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August 1, 2012

TO: Media Outlets
FR: Prosecuting Attorney Shaylene Iseri-Carvalho
RE: **Special Counsel Opinion**

While the County Attorney's Office now discredits the legal opinion of Mr. Slovin, it is important to note that the County Attorney was solely responsible for his selection as Special Counsel. Although the OPA was initially allowed a selection committee that recommended the law firm of Goodsill Anderson Quinn and Stifel, comprised of over 70 attorneys, we were barred from having any participation in choosing which specific attorney would be selected despite our numerous requests.

Slovin is a highly respected and experienced governmental relations attorney that specializes in procurement law. Mr. Slovin has served as Executive Director of the Hawai'i State Ethics Commission and was Corporation Counsel (County Attorney) for the City and County of Honolulu under former mayor Eileen Anderson. Mr. Slovin has also served as a member of the Honolulu Charter Commission, the Board of Directors of the Hawai'i Theatre Center, the Mayor's Budget Review Advisory Committee, and as Chair of the 2001 Aloha United Way campaign.

We have attached Mr. Slovin's entire opinion to this release.

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MEMORANDUM

TO: Alfred B. Castillo, County Attorney
Jay Furfaro, Council Chair
Shaylene Iseri-Carvalho, Prosecuting Attorney

FROM: Gary M. Slovin, Special Counsel

DATE: July 31, 2012

RE: P.O.H.A.K.U. Program

I. Introduction

Special Counsel was retained, effective June 25, 2012, to analyze and assess circumstances surrounding the establishment of the P.O.H.A.K.U. diversionary program that was established during the year 2011 by the Office of the Prosecuting Attorney. An issue has been raised regarding whether the establishment of this program violated the State's Procurement Code, HRS Chapter 103D. In making this assessment, Special Counsel reviewed the facts of the matter available through various sources, reviewed various documents received from the office of the County Attorney and the Office of the Prosecuting Attorney and reviewed State law as well as cases interpreting state law.

II. Discussion of Facts

The P.O.H.A.K.U. diversionary program is intended, as stated on the website of the Office of the Prosecuting Attorney, "to allow non-violent offenders the opportunity to give back to the community that they have offended in a meaningful way, and have their criminal record cleared with a case dismissal." This program was not intended to apply to very serious offenses but rather was intended to apply to what would be seen as relatively less severe and in some cases minor violations that nonetheless reflect that the offender has shown a lack of respect for the community and for the requirements of being a responsible citizen. The offenses involved are district court cases that represent misdemeanors or less. For example, the following would be offenses eligible for diversion through the P.O.H.A.K.U. program: camping without a permit, contempt of court, criminal property damage, disorderly conduct, driving while a license is suspended, false certificates, fraudulent use of license, inattention to driving, leash law violations and similar offenses which are listed on the Office of Prosecuting Attorney website.

According to the Prosecuting Attorney, Shaylene Iseri-Carvalho, one of the goals of the P.O.H.A.K.U. program is to address overcrowding in the Kauai County jail. In addition, it was felt that a program that involved education of offenders could discourage recidivism and thereby accomplish additional community goals beyond dealing with the problem of overcrowding.

When the Prosecutor took office a bad check diversion program was already underway having been established by the prior prosecutor. The individual running that program had indicated to Prosecutor Iseri-Carvalho that he had initiated other programs that dealt with a broader range of offenses that used what he felt was an innovative process to re-educate offenders. This program was described as using a cultural approach that would affect a person's self-esteem and other values that would hopefully assist that person in resisting becoming a habitual offender. The bad check program was apparently not continued. However, the Prosecutor stated that she checked the references of the individual who had put together that program and visited sites on the mainland that had implemented diversionary programs that this individual had designed. The Prosecutor then asked him to develop a program similar to those she had seen on the mainland but that would incorporate Hawaiian cultural values. One component of what was developed is a booklet for participants that is entitled "A Program for Making Positive Life Changes".

It appears that during the early part of 2011 meetings were held in the community to describe and discuss this program. The program began approximately in August of 2011 and ran until sometime in April of 2012. Eventually considerable controversy regarding the program arose, and the decision was made to suspend the program while the issues regarding procurement were addressed. Because the County Attorney concluded that a conflict of interest existed, it was determined that a special counsel should be retained to address this issue.

According to the Prosecutor, approximately 10-15 applications for the program were filed per month. For an applicant to be in the program, a form had to completed, certain reviews made, and a fee of $200 paid to the administrator of the program. The administrator of the program is Strategic Justice Partners ("SJP"), an entity formed by the individual that the Prosecutor had been working with for the purpose of developing this program on Kauai.

As part of its responsibilities, SJP hired an education director as well as teachers who conducted an eight-hour class for the people enrolling. In addition, the applicants to the program were required to perform community service in an area that bore, where possible, some relevance to the offense that had been committed. An employee at the Office of the Prosecuting Attorney was involved in determining if the applicants met the requirements of the program.

