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Posted: Tuesday, Jul 15, 2008 - 11:09:32 am HST

Council may define opinion release policy

by Nathan Eagle - THE GARDEN ISLAND

After at least a year of repeated requests, the Kaua'i County Council next week will broach a policy for the public release of future county attorney opinions provided to the seven-member legislative body.

"Maybe the tide has turned on this subject and there will be votes to do it," Councilman Tim Bynum said yesterday. "I'm anxious for us to bring this public debate more into the light."

Councilman Jay Furfaro's request for agenda time to initiate the discussion has been slated for the Committee of the Whole meeting on July 23 at the Historic County Building.

"I just want to be sure we have ample time," Bynum said at the council's Wednesday meeting. "I've been wanting to discuss this since last year."

In a phone interview yesterday, Bynum said he has been ready since August to hammer out a policy that allows the council to release certain county attorney opinions on questions of law.

"They are routinely released in other jurisdictions and the public should have access to that so they can be fully informed of all the parameters in a public discussion," he said.

When the council developed an ordinance over the past five years to regulate transient vacation rentals, the public was prohibited access to five written legal opinions that explained pertinent aspects of the law.

The council used these opinions in its decision-making, but residents lacked the same insight and they said it impacted their ability to comment on the bill.

Kekaha resident Bruce Pleas served on a panel tasked with helping develop the legislation.

"We had no information as to what the county attorney opinions were on a lot of important aspects of that bill," he said. "The opinions need to be released at some point. The public only has one side of the discussion on bills that are going through the council."

The vacation rental example aside, Bynum said community members need to be cognizant that there are some legal opinions that should remain confidential.

"Attorneys give us opinions as to law and they give us advice and counsel," he said, noting a state Office of Information Practices advisory opinion underscoring the distinction. "It is important for the public to understand they are being well-served by protecting attorney-client privilege when the advice is about liabilities and potential liabilities."

But sometimes there will be opinions as to law that are wrapped up in confidential information. These should be evaluated on a case-by-case basis, Bynum said.

"Releasing the opinions will bring our decisions under greater scrutiny and the work of the county attorney under greater scrutiny and it may broadcast our positions," he said. "There's no perfect answer to anything ... but let's err on the side of openness."

Maui County routinely posts Department of the Corporation Counsel opinions on its Web site — roughly 20 to 30 annually. Nine have been posted so far this year, ranging from board nominations to curfew exceptions.

Kaua'i County has previously made public its legal opinions, but stopped years ago for unclear reasons.

Pleas said county attorney opinions should not be released to the public if they may impact ongoing judicial proceedings. But pending litigation or the threat of a lawsuit should not have an effect on whether to release a legal opinion, he said.

"When an opinion is released to the council, not in executive session, and they use it ... why not make it public?" he said.

County Attorney Matthew Pyun has said the council, as the client, has the authority to release the opinions it requests from his office and forgo the confidentiality privilege.

Currently without a policy on how to release county attorney opinions, there are at least two routes the council could take.

An ordinance, such as the draft bill Bynum wants to propose, could establish a policy. It would require the county attorney to file a copy of each opinion with the county clerk within three days of the date of its issue to become available for public inspection.

The council could also opt to authorize the release of opinions by vote. But first the body must decide how many votes that would take, such as a majority or supermajority.

Bynum said he favors this avenue and that a supermajority, five votes, would be appropriate criteria for authorizing the release.

Until last month, Council Chair Bill "Kaipo" Asing had declined to put the matter on the agenda for discussion despite prodding from some council members and several vocal residents.

The council last week appointed Asing to serve as interim mayor until Dec. 1. He is expected to resign from the council on Thursday morning and be sworn in as mayor that afternoon.

The move is due to the unexpected death on June 22 of Mayor Bryan Baptiste. An election will be held this fall for voters to pick someone to serve in the office for the remaining two years left on his term.

Furfaro on June 13 requested agenda time to initiate the discussion on a policy for the public release of future county attorney opinions provided to the council.

The item was placed on the June 25 agenda, but the council deferred it.

Furfaro said he made the motion to postpone the discussion then because it is "so important" that the entire council should be present. Members were absent due to excused engagements, including the National Association of Counties annual conference in Kansas City, Mo.

The council on Wednesday referred the item to the Committee of the Whole.

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