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ADVISORY OPINION

MEMO TO: Michael J. Molina, Chair
Governance, Ethics, and Transparency Committee

FROM: Gary Y. Murai, Deputy Corporation Counsel

DATE: December 16, 2020

SUBJECT: **AUTHORIZING THE ADOPTION OF A REVISED RECORDS
DISPOSITION SCHEDULE FOR THE DEPARTMENT OF POLICE
IN ACCORDANCE WITH SECTION 46-43, HAWAII REVISED
STATUTES (GET-38)**

This memorandum responds to your memorandum dated November 2, 2020 regarding the matter referenced above. Specifically, you ask:

1. Is the Department's Records Disposition Schedule, as revised in 2010 by the adoption of Resolution 10-36, binding even though the revised schedule was not reviewed and approved by the Records Disposition Committee?
2. Is the Department in violation of Section 2.84.060, MCC, for failing to transmit their revised schedules to the Records Disposition Committee for review and approval?
3. Act 177 (2005) amended Section 46-43, Hawaii Revised Statutes, by deleting the requirement for a Records Disposition Committee and assigning the responsibility of determining the care, custody, and disposition of records to each county's Director of Finance. This statute appears to make Chapter 2.84, MCC, obsolete or in need of amendment or

repeal. To comply with State law, what steps can be taken to ensure the Department's revised Records Disposition Schedules are not held up pending amendments to MCC § 2.84?

I. Brief answer

1. In response to No. 1 above, we answer yes, with a caveat. The MPD Records Disposition Schedule adopted by Resolution 10-36 in 2010 is binding, even though it was not reviewed by a records disposition committee. However, the adoption could be subject to challenge for failure to obtain the consent of a records disposition committee.
2. In response to No. 2 above, we answer yes. Failure to obtain approval of the revised schedules by a records disposition committee prior to seeking county council approval is in violation of MCC § 2.84.060.
3. In response to No. 3 above, we recommend deferral of GET-38 until MPD can obtain the approval of the revised Records Disposition Schedule by a records disposition committee. Otherwise, GET-38 may need to wait until MCC § 2.84 can be amended to omit the need for review by a records disposition committee.¹

II. Background

The above-referenced Resolution, GET-38, seeks the County Council's approval of a revised Department of Police ("MPD") Records Disposition Schedule. The MPD Records Disposition Schedule covers a wide range of records, including Police Commission records, correspondence, financial records, contracts, personnel records, permits, police reports, logs and other law enforcement-related records. The Records Disposition Schedule was last revised in 2010. GET-38 came on for adoption before the Governance, Ethics and Transparency Committee on August 25, 2020, and was adopted unanimously.

The revisions to the 2010 and 2020 MPD Records Disposition Schedule were not reviewed by a records disposition committee, as required by MCC § 2.84.060.

Prior to amendment by Act 177 in 2005, Hawaii Revised Statutes, §46-43 was titled *Destruction of vouchers, documents, etc.*, and the counties were authorized to form a committee comprised of the director of finance, the county's legal advisor and the finance committee of the county's legislative body to

¹ The bill amending MCC § 2.84, entitled A Bill for an Ordinance Amending Chapter 2.84, Relating to Management of Records (GET-62) is pending.

consent to the destruction of financial records, including vouchers, documents and other records or papers. Among other things, Act 177 amended H.R.S. §46-43 by renaming that section as *County records*, removed the requirement that a record disposition committee approve the destruction of records, required the county legislative body to determine which records may be created and maintained in electronic form, and authorized the county finance director to determine the care, custody and maintenance of other records, with the approval of the county legislative body and legal advisor.²

MCC § 2.84 was promulgated in 1983, and amended in 1998 to include management of electronic and computer-assisted public information systems as part of the county's records management system.³ Otherwise, MCC § 2.84 remains unchanged.⁴

Prior memoranda from this office on this subject have opined that "as a result of Act 177 portions of MCC § 2.84 have been rendered obsolete and in need of either revision or repeal."⁵

III. Analysis and Conclusion

1. Is the approval of Resolution 10-36 valid?

We start with the presumption that the county council's approval of Resolution 10-36 in 2010 is valid.⁶

The county council is *prima facie* the sole judge of the necessity and reasonableness of their ordinances, and it is presumed that the county council

² The Standing Committee Reports to Act 177 indicate that the primary purpose of Act 177 was to "create and maintain electronic records" (SCR No. 55), to authorize the creation and storage of electronic records and the conversion of existing paper and microfilm records to electronic format (SCR No. 1066). Neither committee report explains why the records disposition committee was omitted.

