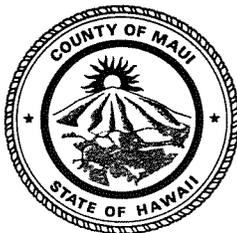


ALAN M. ARAKAWA
Mayor



PATRICK K.WONG
Corporation Counsel

EDWARD S. KUSHI
First Deputy

LYDIA A. TODA
Risk Management Officer
Tel. No. (808) 270-7535
Fax No. (808) 270-1761

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET, 3RD FLOOR
WAILUKU, MAUI, HAWAII 96793
EMAIL: CORPCOUN@MAUICOUNTY.GOV
TELEPHONE: (808) 270-7740
FACSIMILE: (808) 270-7152

February 13, 2015

MEMORANDUM

T O: Mike White
Council Chair

F R O M: Edward S. Kushi, Jr., First Deputy Corporation Counsel

SUBJECT: EMPLOYEE COMMUNICATION DIRECTIVE

We respond to your request dated January 30, 2015, a copy of which, including the Mayor's June 18, 2014 Memorandum (the "Mayor's Directive"), is attached hereto as Exhibit "1".

In responding, we would also reference an advisory memorandum from our office (Deputy Corporation Counsel Linden H. Joesting) to Councilmember Gladys C. Baisa, dated July 28, 2014 (the "July 28, 2014 memo"), which discussed the Mayor's Directive. A copy of said July 28, 2014 memo, together with Councilmember Baisa's July 14, 2014 request, is attached hereto as Exhibit "2". We herein affirm the July 28, 2014 memo as to the responses stated therein.

1) Does the directive regulate the conduct of legislative-branch employees ?

No. ¹

¹ See July 28, 2014 memo; pages 2 and 4; Applicability to the Legislative Branch.

- 2) Do legislative-branch employees subject their counterparts in the executive branch to penalties or negative employment actions by communicating with them?

Depending on the manner and response given by the executive branch employees or officers, perhaps.²

- 3) Should executive-branch officers and employees respond to requests for information and public records from the legislative branch in the same manner in which they respond to such requests from other agencies or the public ?

Yes, subject to and in accordance with the Mayor's Directive.

- 4) In applying the directive, is consideration given to employees' free-speech rights and individual employees' professional duties? See Dahlia v. Rodrigues, 735 F.3d 1060 (9th Cir. 2013), for principles to be considered when evaluating the scope of public employees' free-speech rights (necessarily related to the employees' duties)

We opine that the Mayor's Directive is consistent with the distinctions set forth in Dahlia, as well as in the case of Ellins v. City of Sierra Madre, 710 F.3d 1049 (9th Cir. 2013)³, with regard to the applicability of First Amendment protections for public employees speaking as private citizens versus such employees speaking or making statements pursuant to their official duties. Both cases dealt with police officers' statements. Dahlia involved an officer's public disclosure of alleged use of abusive interrogation tactics by other officers. Ellins involved an officer's actions and statements made in his role as the head of the police officers' union. As in most First Amendment cases, the outcome turns on the specific facts therein presented, and as such, there is no "one size fits all" principal. Accordingly, unless there is a factual scenario presented, we cannot opine whether such speech is constitutionally protected or not.

Further, it is clear that the Mayor's Directive concerns and covers official "County business."⁴

² See July 28, 2014 memo; pages 2 and 3; Enforcement.

³ See July 28, 2014 memo; pages 2 and 4; Free Speech.

⁴ " 1. There shall be no direct communication on matters pertaining to County business, official or otherwise, between administrative staff and employees of the Council, including staff of the Office of Council Services,

- 5) Is the directive legally binding on the legislative-branch employees? If so, please identify the legal authority and procedures under which the directive was issued.

