

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

January 22, 2016

Committee
Report No. _____

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Committee of the Whole, having met on December 18, 2015, makes reference to County Communication 15-90, from Council Chair Mike White, transmitting a proposed resolution entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO ADVISE AND REPRESENT THE COUNCIL FOR THE 2015-2017 TERM."

The purpose of the proposed resolution is to authorize the employment of special counsel to provide independent legal advice and representation to the Council for the 2015-2017 Council term, for a total compensation not to exceed \$50,000 per fiscal year.

By correspondence dated December 11, 2015, the Council Chair transmitted a revised proposed resolution entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO ADVISE AND REPRESENT THE COUNCIL ON CERTAIN MATTERS FOR THE 2015-2017 TERM." The revised proposed resolution increases the total compensation limit to \$75,000 per fiscal year, and provides additional bases for the retention of special counsel by the Council.

Your Committee notes Section 8-2.3(2), Revised Charter of the County of Maui (1983), as amended ("Charter"), provides that the Corporation Counsel is "the chief legal advisor and legal representative of the County of Maui; of the council, the mayor, all departments, and all boards and commissions; and of all officers and employees in matters relating to their official duties."

Your Committee also notes Charter Section 3-6(6) authorizes the Council, by a two-thirds vote, to retain or employ special counsel for any special matter presenting a real necessity for such employment.

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Your Committee further notes the revised proposed resolution points to a real necessity for the Council to employ special counsel on questions presenting an actual or potential conflict of interests with the executive branch, and cites examples of issues or actions for which independent advice from special counsel may benefit the Council. The revised proposed resolution references the Mayor's June 18, 2014, Employee Communication Directive; the Mayor's October 13, 2015, Uniform Information Practices Act request to the Council for executive meeting minutes relating to the Old Wailuku Post Office; and proposed legislation the Department declined to approve as to form and legality based on Charter Section 3-8(2), which prohibits the Council or its members from giving orders to executive branch employees or officers.

Your Committee noted occasions may arise when special counsel is needed to provide confidential advice, and discussed the inherent difficulties the Department faces in balancing executive branch and legislative branch concerns.

Your Committee emphasized the need to be disciplined about the matters for which the Council would resort to special counsel, noting the Corporation Counsel is its Charter-authorized legal representative and has generally provided quality representation to the County.

Your Committee also noted the revised proposed resolution requires the adoption of a further resolution before legal proceedings can be initiated by special counsel.

Your Committee recommended the resolution be further revised by deleting the word "frequent" from the first WHEREAS paragraph, referring to the need for independent legal advice and formal legal opinions.

Your Committee voted 6-1 to recommend adoption of the revised proposed resolution incorporating your Committee's revision. Committee Chair Guzman, Vice-Chair Crivello, and members Carroll, Hokama, Victorino, and White voted "aye." Committee member Couch voted "no." Committee members Baisa and Cochran were excused.

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Your Committee is in receipt of a further revised proposed resolution incorporating your Committee's recommended revision.

Your Committee of the Whole RECOMMENDS that Resolution _____, as revised herein and attached hereto, entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO ADVISE AND REPRESENT THE COUNCIL ON CERTAIN MATTERS FOR THE 2015-2017 TERM," be ADOPTED.

This report is submitted in accordance with Rule 8 of the Rules of the Council.



DON S. GUZMAN, Chair

cow:cr:16002aa:cmn

Resolution

No. _____

AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO ADVISE AND REPRESENT THE COUNCIL ON CERTAIN MATTERS FOR THE 2015-2017 TERM

WHEREAS, the Council has found a need for independent legal advice and formal legal opinions; and

WHEREAS, Section 8-2.3(2), Revised Charter of the County of Maui (1983), as amended ("Charter"), provides that the Department of the Corporation Counsel ("Department") is the chief legal advisor and representative of the County, including both the legislative and executive branches of government; and

WHEREAS, Charter Section 3-6(6) authorizes the Council, by a two-thirds vote, to retain or employ special counsel for any special matter presenting a real necessity for such employment; and

WHEREAS, a real necessity for the Council to employ special counsel exists when the Department is unable to provide legal advice and representation to the Council on questions presenting an actual or potential conflict of interests with the executive branch; and