³ Ordinance No. 2691

⁴ In addition to GET-62, an attempt to repeal MCC § 2.84 and replace it with a new MCC § 2.84A (POL 29) was made in 2009, *see* Memorandum dated October 23, 2009, from First Deputy Corporation Counsel Traci Fujita to Council Chair Danny Mateo. A similar bill amending MCC § 2.84, entitled A Bill for an Ordinance Amending Chapter 2.84, Relating to Management of Records (GET 62) is pending.

⁵ Memorandum dated June 27, 2011 from Deputy Corporation Counsel Adrienne Heely to Policy Committee Chair G. Riki Hokama (with the Memorandum dated March 7, 2006 from Deputy Corporation Counsel John D. Kim to Budget and Finance Committee Chair Dain P. Kane attached); *see also* Memorandum dated January 31, 2012 from Deputy Corporation Counsel Adrienne Heely to Policy Committee Chair G. Riki Hokama.

⁶ Richardson v. City and County of Honolulu, 76 Hawai'i 46 (1994), at 54-55

investigated the matter and found that conditions existed that made their actions in approving Resolution 10-36 appropriate.⁷

Therefore, the County Council's adoption of Resolution 10-36 in 2010, approving MPD's Records Disposition Schedule is valid, notwithstanding that there was no records disposition committee review.⁸ However, the failure to obtain a review by the records disposition committee could subject the approval of Resolution 10-36 to challenge.⁹ Should anyone wish to challenge the validity of MCC § 2.84, the burden of proving that an ordinance is unreasonable, arbitrary, or unconstitutional lies with the party challenging the ordinance.¹⁰

2. Was there a violation of MCC § 2.84?

The ordinance is clear. "[T]he lists and schedules shall be submitted for approval to a committee, designated as the records disposition committee" and "[t]he committee shall return the approved records disposition lists and schedules to the appropriate department..." Failure to submit the records disposition schedule to the records disposition committee for approval prior to seeking council approval is a violation of MCC § 2.84.060.

3. Is MCC § 2.84.060 obsolete or in need of amendment or repeal, and what steps can be taken to ensure the Department's revised Records Disposition Schedules are not held up pending amendments MCC § 2.84?

A municipal ordinance enacted pursuant to the authority of a state statute is invalid when it is in direct and material conflict with that statute.¹¹ The test for whether an ordinance conflicts with a statute is whether the ordinance prohibits what the statute permits, or permits what the statute prohibits.¹²

We considered whether the requirement in MCC § 2.84.060 for approval of the records disposition committee is in material conflict with the removal of the records disposition committee by Act 177.¹³ Moreover, if a conflict exists,

⁷ 56 Am. Jur. 2d Municipal Corporations, Etc. § 315

⁸ Richardson, at 54-55.

⁹ Asato v. Procurement Policy Board, 132 Hawaii 333 (2014), at 353-354

¹⁰ 62 C.J.S. Municipal Corporations § 359

¹¹ 56 Am. Jur. 2d Municipal Corporations, Etc. § 305

¹² Waikiki Resort Hotel, Inc. v. City and County of Honolulu, 63 Hawaii 222 (1981) at 240.