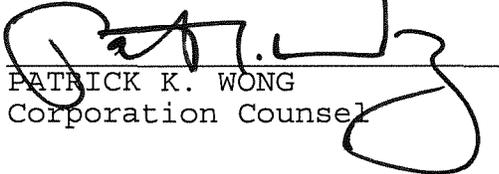
No.⁵

- 6) Section 2.60.010, M.C.C., provides that department heads shall communicate to the Council "through the mayor." Councilmember Don Couch has introduced a bill to repeal Section 2.60.010. Please explain how Section 2.60.010 - or its repeal - relate to the directive's validity.

The repeal of section 2.60.010, M.C.C., nor its continued existence, would not have any effect on the Mayor's Directive. Whether codified or not, the Mayor's Directive and the directions, instructions and orders therein pronounced, is authorized by the Charter of the County of Maui (1983), as amended ("Charter").⁶

Contact this office if further discussion or clarification is needed.

APPROVED FOR TRANSMITTAL:


PATRICK K. WONG
Corporation Counsel

unless authorized by the mayor or the Managing Director, to avoid transmitting partial or incorrect information; and," (Emphasis added)

⁵ See July 28, 2014 memo; pages 2 and 4; Applicability to the Legislative Branch.

⁶ "Powers, Duties and Functions. The mayor shall be the chief executive officer of the county. The mayor shall:

1. Exercise supervision directly or through the managing director over all departments enumerated in Article 8 of this charter and the other agencies as provided by law..." Section 7-5(1), Charter.

2015-3642

Council Chair
Mike White

Vice-Chair
Don S. Guzman

Presiding Officer Pro Tempore
Michael P. Victorino

Councilmembers
Gladys C. Baisa
Robert Carroll
Elle Cochran
Don Couch
Stacy Crivello
Riki Hokama



Director of Council Services
David M. Raatz, Jr., Esq.
RECEIVED
CORPORATION COUNSEL

2015 FEB -2 AM 11:40

COUNTY COUNCIL

COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.MauiCounty.us

January 30, 2015

MEMO TO: Patrick K. Wong
Acting Corporation Counsel

F R O M: Mike White 
Council Chair

SUBJECT: **EMPLOYEE COMMUNICATION DIRECTIVE**

Please see the attached correspondence from the Mayor, dated June 18, 2014, titled "EMPLOYEE COMMUNICATION DIRECTIVE."

The directive purports to limit communication between the two branches of County government, apparently without regard to the differing professional duties among the various classes of appointed and civil-service employees.

Legislative-branch employees are concerned with complying with all applicable workplace laws and policies. Consequently, some employees have asked their supervisors how this directive applies to their work, including their verbal and written communication with executive-branch officers and employees.

In addition, legislative-branch employees have raised concerns about whether their communication with executive-branch officers and employees may inadvertently create violations of the directive, resulting in penalties or negative employment actions imposed on their associates in the executive branch.

Also, legislative-branch employees have been rebuffed when seeking information and public records from certain executive-branch officers and employees. To the extent the directive impedes the transmittal of information, it disserves the public interest.

EXHIBIT " 1 "

Patrick K. Wong
January 30, 2015
Page 2

I am seeking your written guidance, for dissemination to legislative-branch employees and officers, to clarify how the directive affects their conduct.

May I, therefore, request a public legal opinion in response to the following questions:

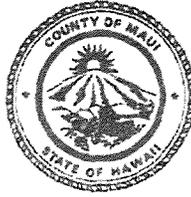
1. Does the directive regulate the conduct of legislative-branch employees?
2. Do legislative-branch employees subject their counterparts in the executive branch to penalties or negative employment actions by communicating with them?
3. Should executive-branch officers and employees respond to requests for information and public records from the legislative branch in the same manner in which they respond to such requests from other agencies or the public?
4. In applying the directive, is consideration given to employees' free-speech rights and individual employees' professional duties? See Dahlia v. Rodriguez, 735 F.3d 1060 (9th Cir. 2013), for principles to be considered when evaluating the scope of public employees' free-speech rights (necessarily related to the employees' duties).
5. Is the directive legally binding on legislative-branch employees? If so, please identify the legal authority and procedures under which the directive was issued.
6. Section 2.60.010, Maui County Code, provides that department heads shall communicate to the Council "through the mayor." Councilmember Don Couch has introduced a bill to repeal Section 2.60.010. Please explain how Section 2.60.010 – or its repeal – relate to the directive's validity.