WHEREAS, the Council has an occasional need to enter into litigation against the executive branch, as in Maui County Council v. Thompson, 84 Haw. 105 (1996), wherein the executive branch is represented by the Department, and the Council must employ special counsel; and

WHEREAS, the Council finds that a structural bias exists that leads the Department to inherently favor the executive branch in its advice and opinions because the Mayor is the only official who can initiate termination of the Corporation Counsel under the Charter and the Department is an executive-branch agency under the Mayor's management; and

WHEREAS, the Council may from time to time require confidential advice from its attorney, not subject to disclosure to the Mayor, in

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instances where the Department has an actual or potential conflict of interests; and

WHEREAS, specific examples of issues or actions for which the Council may have benefited, or may yet benefit, from independent advice from special counsel include the following:

- On June 18, 2014, the Mayor issued an Employee Communication Directive, a copy of which is attached hereto as Exhibit "1," purporting to limit the exchange of information between the executive and legislative branches; and
- On October 13, 2015, the Mayor made a Uniform Information Practices Act request to the Chair of the Council's Policy and Intergovernmental Affairs Committee, a copy of which is attached hereto as Exhibit "2," seeking among other things, executive meeting minutes relating to the Old Wailuku Post Office controversy, in which the Arakawa Administration's exceedance of authority was questioned; and
- In the context of requests for approval as to form and legality of a proposed bill relating to press release guidelines and requirements and a proposed bill relating to public nuisance information and referral, the Department of the Corporation Counsel has opined that a basis for their inability to approve the bills was Section 3-8(2) of the Charter, which states: "Neither the council nor its members shall give orders to any county employees or county officers other than those appointed pursuant to Section 3-7 or Article 5, either publicly or privately"; and

WHEREAS, the Council finds that, because of a conflict of interests, there is a real necessity to retain special counsel to investigate and evaluate the propriety and effect of the Mayor's actions on certain matters and to advise the Council as to whether judicial remedies are appropriate in response thereto; and

WHEREAS, the Council finds that there is a real necessity to retain special counsel to advise and represent the Council during the 2015-2017 term on matters that represent an actual or potential conflict of interests; and

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WHEREAS, the Council further finds it to be in the best interest of the County of Maui to provide special counsel to the Council on such matters; now, therefore,

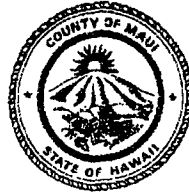
BE IT RESOLVED by the Council of the County of Maui:

1. That the Council hereby authorizes the employment of special counsel, to be selected by the legislative branch's chief procurement officer, to advise and represent the Council on matters during the 2015-2017 term that represent an actual or potential conflict of interests; and
2. That the special counsel shall report to the Council's Committee of the Whole on all matters which represent an actual or potential conflict of interests; and
3. That such matters may include:
 - a. The legality of the Mayor's Employee Communication Directive and, if necessary, representation of the Council against the Administration in a declaratory action;
 - b. Whether Charter Section 3-8(2) limits the Council's legislative authority;
 - c. The legality of proposed bills and resolutions the Department of the Corporation Counsel has refused to sign; and
 - d. Defense of the Council if the denial of the Mayor's Uniform Information Practices Act request for Old Wailuku Post Office results in a legal conflict; and
4. That total compensation for the employment of special counsel shall not exceed \$75,000 per fiscal year; and
5. That special counsel shall take all possible steps to minimize the level of attorneys' fees and costs; and
6. That the hourly rate for the primary attorney shall not exceed \$350; and
7. That the hourly rate of associates shall not exceed \$310; and

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8. That the hourly rate of paralegals shall not exceed \$160; and
9. That compensability of costs shall be in general accord with the intent of 28 U.S.C. Section 1920; and
10. That the compensable costs shall include: (1) fees for printing and witnesses; (2) fees for copies necessarily obtained for use in the case; (3) fees of the clerk and marshal; (4) fees of the court reporter for necessary transcripts; (5) docket fees; and (6) compensation of court-appointed experts and interpreters; and
11. That the non-compensable costs shall include: (1) telephone calls; (2) facsimile charges; (3) postal charges; (4) messenger charges; (5) fees for computerized legal research; (6) travel, unless justified by extraordinary or compelling circumstances; (7) investigative expenses; and (8) other costs reasonably considered part of the law firm's overhead; and
12. That in instances of travel, both inter-island and out-of-state travel shall include travel on regular coach economy fare and must be pre-approved by Council Chair; and
13. That special counsel shall not initiate legal proceedings on the Council's behalf unless the Council adopts a resolution approving such action; and
14. That increases in the total compensation authorized or substantial changes to the responsibilities of special counsel shall require prior Council approval; and
15. That the conduct of special counsel in this matter shall reflect special counsel's understanding that the County of Maui is a public entity that has obligations, concerns, and interests that may extend beyond those of a similarly situated private litigant; and
16. That certified copies of this resolution be transmitted to the Mayor, the Corporation Counsel, the Director of Finance, and the Director of Council Services.

