



OFFICE OF CORPORATION COUNSEL

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To: Interested Parties

From: Margaret C. Daun, Corporation Counsel

Date: September 27, 2023

Re: Caption for File 23-834, submitted in response to File No. 23-554

The Office of Corporation Counsel (OCC) assisted its client, the Milwaukee County Sheriff's office (MCSO), organize and submit as one file submission voluminous reports and exhibits in response to File No. 23-554. As the filing deadline loomed, for expediency, the OCC electronically filed the report on behalf of MCSO. Accordingly, due to technological filing requirements, the OCC was required to identify itself as the submitting department in the caption on File No. 23-834, which responds to File No. 32-554.

The caption for File No. 23-834 states: "From the Office of Corporation Counsel on behalf of the Milwaukee County Sheriff's Office, providing an informational only report responding to County Board Resolution File No. 23-554."

To ensure that members of the public, as well as all County clients and stakeholders have an accurate understanding, the OCC clarifies as follows:

- The report and exhibits attached to File No. 23-834 are the work product of the MCSO.
- MCSO is the submitting department.
- OCC reviewed the contents of the report for case-sensitive information and other confidentiality concerns, but the report is not the OCC's work product.

As explained in an OCC opinion dated August 31, 2023 (attached as Ex. 1 hereto), the OCC provides independent, objective legal advice to all its clients and does not preference one client's viewpoint or interest over any other.

Given the importance of the matters discussed in File No. 23-834, clarification was most prudent, so that all have an accurate understanding of OCC's role.

In sum, the content of File No. 23-834, as well as the presentation of the File, are the sole purview of MCSO and thus, a more accurate caption for File No. 23-834 would be: "From the Milwaukee County Sheriff's Office, providing an informational only report responding to County Board Resolution File No. 23-554."

EXHIBIT 1



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To: Interested Parties

From: Margaret C. Daun, Corporation Counsel
Scott F. Brown, Deputy Corporation Counsel
Karen L. Tidwall, Deputy Corporation Counsel

Date: August 31, 2023

Re: Best Practices for the Request and Use of Office of Corporation Counsel Opinions, OCC Conflicts of Interest, and Use of Outside Counsel

From time to time, the Office of Corporation Counsel (OCC) is asked whether emails, presentations, FAQs, opinions on letterhead, or other guidance (collectively herein, Opinions) previously issued by OCC are still reliable and whether a particular Opinion may be used by clients to guide their decision-making. Related questions arise about how best to submit questions to OCC, conflicts of interest, and the use of outside counsel. This memorandum addresses each of these issues in turn: (I) guidance on how to request an Opinion from OCC; (II) the rules for whether and how to rely upon prior OCC Opinions; (III) conflicts of interest; and (IV) the use of outside counsel.

In conjunction with the issuance of this guidance, to begin to assemble a searchable database of OCC Opinions (*see* Section I.F. below), we are respectfully requesting that **before December 31, 2023**, all clients submit to Rhonda Rogers Opinions that you may have access to (regardless of date, regardless of whether the Opinion may or may not still be “good law,” regardless of any “CONFIDENTIAL” markings, and regardless of the form of the Opinion (i.e., inclusive of emails, presentations, FAQs, etc.)). Please indicate if you are still relying upon a particular Opinion and whenever possible, please submit Opinions in their original format (Word, Excel, PowerPoint, PDF, etc.).

I. Requesting OCC Opinions

- A. Who is an OCC client? The OCC’s clients are every County elected official, department, board, commission, etc.—we are Milwaukee County’s attorneys. However, and very importantly, the OCC represents the *County as an entity*, which acts through its individual officers and employees. We are not attorneys that may act or advise exclusively in the individual, personal, or political interests of any single client. If a client acts or may act in

a manner that will injure, prejudice, or otherwise harm the County's interests in the objective assessment of OCC, we may be ethically and professionally compelled to act to remedy, avoid, or otherwise ameliorate such harms or bad acts. This is an extremely rare occurrence. However, if this does occur, all our clients can rest assured that OCC will make every reasonable effort to counsel the client to change course and will explain OCC's disclosure obligations *before doing so*. We would never "spring" something as important as this on any client.