I would appreciate receiving a response by **February 13, 2015**. Should you have any questions, please contact me or Director of Council Services David Raatz (ext. 7660).

Chr:Ltr:150114a

Attachment

ALAN M. ARAKAWA
MAYOR



200 South High Street
Wailuku, Hawai'i 96793-2155
Telephone (808) 270-7855
Fax (808) 270-7870
e-mail: mayors.office@mauicounty.gov

OFFICE OF THE MAYOR

Ke'ena O Ka Meia
COUNTY OF MAUI – Kalana O Maui

MEMORANDUM

June 18, 2014

From: Alan M. Arakawa, Mayor *ae*
To: All Executive Branch Employees
Gladys C. Baisa, Chair, Maui County Council
SUBJECT: **EMPLOYEE COMMUNICATION DIRECTIVE**

The directives set-forth below are intended to establish a more formal line of communication between the Council and the Administration, and to enhance intra-government communication by facilitating the flow of correct information to the Council.

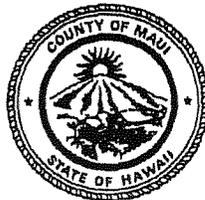
The following directives shall apply to Civil Service County Employees, appointed staff and others employed by the Administration, with regard to any and all verbal and written communications with employees of the County Council:

1. There shall be no direct communication on matters pertaining to County business, official or otherwise, between administrative staff and employees of the Council, including staff of the Office of Council Services, unless authorized by the Mayor or the Managing Director, to avoid transmitting partial or incorrect information; and,
2. All letters, memos and other written communications should be directed to the Office of the Mayor, with copies to the Managing Director, for purposes of tracking, distribution and streamlined communication to the Departments.

Again, our goal is to avoid miscommunication between the Administration and the Council, and to do our best to provide the Council with as accurate and complete information possible.

Thank you for your understanding and cooperation with regards to these matters. Please forward any questions you may have to my office.

ALAN M. ARAKAWA
Mayor



PATRICK K. WONG
Corporation Counsel

EDWARD S. KUSHI
First Deputy

LYDIA A. TODA
Risk Management Officer
Tel. No. (808) 270-7535
Fax No. (808) 270-1761

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET, 3RD FLOOR
WAILUKU, MAUI, HAWAII 96793
EMAIL: CORPCOUN@MAUICOUNTY.GOV
TELEPHONE: (808) 270-7740
FACSIMILE: (808) 270-7152

July 28, 2014

DATE: July 28, 2014

TO: Gladys C. Baisa, Council Chair

FROM: Linden H. Joesting, Deputy Corporation Counsel

SUBJECT: ADVICE RELATING TO "EMPLOYEE COMMUNICATION DIRECTIVE"
(PAF 14-190)

BACKGROUND:

This is in response to your memorandum dated July 14, 2014. In summary, your memorandum asked for advice as to (1) whether the Mayor's directive entitled "Employee Communication Directive" was within the Mayor's authority; (2) what would be the penalties for enforcement; (3) its applicability to the Legislative Branch; (4) any impacts on free speech; and (5) if there is a conflict with the open records laws. Your questions are addressed in the same sequence in which they were presented.

SHORT ANSWERS:

1. Mayor's Authority. Yes, the Mayor has the authority under the Revised Charter of the County of Maui (1983), as amended, ("Charter") and the Maui County Code ("MCC") to restrict communications between the Legislative and Executive branches.