The primary issue to be addressed is whether the manner in which the Prosecuting Attorney implemented the P.O.H.A.K.U. program violated the State Procurement Code. However, another question raised as a part of this issue is whether the prosecutor has the power

to institute a diversionary program like the P.O.H.A.K.U. program. Another question raised has to do with the fee that applicants for the P.O.H.A.K.U. program must pay in order to participate. As noted, each applicant must pay a $200 fee to participate. A question that has been raised is whether the charging of such a fee in order to enroll in the P.O.H.A.K.U. program is constitutional.

III. Diversionary Programs

Special Counsel is persuaded that Diversionary Programs have become an integral part of the overall criminal justice system. These programs may take different forms. For example, Hawaii has become well known for the Hope Program which deals with persons who are addicted to drugs. There are also specialized courts dealing with certain kinds of habitual offenses. The Governor, in announcing his intention to bring prisoners back from the mainland, has stated in his messages dealing with this subject that we must find alternatives to incarceration because our prisons do not have the capacity that would be needed to continue to imprison all of those persons who would return from the mainland. There is also an understanding that, in many cases, imprisonment does not help to rehabilitate certain individuals. While the P.O.H.A.K.U. program may be different from these other very well established programs, it is nonetheless a Diversionary Program. Further, the program has not existed in a vacuum as the Prosecutor's Office has worked with other parts of the criminal justice system in the overall execution of this program. Accordingly, it is the view of Special Counsel that the Prosecutor did and does have the authority to establish the P.O.H.A.K.U. program and diversionary programs generally.

IV. Legitimacy of the fee established for the P.O.H.A.K.U. Program

Research done in pursuance of this assignment indicates that the establishment of a fee for a Diversionary Program is acceptable. The case law is quite clear that the establishment of such a fee is legitimate. In this case, an individual who does pay the fee has the opportunity to avoid the payment of fines which in many cases will exceed the $200 fee. It is true that a person who is able to demonstrate that he or she cannot pay a fine can generally not be imprisoned on the basis of that factor alone if the payment of the fee would otherwise free the person from the threat of incarceration. However, it does appear that there were means for people who could not afford to pay to avoid such payment and still participate in the program. In any event, the payment of a fee to participate in a program like this is clearly legitimate and, to the extent that there is the potential for people to be denied admission if they cannot afford the fee, that is an issue that can be addressed if the program is restarted.

V. Did the implementation of the P.O.H.A.K.U. Program violate the State Procurement Code?

It is the conclusion of the Special Counsel that the implementation of the program did not violate the State Procurement Code. Special Counsel notes that this is perhaps a gray

area that is not explicitly dealt with by the State Procurement Code nor does Special Counsel deny that an argument could be made that the Procurement Code applies. However, opinions issued in cases before the Department of Commerce and Consumer Affairs on matters relating to the application of the Procurement Code indicate clearly that, where public funds are not expended, the Procurement Code does not apply. These opinions address the change in the Code made in 2002. Prior to those changes, it was explicit that the Code did not apply when public funds were not expended.

While the changes expanded the definition of what constitutes an "expenditure", it is the opinion of the Special Counsel that an expenditure is still required to trigger the application of the Code.

Here, SJP charged a fee to those persons who qualified for and were interested in participating in the P.O.H.A.K.U. program. No public funds were expended. While it is the case that personnel in the Office of the Prosecuting Attorney were involved with the program, it is a natural part of a Prosecutor's Office for its employees to be involved in administrating any aspect of the criminal justice system that would affect the prosecution of offenders. To classify the time spent by personnel in the Prosecutor's Office as an expenditure under the Procurement Code does not seem to the Special Counsel to be a reasonable interpretation of that term such as to bring this matter within the application and jurisdiction of the State Procurement Code.

Waikiki Windriders/Hawaiian Ocean's Waikiki v. Department of Budget and Fiscal Services, City & County of Honolulu, PCH-2002-9 (July 26, 2002) is applicable. In *Waikiki Windriders*, the petitioner failed in a bid for a beach concession contract, and eventually appealed to the DCCA Hearings Officer. The respondents contended that the Hearings Officer lacked jurisdiction because the Procurement Code did not apply (instead, § 102-2, which governs concession contracts applied). The petitioner argued that although the solicitation involved a concession contract, it also involved a procurement contract. Thus, according to the petitioner, the Procurement Code governed and the Hearings Officer had jurisdiction.

The Hearings Officer held that the Procurement Code did not apply because the contract did not involve any expenditure of public funds. In reaching this decision, the Officer acknowledged the difference in the previous and amended language to HRS § 103D-102(a), which concerns the applicability of the Code to government contracts. In the amended version, § 103D-102(a) states that "This chapter shall apply to all procurement contracts made by governmental bodies whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed[.]" The previous version of the statute applied the Code to "every expenditure of public funds irrespective of their source."

Comparing both versions, the new version appears to expand the Code's applicability to government contracts that do not involve the expenditure of public funds. However, the Hearings Officer rejected this argument by concluding that:

"Although the amendment deleted "every expenditure of public funds irrespective of their source," the underlying legislative history gives no indication that the Legislature sought to expand the application of the Code to cases other than those involving the expenditure of public funds."