Related, OCC endeavors to ensure that whenever possible, no client is surprised or caught off guard by any Opinion. We will try to share our conclusions before issuance of the Opinion as is reasonable and ethically permissible. This enables us to ensure that we did not misunderstand the question, any relevant facts, or the potential consequences of our Opinion. But of course, OCC Opinions are not subject to negotiation. *See also* Sections III and IV below.

Our aim is to be a problem-solving partner to each and every County client and doing so requires a relationship based in trust, reliability, accuracy, transparency, and candor. If any client ever has concerns that we failed to achieve this objective on any specific matter or in general, we welcome that feedback, as we are committed to consistently provide the highest quality legal services and to constant improvement.

Finally, if we get something wrong, or if new information or law comes to our attention that materially alters a prior OCC Opinion, all clients may count on the OCC to issue a correction or clarification that will make plain that the prior Opinion no longer may be relied upon and/or has been replaced/subsumed by the subsequent Opinion.

- B. Best practices when submitting questions to OCC for guidance: Before submitting a question to OCC, please communicate with those who have worked in your department for some time. It is highly likely others have confronted the issue before.

Often, clients will pose questions that are not exactly the questions that they need answered. Thus, OCC will frequently reframe, expand, or narrow questions in our professional judgment to ensure that Opinions "work" under various factual circumstances to best assist the requesting client and the County generally.

Please carefully assess whether the question is, in fact, a legal question.

In general, employees should obtain approval of any Opinion request from their supervisor and department head/elected official/board or commission before submitting the request to OCC. Requests for formal Opinions must be submitted to Corporation Counsel Daun and the department head/elected official/board or commission chair must be copied on the request.

Please note: Absent extraordinary circumstances, individual board or commission members should not pose questions to OCC. Instead, the board or commission may do so only as a body (via a majority vote approving the submission of the question), unless the bylaws or rules of the board or commission confer such authority upon a specific individual or subcommittee (or establish some other mechanism). This does not apply to County Board Supervisors, who are each elected officials and thus, may request legal guidance from OCC on an individual basis.

Opinion requests should be made in writing and be as specific as possible. In addition, the following information is extremely useful to OCC when we receive Opinion requests, especially when the issue is of critical importance and/or is of broad interest (and we may engage with you to think through some or all these issues, as relevant to your inquiry). If possible, please provide this background information when submitting questions, even if only in summary form (or if you don't think it's important, please let us know that too).

- What action or outcome do you seek and why?
- Who will be impacted by this issue/decision/Opinion? Have they been involved in the decision-making process or otherwise informed/consulted?
- Is an outside advocacy group or individual involved with this issue? What is their objective? Do they have a financial incentive to view the issue/question in a particular way?
- Do you anticipate opposition to the proposed or desired action or outcome? If so, by whom and why?
- What will be the operational and fiscal impacts be, generally speaking, under various potential outcomes that could be impacted by the Opinion?
- Has equity and the County's mission been addressed? Please describe.
- Provide all relevant background information, prior Opinions, legal opinions/analyses from other sources, draft or model legislation from other jurisdictions if relevant, viewpoints of other departments or stakeholders, documents, etc.
- Please indicate whether the issue has been presented to the Chief(s) of Staff, Board Chair, Committee Chair(s), County Executive, etc. as applicable. What is their position?
- What is the desired timeframe for a response?
- Does this involve potential, likely, or currently ongoing litigation? If so, what/how?
- Does this involve any other County boards, commissions, etc.? Please describe.
- Does this involve any outside community stakeholders? Please describe.
- Does this involve any past, current or potential vendors/contractors? Please describe.
- If you need a presentation, FAQ, talking points, graphic, or other non-memoranda form of Opinion, please state that clearly in your request.
- If the question involves contracting, procurement, etc. of any form, please indicate whether the Comptroller has been involved and/or provided guidance (and if so, in what form, when, and what was their view), whether Procurement has been involved and/or provided guidance (and if so, in what form, when, and what was their view), and finally,

whether an RFP (or RFI, RFQ, other competitive bidding process) was used and if not, why not, etc. Provide all prior and/or other legacy contracts relevant to the request.