EXHIBIT " 2 "

Gladys C. Baisa, Council Chair
July 28, 2014

2

2. Enforcement. There are no penalties or fines in the MCC, however, a County employee could be subject to discipline for insubordination or failure to follow a directive.

3. Applicability to the Legislative Branch. No the directive is not binding on the Legislative branch or any of its agencies.

4. Free Speech. So long as the directive is only applied to speech or conduct by government employees regarding government business, free speech will not be impacted.

5. Open Government. As long as the time deadlines are met, there should be no impairment of access to government records. Additionally, the legislative branch already has access to another agency's records through the agency to agency provision in the open records law.

ANALYSIS:

1. Mayor's authority. The Mayor has the authority under the Charter and MCC to restrict communications with the Council. Section 7.5.1 of the Charter permits the Mayor to directly, or through the Managing Director, supervise all departments and other agencies as provided by law. Additionally, section 7.5.17 allows the Mayor to enforce the provisions of the Charter, ordinances of the County, and all applicable laws.

Section 2.60.010, MCC, Communications, states:

All communications to the council from department heads shall be made through the mayor; except, however, the corporation counsel may respond directly upon requests made by the council relative to an investigation by the council of the operations of any department or function of the county, and any subject matter upon which the council may legislate.

Gladys C. Balsa, Council Chair
July 28, 2014

3

Therefore, the Mayor has the specific authority in the Charter and MCC to restrict communications between the Departments and the Council, with some exceptions as to the Corporation Counsel.

2. Enforcement. Yes, you are correct; there are no fines or penalties listed in the above discussed legal provisions. However, employees are subject to the discipline process that applies to their position in County government. This could be a process spelled out in bargaining agreements or the general penalties found in the MCC.

Penalties are described in Chapter 1.12, MCC, entitled "General Penalty" where no penalty is provided in the MCC or Charter. Section 1.12.010, MCC, Penalty where no penalty provided-Code, states:

In any case where there shall be a violation of any of the criminal provisions of this code for which no penalty is provided, the person violating the same shall be subject to a fine of not more than \$100 for each offense.

Section 1.12.020, MCC, Penalty where no penalty provided-Charter, states:

Any person who intentionally fails to exercise his duties and responsibilities as set forth in the charter of the county of Maui or who violates any prohibition provided for therein, for which no penalty is provided, shall be punished by a fine of not more than \$1,000 or by imprisonment for a term not to exceed one year, or both.

Therefore the Mayor has the ability to enforce penalties for violating his directive either through the personnel process or through the provisions of the MCC.

Gladys C. Baisa, Council Chair
July 28, 2014

4

3. Applicability to the Legislative Branch. The directive is not directed to the Legislative Branch and is not binding upon that branch.

4. Free Speech. The behavior of County employees in their jobs is partially regulated by the Code of Ethics found in the Charter. Their behavior is also regulated through the common law, such as in the case citation which you provided.

However, this memo will not respond to the specific examples you provided. As the case of Ellins v. City of Sierra Madre, 710 F.3d 1049 (2013) noted, these are cases that turn on specific issues of material fact. The examples you provided do not give enough information to provide an easy answer. The Ellins case makes clear that free speech rights must not be restricted when speaking as a private citizen. While the Mayor's directive is not meant to restrict County employees' right of free speech, the directive may need to be clarified.

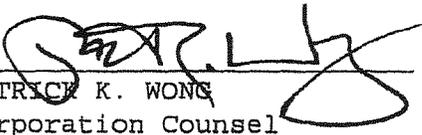
5. Open Government. The Legislative branch will still be able to seek records from the Departments under the Uniform Information Practices Act ("UIPA"). So long as the time requirements of the UIPA are met, the process of routing requests does not violate that law. Since these requests are not discretionary, the departments will be obligated to respond.