Waikiki Windrider, PCH-2002-9 at 4. The Hearings Officer further stated:

> These considerations lead the Hearings Officer to conclude that the Code was originally applicable to and continues to be applicable to procurement contracts made by governmental bodies that involve the expenditure of public funds as consideration irrespective of whether those funds consist of cash, revenues, realizations, receipts, or earnings.
>
> *Id.*

The Officer also concluded that the Code exemptions in HRS § 103D-102(b) supported his conclusion that the Code only applies to contracts in which the government spends public funds. The Officer stated that all the listed exemptions involve the expenditure of public funds as consideration. *Id.* From this, the Officer inferred that there was no need to include specific exemptions for contracts not involving public expenditures because these contracts already do not fall within the Code. Other cases decided by the tribunal support this conclusion. While it is possible these cases and the principle could be overturned in the future they are the prevailing law at this point. Certainly it would be reasonable to rely on these cases in determining whether the P.O.H.A.K.U. program is subject to the Procurement Code.

VI. Exemptions to the Procurement Code

The POHAKU contract may also qualify for an exemption to the Procurement Code as a contract "[t]o procure . . . goods or services which are available from multiple sources but for which procurement by competitive means is either not practicable or not advantageous to the State." Haw. Rev. Stat. § 103D-102(b)(4). This exemption only applies to specific goods or services listed under the statute, or, under § 103D-102 (4)(F), to any other goods or services that the State Procurement Office policy board deems applicable. The policy board lists these additional exemptions in Hawaii Administrative Rules (HAR) § 3-120-4 (2012)'s Exhibit A, entitled "Procurements Exempt from Chapter 103D, HRS." The most likely exemption is for:

"Services of lecturers, speakers, trainers, facilitators and scriptwriters, when the provider possess[es] specialized training methods, techniques or expertise in the subject matter[.]" *Id.*

SJP may qualify as a "trainer" or "facilitator" with "specialized training methods, techniques or expertise in the subject matter." According to SJP's website, the company designs specialized educational intervention programs rather than "stand-in-line, pay-a-fine" diversion.

Moreover, the SJP-run POHAKU program provides "specialized training methods" as it "is the first program of its kind that incorporates culturally-based education," according to its website. http://www.pohakuprogram.com/Home.html.

Further, there was no reliable way that Special Counsel could perceive for the Prosecutor to determine how many persons would participate in the program. During the period that the program ran, no more than 15 people per month chose to apply for the program. There were a number of factors that restricted the number of offenders who would be eligible for the program. Given the responsibilities of the vendor and the fees charged, the total amount of funds put at the disposal of the vendor was small and certainly not an amount that would justify any suspicion of corruption. Accordingly, the Special Counsel concludes that, even if it were determined that the manner in which the program was implemented violated the Procurement Code, there would be no basis for action to be taken against the Prosecuting Attorney. Certainly the Procurement Code is sufficiently complex that one could have reasonably concluded, from a common sense perspective, that the fact that the program did not involve expenditures of public moneys, and was primarily administered by a private vendor, would not bring the agreement with SJP under the Procurement Code.

VII. Additional Consideration

Special Counsel is also persuaded that this is a unique program whose goal is consistent with modern criminal justice practice in the sense that it was an attempt to find a way to prevent offenders from repeating offenses. The approach of using Hawaiian cultural values as a means of instilling a different perspective in the minds of offenders seems legitimate. It also seems that it would be very difficult to craft a procurement process in the traditional sense.

As noted, and in any event, it is the Special Counsel's view that the Procurement Code did not apply for the reasons noted herein.

VIII. Conclusion

Special Counsel does believe that a Memorandum of Understanding between the vendor and the Prosecuting Attorney would be advisable so as to be sure that the responsibilities of the vendor and the parameters of the program are laid out as clearly as possible, with the understanding that there are elements of the program that can not be clearly defined given its somewhat experimental nature. Nor does Special Counsel conclude that a procurement process could not be utilized. It is conceivable that there might be other suitable vendors. But, again, Special Counsel does conclude that a procurement was not required by the Procurement Code.

It has been noted that the First Deputy Prosecuting Attorney acted as the agent for SJP. Special Counsel found no evidence that the First Deputy made any personal gain from this position. However, serving in that position creates an appearance of impropriety even if none

existed. Therefore, if the program should be resumed, no one in the Prosecuting Attorneys Office should occupy such a position.

Special Counsel acknowledges that the Finance Director is the County's chief procurement officer and that that officer may have a different view. HRS Chapter 103D establishes a review and appeal procedure. However, Special Counsel would strongly recommend that the Finance Director and the Prosecuting Attorney confer toward a compromise position. To do otherwise may prolong a controversy that impedes the implementation of what amounts to a pilot program that appears to have value.

Respectfully submitted,

Gary M. Slovin
Special Counsel