Memorandum City Attorney's Office

No. 13-

To: Cynthia A. Everett, City Attorney

From: Paul G. Bangel, Senior Assistant City Attorney/5045

Date: November 6, 2013

Re: Oracle Cloud Services Agreement

It is my recommendation that the proposed Oracle Cloud Services Agreement be adjusted as follows:

1. Sections 3.5 and 3.6 of the agreement require the City's compliance with terms governing third party technology, but they do not provide for a mechanism for the City to negotiate the terms or to review them in advance. It is therefore my recommendation that the second sentence of Section 3.5 provide as follows: "You are responsible for complying with the Separate Terms as may be negotiated by You and the third party that govern Your use of Separately Licensed Third Party Technology." It is also my recommendation that the third sentence of Section 3.6 provide as follows: "The third party owner, author or provider of such Third Party Content retains all ownership and intellectual property rights in and to that content, and Your rights to use such Third Party Content are subject to, and governed by, the terms applicable to such content as may be negotiated by You and such third party owner, author or provider."

2. Section 4.2 of the agreement prohibits the City's disclosure of security testing and benchmark or performance tests. Pursuant to Subsection 119.011(12), Florida Statutes (2013), any record "made or received pursuant to law or ordinance or in connection with the transaction of official business" is a public record. It would be up to the provider of the records to demonstrate that the records are a trade secret and therefore confidential pursuant to Subsection 812.081(1)(c), Florida Statutes (2013). It is therefore my recommendation that Subsection 4.2(e) provide as follows: "perform or, to the extent a trade secret pursuant to Florida law, disclose any of the following security testing of the Services Environment or associated infrastructure without Oracle's prior written consent: network discovery, port and service identification, vulnerability scanning, password cracking, remote access testing, or penetration testing;" It is my recommendation that Subsection 4.2(f) provide as follows: "license, sell, rent, lease, transfer, assign, distribute, display, host, outsource, to the extent a trade secret pursuant to Florida law, disclose, permit timesharing or service bureau use, or otherwise commercially exploit or make the Services, Oracle Programs, Ancillary Programs, Services Environments or materials available, to any third party, other than as expressly permitted under the terms of the applicable order."

3. Section 4.3 of the agreement prohibits copying, reproduction, distribution, republication, download, display, posting, or transmission of the Services. To the extent the Services include records, they would be public records pursuant to Subsection 119.011(12) unless they are trade secret pursuant to Subsection 812.081(1)(c), Florida Statutes (2013). It is therefore my recommendation that Subsection 4.3(a) provide as follows: "except as expressly provided herein or in Your order, to the extent they are trade secret pursuant to Florida law, no part of the Services may be copied, reproduced, distributed, republished, downloaded, displayed, posted or transmitted in any form or by any means, including but not limited to electronic, mechanical, photocopying, recording, or other means;"

4. Section 6.1 of the agreement provides for "the confidentiality of usernames, passwords and account information." To the extent they are records, I am not aware of an exemption from the public records law that would apply. It is therefore my recommendation that the first sentence of Section 6.1 provide as follows: "You are responsible for identifying and authenticating all Users, for approving access by such Users to the Services, for controlling against unauthorized access by Users, and, except as otherwise provided by Florida law, for maintaining the confidentiality of usernames, passwords and account information."

5. Section 6.2 of the agreement provides that the City agrees "not to use or permit use of the Services . . . for any purpose that may . . . (c)violate privacy rights." It is unclear what is meant by privacy rights. It is therefore my recommendation that Section 6.2 provide as follows:

> You agree not to use or permit use of the Services, including by uploading, emailing, posting, publishing or otherwise transmitting any material, including Your Content, Your Applications and Third Party Content, for any purpose that may (a) menace or harass any person or cause damage or injury to any person or property, (b) involve the publication of any material that is false, defamatory, harassing or obscene, (c) except as otherwise provided by Florida law, violate privacy rights or promote bigotry, racism, hatred or harm, (d) constitute unsolicited bulk e-mail, "junk mail", "spam" or chain letters; (e) constitute an infringement of intellectual property or other proprietary rights, or (f) otherwise violate applicable laws, ordinances or regulations. In addition to any other rights afforded to Oracle under this Agreement, Oracle reserves the right, but has no obligation, to take remedial action if any material violates the foregoing restrictions, including, except as otherwise provided by Florida law, the removal or disablement of access to such material. Unless Oracle violates applicable law, including, but not limited to the Florida public records law, Oracle shall have no liability to You in the event that Oracle takes such action. You shall have sole responsibility for the

accuracy, quality, integrity, legality, reliability, appropriateness and ownership of all of Your Content and Your Applications.

6. Section 9.2 of the agreement provides, in part, "[a]t the end of such 60 day period, and except as may be required by law, Oracle will delete or otherwise render inaccessible any or Your Content and Your Applications that remain in the Services Environment." This does not adequately preserve records that may be public records. It is therefore my recommendation that the following language, which is required by Florida Statute Section 119.0701 (2013) for service agreements, be inserted in Section 10.3:

> Notwithstanding anything contained in this Agreement to the contrary, Oracle shall:
> a) Keep and maintain public records that ordinarily and necessarily would be required by You in order to perform the Services.
> (b) Provide the public with access to public records on the same terms and conditions that You would provide the records and at a cost that does not exceed the cost provided in Chapter 119, Florida Statutes (2013), as may be amended or revised, or as otherwise provided by law.
> (c) Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law.
> (d) Meet all requirements for retaining public records and transfer, at no cost, to You, all public records in possession of Oracle upon termination of this contract and destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. All records stored electronically must be provided to You in a format that is compatible with Your information technology systems.

7. With regard to Section 9.7, I had proposed that provisions regarding public records would survive termination or expiration of the agreement. The insertion of the statutory language in Paragraph 6 above would render this concern moot.