Additionally, the Legislative branch has the specific authority to request records from another agency. Hawaii Revised Statutes ("HRS") § 92F-19(a)(6). This specific authority is not impacted by the Mayor's directive. However, the specific authority to release records is subject to the same restrictions on disclosure of the records as the originating agency and the originating agency has the discretion to refuse to respond to the request. HRS § 92F-19(a) and -19(b).

Gladys C. Baisa, Council Chair
July 28, 2014
5

Thank you for the opportunity to address these important questions about the Mayor's directive.

APPROVED FOR TRANSMITTAL:



PATRICK K. WONG
Corporation Counsel

LHJ:lak

S:\ALL\LHJ\Assignments\2014-2180 PAF 14-190 Legal Advice Relating to Employee Communication Directive\2014-07-28 Memo to Baisa.final.doc

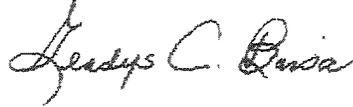
RECEIVED
CORPORATION COUNSEL

July 14, 2014

2014 JUL 14 PM 3: 53

MEMO TO: Patrick K. Wong
Corporation Counsel

F R O M: Gladys C. Baisa
Council Chair



SUBJECT: **LEGAL ADVICE RELATING TO "EMPLOYEE COMMUNICATION DIRECTIVE"** (PAF 14-190)

May I please call your attention to the attached correspondence, dated June 18, 2014, titled "EMPLOYEE COMMUNICATION DIRECTIVE". The directive's wording is unclear and imprecise in some respects, but it purports to do the following: (1) prohibit executive-branch employees from communicating with legislative-branch employees, without approval from the Mayor or Managing Director; and (2) establish the following policy: "All letters, memos and other written communications should be directed to the Office of Mayor with copies to the Managing Director . . ."

With reference to the directive, please provide legal advice in response to the following:

1. **Mayor's Authority.**

Section 7-5 of the Revised Charter of the County of Maui (1983), as amended, enumerates 18 powers, duties, and functions assigned to the Mayor. Is the directive a lawful exercise of one or more of those powers, duties, and functions? If so, please cite any applicable section and explain how it applies to the directive.

2. **Enforcement.**

What are the penalties for violating the directive's terms? Who determines whether the directive has been violated? How is such a determination made? Do the enforcement policies provide due process and conform to terms of relevant collective-bargaining agreements?

3. **Applicability to Legislative Branch.**

Is the directive binding on any legislative-branch agencies, officers, or employees? If so, please identify them and explain the Mayor's legal authority in this regard.

4. **Free Speech.**

Does the prohibition on executive-legislative communication in the directive's first numbered paragraph apply when County officers or employees are expressing themselves on matters of public concern unrelated to their positions in County government? For instance, is a police officer banned from asking a Council member to install a speed hump in her neighborhood or to support a resolution asking Congress to provide funding to the University of Hawaii? And is a firefighter banned from asking the Office of Council Services about the status of pending legislation to ban smoking at his favorite beach? If the answer to any of these questions is yes, does the directive violate the Free Speech Clauses of the Hawaii and United States Constitutions? In your response, please note the United States Court of Appeals for the Ninth Circuit (which has jurisdiction over the State of Hawaii) has stated: "The First Amendment shields a public employee if he speaks as a citizen on a matter of public concern."¹

5. **Open Government.**

According to Office of Information Practices Opinion Letter 01-07 (attached), State law grants any person the right to request government records. It appears both numbered paragraphs in the directive contravene this right. Please advise.

May I please request that you provide your response by **July 28, 2014**. Should you have any questions, please contact me, Legislative Attorney Sharon Brooks (ext. 7137), or Legislative Attorney Erin Fleming (ext. 7687).

Attachments

paf:elf:14-190a

¹ Ellins v. City of Sierra Madre, 710 F.3d 1049, 1056 (9th Cir. 2013) (quoting Anthoine v. North Central Counties Consortium, 605 F.3d 740, 748 (9th Cir. 2010)).