in other words, egregious and clearly unconstitutional under the Fourth Amendment). This is a rare case.

The USDOJ review of the force policies is nearing a conclusion. Once that review is concluded the Police Chief wishes to move forward with in-service training, which will cover the revised

policies and has been delayed pending USDOJ feedback. The PPB has a window of opportunity from a logistical and cost perspective to complete training for a portion of its sworn members between now and June/July, 2013. After that point, the training facility will be undergoing substantial remodeling/construction.

The PPA claims that under Article 3 of the labor agreement, there is a dispute that must be submitted through the grievance process to an arbitrator for a conclusion. Article 3 of the City-PPA labor agreement states:

Standards of employment related to wages, hours and working conditions which are mandatory for collective bargaining except those standards modified through collective bargaining shall be maintained at not less than the level in effect at the time of the signing of this Agreement. Any disagreement between the Association and the City with respect to this section shall be subject to the grievance procedure.

But, Article 2 of the City-PPA labor agreement states:

The City shall retain the exclusive right to exercise the customary functions of management including, but not limited to, directing the activities of the Bureau, determining the levels of service and methods of operation including subcontracting and the introduction of new equipment; the right to hire, lay off, transfer and promote; to discipline or discharge for cause, to determine work schedules and assign work and any other such rights not specifically referred to in this Contract. Management rights, except where abridged by specific provisions of this Contract or general law, are not subject to the Grievance Procedure.

Under state collective bargaining law, the Oregon Employment Relations Board is the entity with the authority to determine whether a subject is mandatory for bargaining. Whether force policy is mandatory for bargaining has been considered in one case specifically. In a 2003 case, the Oregon State Hospital changed its policy to eliminate the ability of its staff to use steel handcuffs to restraining disruptive, mentally ill patients. The ERB held that because the staff had other options for safely and effectively restraining the person, the handcuff ban was not mandatory for bargaining. The Office of City Attorney and the Bureau of Human Resources are recommending that the City file an action before the ERB in order to obtain clear direction on the bargaining obligation.

In summary, PPA contends the City must bargain any change to the City's use of force policies. PPB does not want to bargain this as it is fundamental to the right to manage its operations, and our legal opinion is that bargaining is not required. To resolve this issue quickly, the City must file an action with the Employment Relations Board requesting an expedited decision within 45 days. This action is intended to be a clarification of the parties' legal rights and responsibilities under state bargaining law.

8. FINANCIAL IMPACT

No direct fiscal impact anticipated other than in-house attorney costs.

9. RECOMMENDATION/ACTION REQUESTED

Council approval of the resolution.