

## GET Committee

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**From:** County Clerk  
**Sent:** Monday, May 18, 2020 3:26 PM  
**To:** GET Committee  
**Subject:** FW: Written Testimony GET 10-9  
**Attachments:** Letter to OIP 5 18 20 Highlight.pdf

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**From:** Chris Salem <chrissalem8@yahoo.com>  
**Sent:** Monday, May 18, 2020 3:20 PM  
**To:** County Clerk <County.Clerk@mauicounty.us>  
**Subject:** Written Testimony GET 10-9

Dear County Clerk;

Please present this email and the attached PDF as written testimony to the GET Committee item 10-9 on Tuesday, May 19, 2020.

Sincerely;

Christopher Salem - Resident

May 18, 2020

Maui County Council  
Committee of Governance, Ethics, and Transparency  
Attention: Council Member Mike Molina

### **GET ITEM - 10(9) - Written Testimony**

RE: Reopened OIP Case from 2017

Dear Council Member Molina;

I am forwarding for your review and consideration a copy of a response letter to the State of Hawaii Office of Information Practices ("OIP") regarding a case reopened from 3 years ago. The case involves, in part, the following government records requested under UIPA;

**Record Requested: Copy of outside special counsel Procurement disclosures by Deputy Bilberry of potential conflicts of interest.**

Deputy Bilberry's alleges that Corporation Counsel does not have an ethical Procurement duty to disclose potential attorney conflicts of interest in writing to the members of the Maui County Council during the **public** employment of outside special counsel.

### **Statement by Public Employee Corporation Counsel Deputy Bilberry;**

*"Requester's assertions that the public procurement code requires a written report is baseless."*

*"It is Corp Counsel's professional and ethical **prerogative** to confer with **any client** verbally and **confidentially** about any potential conflicts of interest involving retention of special counsel."*

**State Law: State of Hawaii Public Procurement Code – HRS §103D-101(11)**

1. **Requirements of ethical public procurement** (a) All public employees shall conduct and participate in public procurement in an ethical manner. In conducting and participating in procurement, public employees shall;

**(11) Identify and eliminate any conflicts of interest.**

I respectfully request this communication be posted as written testimony along with consideration by the GET Committee to review the current Procurement policies and procedures to ensure full public disclosures of potential conflicts of interest are presented to the members of the Maui County Council in writing.

Please confirm receipt of this communication.

Sincerely;

Christopher Salem

Christopher Salem  
5100 Lower Honoapiilani Road  
Lahaina, HI 96761

May 18, 2020

State of Hawaii  
Office of Information Practices  
250 South Hotel Street, Suite 107  
Honolulu, Hawai'i 96813  
Attention: Staff Attorney Lorna Aratani

RE: Request for Clarification of OIP Letter May 8, 2020: U APPEAL 17-45 / UAPPEAL 18-07

Dear Ms. Aratani;

Thank you for your lengthy letter regarding the Office of Information Practices ("OIP") conclusions regarding the backlogged 2017 case for access to government records from the Department of Corporation Counsel. As you can imagine, the findings, facts, and public official disclosures surrounding these requested records from Corporation Counsel have taken on an entirely new life over the last 3 years.

Through this prolonged OIP examination, requester respectfully informs the OIP that there are errors and ambiguities in the findings and references in the OIP letter for reconsideration. Specifically, as follows;

**Confirmation of Office of Information Practice's Authority**

1. The Office of Information Practices ("OIP") only mandates agencies to produce records which **they allege they maintain**. "The Uniform Information Practices Act, ("UIPA") OIP does not impose and affirmative obligation on government agencies to maintain records". (Page 3)
2. "**Other laws may exist to which require creation of or retention of records** by government agencies, but the UIPA contains no such requirements." (Page 3)

**Statement by Corporation Counsel Director Moana Lutey**

1. "Most Courts which have considered the question have concluded that the FOIA is only directed at requiring agencies to disclose those "agency records" for which they have **chosen** to retain or control" (Deputy Corporation Counsel Monna Lutey - Civil No. 17-1-0280(1))

