

LAW OFFICES OF RICHARD E. WILSON, LLC

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March 12, 2014

Christopher D.W. Young, Esq.  
Department of the Attorney General  
333 Queen St., Ste. 200  
Honolulu, Hawaii 96843

Re: *Former Mayor Carvalho/Haw.Rev.Stat Ch. 78*

Dear Mr. Young:

This letter follows our conversation last week.

As I said on the phone, my client Michael G. Sheehan is requesting that the Attorney General's office comport with its obligations under Haw.Rev.Stat. §78-10, which states in pertinent part as follows:

If any person subject to sections 78-8 to 78-11 refuses to appear or refuses to testify under any of the circumstances contemplated in section 78-9, the presiding judge or officer of the court or body before which the default or refusal occurs shall certify the fact thereof to the appointing or employing authority having cognizance of the person as a public officer or public employee and to the comptroller or other disbursing officer who issues warrants or checks to pay the person for the person's services as a public officer or public employee. **If the default or refusal occurs before any court or body whose presiding judge or officer may not be required by the legislature to make and file such a certificate,** then (1) the presiding judge or officer may make and file the certificate,<sup>1</sup> and (2) **the attorney general of the State, upon learning of the default or refusal, shall make and file the certificate if the presiding judge or officer of the court or body has not filed the same.**

Section 78-10. We are asking that the Office of the Attorney General "make and file the certificate" that Mr. Carvalho, fka Mayor Carvalho, refused to testify in connection with an investigation undertaken by the County Auditor regarding the Fuel Audit ("gas card scandal"). We further request that the certificate be sent to County of Kauai Director of Finance Steve Hunt.

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<sup>1</sup> Assuming that the officer is unable or unwilling to make and file a certificate, we will obtain a transcript of the proceeding and forward it to the Attorney General for disposition.

Fortunately you have some background concerning the Gas Card Scandal. Essentially, allegations had been made against Former Mayor Carvalho in connection with his purported or alleged improper personal use of a County of Kauai gas card. Kenneth Chang and Paul Wong (of the McCorrison firm) were retained by the Auditor's Office of the County of Kauai in connection with the investigation regarding a fuel audit and the former Mayor's alleged use of fuel card 23066. On or about February 1, 2012, the former Mayor was questioned by Mr. Wong. The following colloquy took place.

MR. WONG: . . . "Before proceeding, I want to inform you that you have certain constitutional rights, the first among them is the right against self-incrimination that is you have the right to remain silent, you do not have to talk to us, you can refuse to make a statement and go further with this interview. **I would also inform you that if you choose to waive that right anything that you say this afternoon may, can and may be used against you if this matter were to proceed to a court hearing.** I understand that Mr. Castillo as County Attorney is here to provide legal counsel should there be any questions. **Do you understand the rights that are afforded to you under the constitution?**

A. **Yes, I do.**

05. After having the opportunity to consider those rights **do you wish to make a statement or invoke the use of those rights?**

A. Upon the advice of my legal counsel, **I chose [sic] not to say anything.**

Record of Interview, pages 1-2 (emphasis added).

Former Mayor Carvalho **admitted** in a letter dated February 20, 2014 to Messrs. Taylor and Mickens that he had indeed invoked his Fifth Amendment right to remain silent in connection with the investigation into his alleged fuel use.

In early 2002, a staff member from the auditor's office had been working with my staff to schedule an interview regarding the ongoing gas audit. Then, **investigators that had been hired by the auditor's office indicated that they would be conducting the interview instead, which appeared to have turned into a criminal investigation.** At the outset of the interview, **the investigators offered me my 5<sup>th</sup> Amendment rights, which I chose to exercise by declining to answer questions.**

February 20, 2014 letter (emphasis added).

Christopher D.W. Young, Esq.  
March 12, 2014  
Page 3 of 3

Haw.Rev.Stat. §78-9 states as follows:

If any person subject to sections 78-8 to 78-11, after lawful notice or process [] having appeared refuses to testify or to answer any question regarding (1) the government, property or affairs of the State or of any political subdivision thereof [] on the ground that the person's answer would tend to incriminate the person [] the person's term or tenure of office or employment *shall terminate* and the office or employment shall be vacant[.]

