

RECEIVED

September 30, 2020

2020 SEP 30 PM 2:34


OFFICE OF THE
COUNTY COUNCIL

MEMO TO: GET-61 File

F R O M: Alice Lee, Council Chair



SUBJECT: **TRANSMITTAL OF INFORMATIONAL DOCUMENT RELATING TO
CONTACT TRACING APPLICATIONS** (PAF 20-255)

The attached informational  document pertains to Item 61 on the Committee's agenda.

paf:jbf:20-255b

Attachment

REQUEST FOR LEGAL SERVICES

RECEIVED

By Dept. of the Corporation Counsel at 12:20 pm, Sep 25, 2020

Date: September 24, 2020
From: Alice L. Lee, Chair
Maui County Council

TRANSMITTAL

Memo to: DEPARTMENT OF THE CORPORATION COUNSEL
Attention: Moana Lutey, Esq.

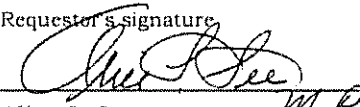
Subject: Legal issues regarding contact tracing and the Perseus app. (PAF 20-255)

Background Data: Resolution 20-125 (attached) was discussed by the Planning and Sustainable Land Use Committee under PSLU-74 (CORONAVIRUS CONTACT TRACING AND APPLICATIONS) on September 23, 2020.

Page two of the resolution starts with this paragraph: "WHEREAS, the Perseus contact tracing application needs approval by the Mayor or another governmental authority to go public within the County via Apple and Google application services; and."

Work Requested: ☐ FOR APPROVAL AS TO FORM AND LEGALITY

☒ OTHER: Does the Maui County Council have the ability to exercise the referenced authority by resolution or ordinance? If so, what are the Council's legal obligations, liabilities, or responsibilities when considering the exercise of its authority?

Requestor's signature  Alice L. Lee	Contact Person <u>James Forrest, Legislative Attorney</u> (Telephone Extension: <u>3715, please email</u>)
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☐ ROUTINE (WITHIN 15 WORKING DAYS) ☐ RUSH (WITHIN 5 WORKING DAYS)
☐ PRIORITY (WITHIN 10 WORKING DAYS) ☐ URGENT (WITHIN 3 WORKING DAYS)

☒ SPECIFY DUE DATE (IF IMPOSED BY SPECIFIC CIRCUMSTANCES): September 29, 2020

REASON: Needed before the next GET meeting posting deadline of 9/30

FOR CORPORATION COUNSEL'S RESPONSE

ASSIGNED TO: <u>KRW</u>	ASSIGNMENT NO. <u>2020-1467</u>	BY: <u>GMR</u>
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TO REQUESTOR: ☐ APPROVED ☐ DISAPPROVED ☒ OTHER (SEE COMMENTS BELOW)
☐ RETURNING--PLEASE EXPAND AND PROVIDE DETAILS REGARDING ITEMS AS NOTED

COMMENTS (NOTE - THIS SECTION NOT TO BE USED FOR LEGAL ADVICE): See September 29, 2020 memorandum.

DEPARTMENT OF THE CORPORATION COUNSEL

Date

9-30-2020

By



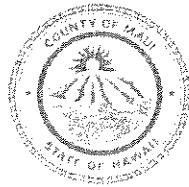
(Rev. 7/03)

MICHAEL P. VICTORINO
Mayor

MOANA M. LUTEY
Corporation Counsel

RICHELLE M. THOMSON
First Deputy

LYDIA A. TODA
Risk Management Officer



DEPARTMENT OF THE CORPORATION COUNSEL
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MEMORANDUM

September 29, 2020

TO: Alice L. Lee
Council Chair

FROM: Keola R. Whittaker, Deputy Corporation Counsel *KRW*

**SUBJECT: Legal Issues Regarding Contact Tracing and the Perseus App
(PAF 20-255)**

Thank you for your request for legal services dated September 24, 2020 requesting an opinion on whether the Maui County Council as the ability to approve the use of the PERSEUS contact tracing application by resolution or ordinance, and if so, what are the Council's legal obligations, liabilities, or responsibilities when considering the exercise of its authority.