**Statement by Requester Christopher Salem**

1. Shoreline Management Area Permit ("SMA") applications, along with conditioned environmental studies, Order of Magnitude Valuations and Shoreline setback surveys certified by licensed professionals, are maintained in the Planning Department's files to ensure the cumulative environmental impacts caused by future development activities upon the land are evaluated and mitigated.
2. The State of Hawai'i Public Procurement law requires all public employees, including the attorneys in the Department of Corporation Counsel to conduct and participate in **public** procurement in an ethical manner. State law imposes and absolute duty upon the procuring agency to **identify and eliminate any conflicts of interest**. (See HRS §103D-101)

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**U APPEAL 18-07: Records of “Ultimately Produced” SMA Permit File**  
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**OIP’s References**

1. Requester informed OIP that he requested “when Corporation Counsel supposedly produced and disclosed Developer Lot 48A, LLC’s complete County of Maui SMA Permit file.” as alleged by Director Lutey in a 2<sup>nd</sup> Circuit Court “**eventually produced**” pleading.
2. “The OIP finds that the Permit file is the same government record for which Requester filed a Complaint for Production of government records in the Hawai’i Circuit Court for the Second Circuit which alleged that the County “failed and refused to produce” to him under the UIPA.”
3. Corporation Counsel stated that; “this notice is to inform you that your record request cannot be granted because the Agency does not maintain the record”.
4. “The OIP finds “credible” Corp Counsel’s assertion that the SMA Permit File, which is the “same file” considered in the present appeal before the OIP, cannot be produced because it does not exist.

**Findings**

1. Requester informs the OIP that there is an error in the findings and references in the OIP letter.
2. The “State Lawsuit” referenced in the OIP letter involves different undisclosed government records which have also been discovered. Consequently, the Circuit Court case is under Appeal. (See Intermediate Court of Appeals CAAP-18-0000105)
3. In a letter dated February 18, 2020, Requester responded to the OIP February 14, 2020 letter wherein OIP requested clarification of which records the Requester was seeking.
4. The records requested in this OIP case involve a request for documented proof to support Director Lutey’s pleading which stated that Developer Lot 48A, LLC’s complete SMA Permit government records were “**eventually produced**” in response to Requester’s requests. Director Lutey alleged;

“The declaration provided by (attorney) Matson Kelley is in reference to a matter where the documents were **eventually produced**.”.

5. Requester asserts “eventually” (**adverb: in the end, especially after a long delay, dispute, or series of problems**) or “ultimately” (**adverb: finally; in the end**) acknowledges the complete SMA Permit file was either concealed or withheld for a prolonged period of time. Requester’s’ first request for production was in 2001.

**For the Record**

1. Requester has every single request and County response for production of Developer Lot 48A, LLC’s complete SMA Permit in precise chronological order dating back to 2001. **The County does in fact retain these requested records.**

2. On August 3, 2009, the Planning Department responded to Requester's request for access to public records relating to Developer Lot 48A, LLC's SMA Permit file SM2 2000/0042; as follows;

“.. The SM2 file **cannot be found** at the County. Without the file I could only locate documents on the computer and was only able to find the following.”

3. In 2014, In the United States Bankruptcy Court, a Rule 2004 Subpoena was issued to the Department of Planning and the Department of Corporation Counsel requesting government records relating to Developer Lot 48A, LLC's SMA Permit file.
4. Under former Director Patrick Wong, Corporation Council filed Motions to Quash access to the requested government SMA Permit records by falsely alleging the requests were “**oppressive**,” “**abusive**,” “**unreasonable**,” and “**unduly burdensome**” upon the respondent.
  - a. As of 2014, Corporation Counsel made no claims of previous production of the requested SMA Permit records.
5. In 2016, the SMA Permit records were discovered to be in the Planning Director Jeff Hunt's immediate possession. **The OIP was informed of the Requester's discovery of the concealed government records.**
6. In 2016, Corporation Counsel Deputy Bilberry filed a lawsuit against Requester claiming an abuse of the discovery process by repeatedly requesting the complete SMA Permit file.
7. As Director Lutey cannot come up with a record of the first production of Developer Lot 48A, LLC's complete “**eventually produced**” SMA Permit file, Deputy Bilberry's allegations and act of intimidation was “**baseless**”, and not credible.

#### **Attorney Rules of Professional Conduct adopted by the Supreme Court**

1. As a licensed professional attorney, a pleading must honor Rule 11 of the Federal Rules of Civil Procedure. (“FRCP”) Under Rule 11 of the FRCP: “representations to the Court by an attorney is a certification of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances.”