¹³ We note that other sections of MCC § 2.84 appear to be inconsistent with HRS § 46-43, including Chapter 2.84.20, which gives the managing director overall responsibility for record management of executive department records and Chapter 2.84.30 which gives the county clerk overall responsibility for record management legislative records, either of which could be

we also considered whether MCC § 2.84.060 must be amended to resolve the conflict. We are also aware that prior opinions of this office pronounced MCC § 2.84 as bring obsolete and/or in need of amendment or repeal.¹⁴

We note that while Act 177 omitted reference to a records disposition committee, it does not prohibit the counties from having such a committee to review and approve their record management plan. Without an express or implied prohibition against requiring approval by a records disposition committee prior to obtaining county council approval, it is our opinion that MCC § 2.84.060 and the requirement for approval of a records disposition committee is not in conflict with HRS § 46-43, and that amendment to remove the requirement of disposition committee approval is discretionary and not mandatory.¹⁵

Notwithstanding our opinion that Act 177 does not prohibit the county from having a records disposition committee, we also note that other portions of MCC § 2.84 that are not part of this request for an advisory opinion have been made inconsistent with H.R.S. § 46-43. For example, MCC § 2.84.020 gives the managing director overall responsibility for records management for executive department records, and the county clerk responsibility for legislative branch records.¹⁶ However, in addition to omitting the requirement for the record disposition committee, Act 177 also changed the county finance director's duties from being a member of the record disposition committee to having the overall care, custody and control over all government records.¹⁷ This change, among others, may cause confusion over who has responsibility for maintenance and

construed to be in conflict with HRS § 46-43 (b) and (c), which assign those duties to the director of finance.

¹⁴ Prior opinions of this office listed in footnote No. 4 have described portions of MCC § 2.84 as being "obsolete and/or in need of revision or repeal." However, we distinguish this opinion from our prior opinions because those prior opinions regarded Act 177 and its several amendments as a whole. With regard to MCC § 2.84.060 specifically, we can find nothing in Act 177 that prohibits the counties from maintaining a record disposition committee.

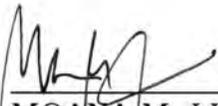
¹⁵ It is not clear whether HRS § 46-43 is the enabling statute or sole authority for the county to enact MCC § 2.84. We believe HRS § 46-1.5(13) also provides the counties the authority to maintain a record disposition committee. (Each county shall have the power to enact ordinances deemed necessary to protect health, life and property, and to preserve the order and security of the county and its inhabitants on any subject or matter not inconsistent with, or tending to defeat, the intent of any State statute where the statute does not disclose an express or implied intent that the statute shall be exclusive or uniform throughout the State).

¹⁶ See, also, MCC § 2.84030, which makes the county clerk responsible for county-wide standards for maintenance of records and MCC § 2.84050, which requires the managing director to approve the disposition of records, both of which have become inconsistent with H.R.S. §46-43.

¹⁷ H.R.S. §46-43(b) and (c)

disposition of county records. Therefore, consideration should be given to harmonizing MCC § 2.84 in its entirety with H.R.S. § 46-43.

APPROVED FOR TRANSMITTAL:



MOANA M. LUTEY
Corporation Counsel

LF 2019-0065
2020-12-14 Advisory Opinion Re GET-38.docx

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November 2, 2020

RECEIVED

By Dept of the Corporation Counsel at 8:27 am, Nov 04, 2020

MEMO TO: Moana M. Lutey
Corporation Counsel

F R O M: Michael J. Molina, Chair Michael J. Molina
Governance, Ethics, and Transparency Committee

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At its meeting of August 25, 2020, the Governance, Ethics, and Transparency Committee recommended adoption of a proposed resolution approving a revised Records Disposition Schedule for the Department of Police.

The Department's revised Records Disposition Schedule was not reviewed and approved by the Records Disposition Committee in accordance with Section 2.84.060, Maui County Code ("MCC").

The Department previously revised its Records Disposition Schedule in 2010 (Resolution 10-36); however, the revised schedule was not reviewed and approved by the Records Disposition Committee either.

May I please request a legal opinion and response to the following:

1. Is the Department's Records Disposition Schedule, as revised in 2010 by the adoption of Resolution 10-36, binding even though the revised schedule was not reviewed and approved by the Records Disposition Committee?

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I would appreciate receiving a response by **November 13, 2020**. To ensure efficient processing, please include the relevant Committee item number in the subject line of your response.

Should you have any questions, please contact me or the Committee staff (Shelly Espeleta at ext. 7134, or Pauline Martins at ext. 8039).

get:ltr:038acc02:ske

cc: Mayor Michael P. Victorino