Due to the request for an expedited response and the limited information available about the legal obligations that may be associated with contact tracing applications, our response makes certain assumptions regarding these issues based on publicly available information, as explained more fully below.

BACKGROUND ON THE PERSEUS APPLICATION:

It is our understanding that the Planned Emergency Response System Engaging Unified Support (PERSEUS) application uses the joint Apple/Google Application Programming Interface (API). This API is available to governmental entities that are approved by and enter into an agreement with Apple/Google or developers who are approved by governmental entities. The AlohaSafe application, which has been adopted by the Hawaii State Department of Health, appears to use the same API.

Apple and Google developed a website to provide more information regarding their contact tracing API. According to that website the API "will be granted only to public health authorities. If they create an app, it must meet

specific criteria around privacy, security, and data control. The public health authority will be able to access a list of beacons provided by users confirmed as positive for COVID-19 who have consented to sharing them.” The website also indicates that the public health authorities “will update or create apps which users may install if they choose to participate.”¹

AUTHORITY TO EXECUTE CONTRACTS:

Section 7-5 of the Charter of the County of Maui (1983), as amended (“Charter”), details the duties and functions of the County’s chief executive. Among those duties are supervising all County departments; assigning powers, duties, and functions that are not already assigned to a specific department by the Charter; and signing instruments requiring execution by the County. Binding the County to certain requirements for use of a contact tracing application falls within these enumerated powers.

Section 9-18 of the Charter sets forth the powers of various County officials to execute contracts on behalf of the County. The Chair of the Council executes contracts involving the Council, the Office of Council Services, and the Office of the County Clerk. The Director of Finance executes contracts for purchase of materials, supplies, equipment, personal services, and public works contracts. The Mayor is required to execute all other contracts on behalf of the County.

While we have not reviewed the specific contracts relating to the Apple/Google API or the PERSEUS application, it is clear that such agreements will bind the County to abide by certain limitations relating to privacy, security, and data control. These requirements would require coordination between several County departments. The Emergency Management powers reserved to the Mayor under Chapter 127A, Hawaii Revised Statutes, include entering into or participating in mutual-aid agreements, including those that are health, medical, or related services. Accordingly, the Mayor would have to execute contracts relating to the County’s use and adoption of any contract tracing application.

OPTIONS FOR THE COUNCIL REGARDING CONTACT TRACING APPLICATIONS:

There are several options for the Council to indicate its support for the County’s use of contact tracing applications. The Council adopted Resolution

¹ See “Exposure Notifications: Frequently asked questions,” September 2020, available at <https://covid19-static.cdn-apple.com/applications/covid19/current/static/contact-tracing/pdf/ExposureNotification-FAQv1.2.pdf>.

20-125 on September 11, 2020, a non-binding resolution urging the Mayor to approve the PERSUS application.

The County may also be able to partner with the State Department of Health in its rollout of the AlohaSafe contact tracing application, which would require an intergovernmental agreement (IGA). At this time it is our understanding that such an IGA would not place a financial obligation on the County and therefore entering into it does not require Council authorization by ordinance.

If such an agreement would require the County to incur a financial obligation, the Council would have to pass an ordinance pursuant to Section 2.20.020 of the Maui County Code. That law provides that:

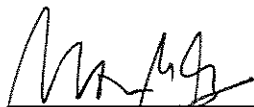
Unless authorized by ordinance, the mayor shall not enter into any intergovernmental agreement or any amendment thereto which places a financial obligation upon the county or other department or agency thereof.

It is also within the Council's power to pass an ordinance regarding the County's use and adoption of a contact tracing application. However, as stated previously, the implementation by County executive departments would fall under the powers reserved to the Mayor by Charter, and agreements/contracts related to engaging third-parties would be executed by the Mayor or Finance Director.

CONCLUSION:

The authority to execute contracts or agreements relating to the adoption and use of contact tracing applications is reserved to the Mayor. The Council does not have the authority to require the adoption or use of any particular contact tracing application through resolution but may pass a non-binding resolution to encourage the Mayor to approve agreements which would allow for the County's use of the PERSEUS application or another tracing application.

APPROVED FOR TRANSMITTAL:



MOANA M. LUTEY
Corporation Counsel
PAF 20-255
LF No. 2020-1467