#### **Requests for Consideration**

1. Developer Lot 48A, LLC's complete SMA Permit is now proven to be in the County's immediate possession all along. This record request is for Director Lutey to prove through a government record her 2<sup>nd</sup> Circuit Court pleading alleging that the complete SMA Permit file was “**eventually produced**”.
2. The OIP decision letter draws unrelated conclusions from a different government record request referenced in Circuit Court case Civil No. 17-1-0280(1). (Page 4)
3. The OIP decision letter states the OIP finds “credible” the SMA Permit File cannot be produced because it does not exist. Requester respectfully request this inaccurate OIP conclusion be reconsidered and redacted. (Page 4)

4. The OIP's decision proves the fact Director Lutey's Circuit Court pleading stating that Developer Lot 48A, LLC's complete SMA Permit Files was NOT "eventually produced", and therefore was a falsification of government records,
5. Requester believes Director Lutey knew the pleading was falsely made with the intent be taken as genuine. (See Hawai'i Penal Code - HRS Title 37 §710-1017 Tampering with Government Records)
6. Requester respectfully requests the complete file of Director Lutey's alleged "30 UIPA" requests. Requester further request the OIP review the documents and consolidated into the OIP'S updated findings and conclusion.

### Conclusion

1. The record shows that Developer Lot 48A, LLC's SMA Permit # SM2 2000/0042 complete file does exist in the County files and was withheld and concealed from the Requester since 2001.

### Comments and Clarifications for OIP's Consideration

1. Director Lutey also alleged in a letter dated October 6, 2017, that "Mr. Salem has made approximately 30 UIPA requests for the Developer Lot 48A, LLC's complete SMA Permit file".
  - a. On October 14, 2019 Requester requested from Director Lutey a copy of the referenced "30 UIPA" requests. Despite confirmation of receipt of the request by the County of Maui Kiva system, the government records were NOT produced by Director Lutey.

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### U APPEAL 17-45: Procurement Report & Conflicts of Interests

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### OIP's References

"Requester (Salem) provided to the OIP a copy of Corporation Counsel's Procurement Report from the Professional Services Procurement Committee that was submitted to the Counsel by a different law firm in separate litigation. The Corporation Counsel Procurement report provides a written conflict of interest disclosure by the outside special counsel for consideration by the voting members of the Maui County Council.

"In the present case, OIP finds "credible" CORP COUNSEL's assertion that it did not and does not maintain a Procurement Report responsive to Requester's specific request."

### Findings

On October 16, 2015, Council Committee Chair attorney Donald Guzman presented a public Procurement Resolution drafted by Deputy Bilberry to employ outside special counsel.

Evidence by the October 16, 2015, Maui County Council Committee of the Whole Communication, which references County Communication #15-219 from Council Chair and Procurement Committee Chair Mike White, the outside special counsel public Procurement Resolution was approved as to legality and form by Deputy Bilberry. The Procurement Resolution states as follows;

“Whereas, special counsel **shall be** selected in accordance and in procedure in compliance with the Hawaii Public Procurement Code”.

**Statement by Public Employee Corporation Counsel Deputy Bilberry**

*“Requestor’s assertions that the public procurement code requires a written report is baseless.”*

*“It is Corp Counsel’s professional and ethical **prerogative** to confer with **any client** verbally and confidentially about any potential conflicts of interest involving retention of special counsel.*

**State Law: State of Hawaii Public Procurement Code – HRS §103D-101(11)**

- 1. Requirements of ethical public procurement** (a) All public employees shall conduct and participate in public procurement in an ethical manner. In conducting and participating in procurement, public employees shall;

**(11) Identify and eliminate any conflicts of interest.**

**State of Hawaii Rules of Professional Attorney Conduct**

1. Rule 1.7 – Rule 1.13: The adopted attorney rules contain volumes of general and specific circumstances which may constitute attorney conflicts of interest and require attorneys to disclose to potential and current clients. For example, after applicable disclosures, attorneys must obtain informed written consent and a conflict waiver before continuing representation.
2. Rule 1.13(h): If a government lawyer knows that an officer, employee or other person associated with the government is engaged in action, intends to act or refuses to act in a matter related to the lawyer's representation that is a violation of a **legal obligation to the government or the public**, or a violation of law which reasonably might be imputed to the government, the lawyer shall proceed as is reasonably necessary in the **best interest of the government or the public**.