- C. Mixed questions that involve more than just ‘the law.’ Where questions involve a mix of policy, politics, financial, operational, equity, and/or legal issues, OCC always endeavors to provide guidance that is comprehensive, based in the realities faced by all our clients and stakeholders, maximally useful to nonlawyers, as well as grounded in reliable formal legal analysis, accessible to any legal professional. We aim to provide highly competent, creative, compassionate, and responsive legal advice to help our clients make the best decisions, reduce risks, and maximize public resources. These goals require sophisticated integration of factors that go beyond pure legal questions.
- D. Confidentiality: Unless confidentiality is requested or is manifestly required, all Opinions are presumed by OCC to be sharable among any and all clients, stakeholders, and the public and may be subject to open records laws. Any confidential Opinion will be clearly marked as such and is not a public record subject to disclosure.

In addition, even where confidentiality is requested, OCC may, in its sole discretion, issue an Opinion identical or substantially similar to the requested Opinion to multiple clients, so that all have a shared understanding of OCC’s interpretation of the law.

Confidentiality should be requested as infrequently as possible and is subject to review and discussion with OCC.

Once a confidential Opinion has been provided, only the recipient client may elect to disclose the communication and waive the attorney-client privilege; the OCC may not unilaterally do so. However, Opinions that are older than five years (based on the date the Opinion was issued) are presumed to no longer be confidential even if marked “CONFIDENTIAL,” though OCC will make every effort to confer with the client (as represented by the individual that currently holds the relevant position) before disclosure.¹

Notwithstanding the foregoing, *communications* with OCC to submit a request for an Opinion, to best identify the problem/question/issue, provide context (see below), etc., are ***automatically presumed to be confidential attorney-client communications and are not public records subject to disclosure***, regardless of whether the communication is marked “CONFIDENTIAL” (so long as a legal question is posed).

- E. Form: Clients may request either a formal (on letterhead) or informal (email or other) Opinion. While OCC will carefully consider the client’s requested form, it is ultimately OCC’s exclusive judgment as to what form its response will take. Typically, formal Opinions are used when the issue is of grave importance or is a matter of general interest, when a matter is legislatively referred to OCC under MGCO § given time constraints and

¹ A disclosure to this effect will be added to Opinions marked “CONFIDENTIAL” going forward.

available resources. Inversely, informal Opinions are typically used when immediate guidance is required, for narrow, factually specific questions, issues of lower relative importance, or when resources are not available for more in-depth analysis and presentation.

- F. Systemization. The OCC is undergoing an information technology and software review to best identify and determine how to systemize the following: (i) a database of prior, public Opinions, accessible to all County employees and the public; (ii) Opinion requests (including a fillable form); and (iii) Opinion request tracking.

II. Using OCC Opinions

- A. Any Opinion, regardless of form, provided by any staff member of OCC *dated prior to January 7, 2017, must be reconfirmed by the OCC before it may be relied upon* because there have been significant changes to key portions of state law since that time and because certain Opinions may have been limited to particular facts. Accordingly, *such Opinions should not be presumed to provide accurate legal analysis, factual information, or other guidance*. If you seek to rely upon an Opinion dated prior to 2017, contact Corporation Counsel Daun before doing so and ask for a review. If OCC determines that it is still applicable and may be relied upon, OCC will reissue the Opinion either formally (on letterhead) or informally (confirmed via email).
- B. Generally, any *formal* OCC Opinion (issued on letterhead), *dated after January 7, 2017, may be broadly relied upon, so long as Corporation Counsel Daun was a co-author.*² However, just like Opinions issued before that date, laws may have changed and/or the conclusions may be limited to the particular facts unique to that Opinion. Thus, if the opinion is on the older side or if, upon a careful reading, it seems to be a narrowly tailored Opinion, and you wish to rely upon it, please reach out to Corporation Counsel Daun to reconfirm its continued reliability.
- C. No *informal* OCC Opinion (any format other than on letterhead), *dated after January 7, 2017*, may be generally relied upon or applied to any facts or circumstances other than those specifically addressed in the informal Opinion. To determine if any informal Opinion dated after January 7, 2017, may be relied upon, please contact Corporation Counsel Daun.