8. Section 10.1 defines "Confidential Information" as "information that is confidential to one another," and provides that, "[t]o the extent permitted by law, Confidential information shall be limited to the terms and pricing under this Agreement, Your Content and Your Applications residing in the Services Environment, and all information clearly identified as confidential at the time of disclosure. It is my suggestion that "Confidential Information" be defined as provided by Florida law. Section 10.1 should provide as follows: "By virtue of this Agreement, the parties may have access to information that is confidential pursuant to Florida law ("Confidential Information"). We each agree to disclose only information that is not confidential pursuant to Florida law or exempt from disclosure pursuant to Florida law." In addition,

Section 10.2 should provide, “A party’s Confidential Information shall not include information that is not confidential pursuant to Florida law.”

9. Section 10.3 provides in part:

> Subject to applicable law, we each agree not to disclose each other’s Confidential Information to any third party other than as set forth in the following sentence for a period of three years from the date of the disclosing party’s disclosure of the Confidential Information to the receiving party; however, Oracle will hold Your Confidential Information that resides within the Services Environment in confidence for as long as such information resides in the Services Environment. We each may disclose Confidential Information only to those employees, agents or subcontractors who are required to protect it against unauthorized disclosure in a manner no less protective than required under this Agreement.

It is recommended that this provision be clarified so that the period of confidentiality be governed by Florida law and corresponding records retention schedules. Section 10.3 should provide as follows:

> Subject to applicable law, we each agree not to disclose each other’s Confidential Information to any third party for a period of three years from the date of the disclosing party’s disclosure of the Confidential Information to the receiving party; however, Oracle will hold Your Confidential Information that resides within the Services Environment in confidence for as long as such information resides in the Services Environment or as long as required by Florida law and corresponding records retention schedules, whichever is longer. We each may disclose Confidential Information only to those employees, agents or subcontractors who are required to protect it against unauthorized disclosure in a manner no less protective than required under this Agreement. Oracle will protect the confidentiality of Your Content or Your Applications residing in the Services Environment in accordance with the Oracle security practices defined as part of the Service Specifications applicable to Your order and in accordance with Florida law. In addition, Your Personal Data will be treated in accordance with the terms of Section 11 below. Nothing shall prevent either party from disclosing the terms or pricing under this Agreement or orders placed under this Agreement.
>
> The parties acknowledge and agree that You and this Agreement are subject to the Florida public records law.

> Notwithstanding anything contained in this Agreement to the contrary, Oracle shall:
>
> a) Keep and maintain public records that ordinarily and necessarily would be required by You in order to perform the Services.
> (b) Provide the public with access to public records on the same terms and conditions that You would provide the records and at a cost that does not exceed the cost provided in Chapter 119, Florida Statutes (2013), as may be amended or revised, or as otherwise provided by law.
> (c) Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law.
> (d) Meet all requirements for retaining public records and transfer, at no cost, to You, all public records in possession of Oracle upon termination of this contract and destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. All records stored electronically must be provided to You in a format that is compatible with Your information technology systems.

10. Section 14.2 provides for the return of certain material if Oracle believes or it is determined that it may have violated a third party's intellectual property rights. The first sentence of Section 14.2 should provide as follows in case any of the material is a public record under Florida law: "If Oracle believes or it is determined that any of the Material may have violated a third party's intellectual property rights, Oracle may choose to either modify the Material to be non-infringing (while substantially preserving its utility or functionality) or obtain a license to allow for continued use, or if these alternatives are not commercially reasonable, Oracle may end the license for, and, except as otherwise provided by Florida law, require return of, the applicable Material and refund any unused, prepaid fees You may have paid to Oracle for such Material.

11. Section 22.1 provides:

> To the extent not prohibited by law, You shall defend and indemnify Oracle against liability arising under any applicable laws, ordinances or regulations related to Your termination or modification of the employment of any of Your employees in connection with any Services under this Agreement.

This provision is inconsistent with Article VII, Section 10, the Pledging Credit clause of the Florida Constitution. It is my suggestion that indemnification by the City, if at all, be limited as follows:

> Except as prohibited by the Florida Constitution or by the laws of the State of Florida, and subject to the limitations contained in Section 768.28, Florida Statutes (2013), as may be amended or revised, You agree to indemnify and hold harmless Oracle against a judgment entered by a court of competent jurisdiction in the State of Florida against Oracle for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of Your employee while acting within the scope of the employee's employment under circumstances in which You, if a private person, would be liable to the claimant, in accordance with the general laws of the State of Florida. The foregoing sentence does not serve as a waiver of Your sovereign immunity or of any other legal defense available to You.

12. Section 15.3 authorizes Oracle to take remedial action if any Third Party Content made accessible by Oracle violates Section 6.2 of the Agreement (menace or harass any person or cause damage or injury to person or property, material that is false, defamatory, harassing or obscene, violate privacy rights or promote bigotry, racism, hatred or harm, unsolicited bulk e-mail, "junk mail", "spam" chain letters, infringement of intellectual property or other proprietary rights, or violate laws, ordinances or regulations) including removal of such content. Such content may nevertheless be public record. It is therefore my recommendation that the second sentence of Section 15.3 provide as follows:

> Any Third Party Content made accessible by Oracle in or through the Services Environment is provided on an "as-is" and "as available" basis without any warranty of any kind. Third Party Content may be indecent, offensive, inaccurate, infringing or otherwise objectionable or unlawful, and You acknowledge that Oracle is not responsible for and under no obligation to control, monitor or correct Third Party Content; however, Oracle reserves the right to take remedial action if any such content violates applicable restrictions under Section 6.2 of this Agreement, including, except as otherwise provided by Florida law, the removal of, or disablement of access to, such content.