In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, governmental policies concerning such matters, **governmental chain of command**, and any other relevant consideration. Any measures taken shall be designed to minimize disruption of the governmental functions.

Such measures may include among others: (1) asking for reconsideration of the matter; (2) referring the matter to a higher authority in the government, including if warranted by the seriousness of the matter, **referral to the highest government official that can act on behalf of the government on the particular matter as determined by applicable law even if the highest authority is not within the agency or department the lawyer represents**; (3) advising that a separate legal opinion on the matter be sought and considered;

**Comments and Clarifications for OIP’s Consideration**

1. Corporation Counsel and the Maui County Council did in fact create and maintain the Council Procurement Report and related outside special counsel Resolutions which were approved as to legality and form by Deputy Bilberry. (See Related Procurement County Communications & Resolutions #15-219 / #15-257 / #15-146 / #15-135)

2. The OIP decision letter proves the Requester's assertion that NO written disclosures of outside special counsel attorney conflicts of interest were created, maintained, or presented to the members of the Maui County Council by Deputy Bilberry.
3. Special Counsel Procurement is a **public process** by which State Procurement laws require "identification and elimination of any potential conflicts of interest".
4. The OIP's letter provides a reference to another case involving verbal conversations about an unrelated settlement agreement. Requestor believes the reference **should be redacted** as it is confusing and slants away from the adopted State Procurement laws.

#### **For the Record**

1. The requestor's employer, Mayor Michael Victorino, was a voting member of the Maui County Council for the Procurement of outside legal counsel. Mayor Victorino has affirmed he was never consulted with on the potential conflicts of interest with the special counsel law firm in question.

#### **Conclusion**

1. In violation of State Procurement Laws and State of Hawaii Rules of Professional Conduct adopted by the Hawai'i Supreme Court, Deputy Bilberry failed to provide any records which prove the special counsel conflicts of interest were identified, eliminated, or even disclosed to **all** of the voting members of the Maui County Council **and the public**. Therefore;
  - a. Deputy Bilberry's "baseless" comment is condescending, **not creditable**, and contradicts State Law and Professional attorney rules adopted by the Supreme Court.
  - b. The retained outside special legal counsel had undisclosed conflicts of interest which the members of the Maui County Council, a higher authority, and separate legal counsel (including attorney Council Member Don Guzman) were denied of their rights to review, consider, and discuss during the public Procurement process.
  - c. Deputy Bilberry failed to conduct the procurement process in an ethical manner.
2. In conclusion, Deputy Bilberry has provided personal opinions which are unsupported by any referenced professional rule or law. Deputy Bilberry acknowledges that no record of disclosure potential or actual conflicts of interest were created.

#### **Requests for Consideration**

1. Requester asks the OP to consider removing the reference to the OIP Opinion Letter No. 97-8. The reference insinuates Deputy Bilberry's had verbal or "confidential" conversations with all members of the Maui County Council regarding conflicts of interest's disclosures by the outside legal counsel. Deputy Bilberry's allegation contradicts the claims of "creditable" Council Members.
2. Again, Requester requests the OIP reconsider the use of the word "credible". The word is misleading and implies the OIP agrees that Deputy Bilberry's opinions that the identification and elimination of potential conflicts of interest during the public Procurement process is at Deputy Bilberry's verbal discretion.



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**Requester's Statement of Request for Clarification and Consideration**  
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In conclusion, after OIP's consideration of the relevant references and information provided herein, Requester's prays for an amended letter which accurately reflects the record requested. It is the Requesters' hope and prayer that this request for clarification and reconsideration will motivate Director Lutey to retract the false pleadings and reconcile the injuries caused by the underlying evidence of concealment of the complete file of the SMA Permit government records.

With this purpose, Requester prays to the Council Chair of Governance, Ethics, and Transparency to present the Requester's settlement agreement to the members of the Maui County Council to prevent further litigation and burden upon the OIP, 2<sup>nd</sup> Circuit Court, and the United States Bankruptcy Court.

Sincerely;

*Christopher Salem*

cc: Maui County Council Member Mike Molina  
Chair of the Governance, Ethics, and Transparency Committee