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Posted: Monday, Jul 28, 2008 - 09:50:50 pm HST

Opinion release debate has new tone

Council grapples with release of county attorney opinions

by Nathan Eagle - THE GARDEN ISLAND

What seemed simple policy-making to some Kaua'i County Council members brimmed with perils to others last week at the Historic County Building.

The seven-member legislative body, now steered by interim Council Chair Jay Furfaro, on Wednesday initiated a "long overdue" discussion on the future release of certain county attorney opinions to the public.

A consensus eluded the council from the onset, but members highlighted several key points that they will debate in greater detail at future sessions.

"The release of these opinions going forward ... is one that this council needs a policy on," Furfaro said.

For starters, council members said critical distinctions at multiple levels must be made.

Councilman Tim Bynum, who has pushed to have this discussion for the past year, distinguishes two types of legal opinions — questions of law and advice and counsel.

In a presentation backing his position that county attorney opinions as to law should be released to the public, he cited Hawai'i Revised Statutes, a state Office of Information Practices opinion and Maui County's policy.

"Attorney-client privilege is not a foreign notion to the general public," he said. "We're serving the community well when we use attorney-client privilege as a process to make wise decisions."

But aside from that there are interpretations, Bynum said.

"What does the law say about this?" he said. "Those opinions are given very thoughtful consideration by our attorneys. ... It basically comes down to an interpretation of law that we're going to use to set our policy."

The question is "Where do we draw the line?" Bynum said. "That's what the community has been asking the council to decide."

Councilwoman Shaylene Iseri-Carvalho said the line is muddled and often the two types are intrinsically linked.

Releasing these legal opinions has "serious impacts to the county," she said.

Deputy County Attorney Harrison Kawate said of the requests he has seen, none were only for an interpretation of the statute.

"It's not something we withhold from the public anyway," Iseri-Carvalho said.

But Bynum disagreed, saying the majority of the county attorney opinions he has seen could have been released to the public.

He said in the interest of open government and in allowing the public to be completely involved in the debates going forward, a policy needs to be set so certain legal opinions may be released.

"The public has a right to this information," Bynum said. "We need to find a way through this maze. The balance is way too far on the side of secrecy."

Hawai'i Revised Statutes 28-3, which directs the attorney general to make opinions upon questions of law available for public inspection, has gone unchallenged for four years, Bynum said.

Maui County's Department of Corporation Counsel routinely publishes this type on its Web site, he added.

"That's all fine and dandy ... but Kaua'i is unique," Councilman Mel Rapozo said, but added that he relies a lot on "our sister counties for advice."

He also said he did not know how there could be agreement over what "opinions of law" means.

Bynum said the attorney general has defined the criteria.

Aside from debating the ability to distinguish between what legal opinions should be made public and what advice should remain confidential, council members differed on the release mechanism.

Rapozo said Bynum's proposed five votes, a supermajority, was insufficient.

A county attorney opinion directed to the council as a body should require a unanimous vote to be released to the public, Rapozo said.

"Each one of us is a client," he said.

Furfaro said as the discussion moves forward, one of the questions that will need to be answered is when an opinion is requested by an individual council member is it the County Attorney's Office's belief that it is releasing it to the council member or the body.

Councilwoman JoAnn Yukimura said it may be that the county attorney should just decide which opinions to make public as Maui does.

County Attorney Matthew Pyun Jr. said in a statement that "attorney-client privilege rests with the client." He declined to respond to additional questions.

Iseri-Carvalho said she remains concerned about increasing the county's exposure to liability.

Rapozo said he believes if the council waives its attorney-client privilege to an opinion, this also waives the right to all the discussions dealing with it, including executive session conversations.

If releasing a legal opinion could affect "my livelihood, my home," Rapozo said, a unanimous council vote should be required.

Referencing a 1991 OIP opinion, Bynum said only the portion of a conversation behind closed doors that directly relates to the written legal opinion must be released.

Rapozo said that opinion fails to carry any legal weight.

Beyond drawing distinctions as to what opinions should be made public and how they should be released, the council discussed the implications to the county's overall functioning.

For public policy purposes, Yukimura said legal opinions that govern official actions should be released.

When council members over the past year were working on a bill to regulate transient vacation rentals, residents repeatedly requested access to the county attorney opinions they were referencing and relying upon. Same issue for the shoreline setback bill and housing policy.

There are even county attorney opinions on the release of county attorney opinions, but all remain sealed under attorney-client privilege until the council sets a policy on how to release them. But if the agenda wording is any clue, the policy will only apply to "future" legal opinions.

"I know this is not going to be the end of the discussion," Yukimura said. "It's only the beginning."

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