When in doubt, please request confirmation of the continued accuracy and applicability of a past Opinion from Corporation Counsel Daun.

² If Corporation Counsel Daun is not included as a co-author (or carbon copied in the case of email), the opinion may *not* be relied upon absent confirmation from Corporation Counsel Daun, even if the opinion was issued after January 7, 2017.

III. Conflicts of Interest

Government attorneys are “public officer[s], acting judicially, under all the solemn responsibilities of conscience and legal obligation.” 6 Op. Atty Gen. 326, 334 (1854). Even where a private attorney in a similar circumstance would be unable to represent clients that hold opposing views or positions, OCC is not conflicted. The American Bar Association’s Scope 18, Comment 9 to Supreme Court Rule 10:1.13 (1987) explains that “[government] lawyers ... may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients.”

This is so for many reasons, some of which include:

- A government lawyer “is not neutral, she is an advocate; [] an advocate for a client whose business is not merely to prevail in the instant case. [A government lawyer’s] chief business is not to achieve victory *but to establish justice*. ... [T]he government wins its point when justice is done in its courts.” Former Solicitor General, 4th Circuit Court of Appeals Judge Simon Sobeloff (emphasis added).
- State law ensures that OCC provides independent, objective advice, because Wisconsin statutes insulate the office from political and other influences.³ Our mandate is to get it right, not to pick sides.
- Accordingly, OCC is often best suited to resolve legal conflicts and disputes among County clients. And as noted above, in doing so, OCC is ethically bound to serve the **County’s interests** writ large, not the interests of any single branch of government, individual, or elected official.

IV. Outside Counsel

Under Wis. Stat. § 59.42(b), OCC “defend[s] all civil actions...give[s] advice to [clients] in all civil matters...perform[s] all duties in connection with civil matters... [and] review[s] and countersign[s] all contracts.” *Accordingly, outside counsel may not be retained by any County client except with the express approval of OCC.*

The OCC will approve retention of outside counsel only where it is required due to bandwidth/resource limitations, system limitations, lack of subject matter expertise, as directed by a County insurer, or where clients sue one another (absent a waiver of the conflict).

If a client’s mere dislike of opinions or clashes with other clients required the hiring of outside counsel “on demand,” OCC would fast become irrelevant. For the right price, a “hired gun”

³ By state statute, all Deputy Corporation Counsels, Assistants, and staff are in the classified civil service, not removable at will by any person, including the Corporation Counsel. Wis. Stat. § 59.42(2)(a). In addition, Milwaukee County’s Corporation Counsel, though unclassified, may be removed only if the County Board and County Executive agree to removal through a formal resolution process (or, if the resolution is vetoed, by a 2/3 supermajority veto override). *Id.*

attorney will say whatever a client wants. The OCC does its job when it provides correct, objective, reliable, understandable, and usable legal advice—notwithstanding who might be benefitted/pleased—and when OCC “establishes justice” in the courts. *See supra*.

We promise each client that we will do our best, every day, to help you make the most informed decisions possible and we thank you for your understanding that doing so sometimes requires us to provide advice that may disappoint or frustrate short-term objectives. In the long run, however, we hope our commitment to objectivity, usability, community wellness, social justice, and professionalism will always support the County’s mission and make the Milwaukee County community a better place for all.