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 *al*
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:

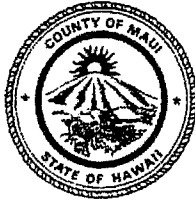
1. There shall be no direct communication on matters pertaining to County business, official or otherwise, between administrative staff and employees of the Council, including staff of the Office of Council Services, unless authorized by the Mayor or the Managing Director, to avoid transmitting partial 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.

EXHIBIT "1"

ALAN M. ARAKAWA
MAYOR



KEITH A. REGAN
MANAGING DIRECTOR

OFFICE OF THE MAYOR

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

October 13, 2015

Michael P. Victorino, Chair
Policy and Intergovernmental Affairs Committee
Maui County Council
200 S. High St., 8th Floor
Wailuku, Hawaii 96793

OFFICE OF THE
COUNTY COUNCIL

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RECEIVED

RE: REQUEST FOR ACCESS TO GOVERNMENT RECORDS RELATING TO THE EXECUTIVE SESSION OF THE POLICY AND INTERGOVERNMENTAL AFFAIRS COMMITTEE MEETING OF AUGUST 14, 2013

Councilmember Victorino:

This is a request for access to government records under the Hawaii Uniform Information Practices Act. It seeks access to minutes and all written communications relating to or stemming from the Maui County Council's meeting of the Policy and Intergovernmental Affairs Committee on August 14, 2013, then chaired by Committee Chair Riki Hokama.

Specifically, this request seeks access to the following:

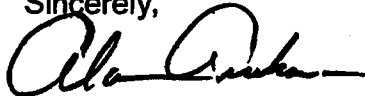
- Minutes of the Policy and Intergovernmental Affairs Committee's meeting of August 14, 2013.
- Minutes of the Policy and Intergovernmental Affairs Committee's executive session that took place during the Policy and Intergovernmental Affairs Committee meeting on August 14, 2013.
- Emails, memorandums, and other written communications relating to, or stemming from, the Policy and Intergovernmental Affairs Committee's executive session on August 14, 2013 (referenced herein-above). This should include, but not limited to, emails, memorandums, and other written communications maintained, sent and/or received by then-Policy and Intergovernmental Affairs Committee Chair Riki Hokama or his employees; current-Policy and Intergovernmental Affairs Committee Chair Mike Victorino or his employees; staff assigned to the Policy and Intergovernmental Affairs Committee; Council Chair Mike White, Council Vice-Chair Don Guzman, David Rantz, Director of the office of Council Services or his employees. This request should include emails, memorandums and other written communications relating to, or stemming from, the Policy and Intergovernmental Affairs Committee's executive session on August 14, 2013, received from, or sent to, Maui County Corporation Counsel, Maui County Office of the Auditor, and, the State of Hawaii Office of Information Practices.

Michael P. Victorino, Chair
Policy & Intergovernmental Affairs Committee
Request for Access to Government Records
Oct. 13, 2015
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- May I request copies of the memorandums, emails – either digital or hard copy – and other communications. If there's a cost that would arise from this request, please let me know what the estimated cost would be before it is incurred. A waiver of any fees is requested.
- Additionally, to the extent your office will deny access to records or portions of records, I would like a detailed explanation of the records or portions withheld and the legal authority for denying access.

May I ask that the minutes and all communications requested be received by my office within ten (10) working days of this request. Please verify receipt of this communication. Please feel free to contact me should you have any questions.

Sincerely,



Alan M. Arakawa
Mayor

cc: Keith Regan, Managing Director
Patrick Wong, Corporation Counsel
Mike White, Council Chair