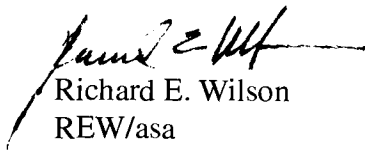
The former Mayor was person subject to sections 78-8 to 78-11. *See*, §78-8(**The persons subject to sections 78-8 to 78-11 are those elected to** or appointed or employed in **the government of** the State or **any county**, or in any political subdivision thereof, or appointed to or employed in any office or employment any part of the compensation of which is paid out of public funds.)(emphasis added).

In my February 20, 2014 letter to County of Kauai Finance Director Steve Hunt I asked that he comply with Haw.Rev.Stat. §78-10 and cease paying former Mayor Carvalho any public funds, *i.e.*, his former salary. Deputy County Attorney Jennifer S. Winn informed me via letter that Mr. Hunt would be taking no action in response to my letter.

In light of the foregoing, we ask that the Attorney General make and file a certificate with the County of Kauai Finance Director that Former Mayor Carvalho "refused to [] to answer [] question[s] regarding (1) the government, property or affairs of the [County] [] on the ground that the person's answer would tend to incriminate the person."<sup>2</sup>  
Haw.Rev.Stat. §78-9.

If you have any question, please let me know.

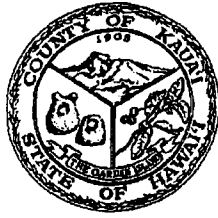
Very truly yours,

  
Richard E. Wilson  
REW/asa  
(enclosures)

cc: Michael G. Sheehan (w/out enclosures)

<sup>2</sup> In light of the Former Mayor's February 20, 2014 letter, this is an undisputable fact.

**Bernard P. Carvalho, Jr.**  
Mayor



**Nadine K. Nakamura**  
Managing Director

**OFFICE OF THE MAYOR**  
**County of Kaua'i, State of Hawai'i**  
4444 Rice Street, Suite 235, Līhu'e, Hawai'i 96766  
TEL (808) 241-4900 FAX (808) 241-6877

February 20, 2014

Mr. Ken Taylor  
Mr. Glenn Mickens

Aloha Glenn and Ken:

First of all, please note that I was, and continue to be, more than willing to respond to questions of the county auditor in a civil investigation. In early 2012, a staff member from the auditor's office had been working with my staff to schedule an interview regarding the ongoing gas audit. Then, investigators that had been hired by the auditor's office indicated that they would be conducting the interview instead, which appeared to have turned into a criminal investigation. At the outset of the interview, the investigators offered me my 5th Amendment rights, which I chose to exercise by declining to answer questions.

The county attorney's office has reviewed all available information on this matter and does not believe that the circumstances of this situation give rise to a legal application of Hawai'i Revised Statute §78-9. In addition, based on information received from my personal attorney, I do not believe that the basic rights afforded to me in the U.S. Constitution can be circumvented by way of state statute.

Hopefully this answers your question.

Respectfully,

A handwritten signature in black ink, appearing to read 'Bernard P. Carvalho, Jr.', is written over a horizontal line.

Bernard P. Carvalho, Jr.  
Mayor

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**COPY**

February 20, 2014

Steve Hunt  
Director of Finance  
County of Kauai  
4444 Rice Street, Ste. 280  
Lihue, Hawaii 96766

Re: *Compliance with Haw.Rev.Stat. §78-10*

Dear Steve:

I am sure you have reviewed my January 30, 2014 letter to Former Mayor Carvalho. However, I am enclosing another copy just to be sure. While it is self-explanatory, the sum and substance is that having asserted his Fifth Amendment right against self-incrimination and refused to answer questions on connection with the formal investigation "regarding a fuel audit" and the Former Mayor's "alleged use of fuel card number 23066" Mr. Carvalho is no longer the Mayor of Kauai.

Accordingly, you are required and demand is hereby made that you comply with Haw.Rev.Stat. §78-10 and cease making any "further payments of public funds to [him.]"

If any person subject to sections 78-8 to 78-11 refuses to appear or refuses to testify under any of the circumstances contemplated in section 78-9, the presiding judge or officer of the court or body before which the default or refusal occurs shall certify the fact thereof to the appointing or employing authority having cognizance of the person as a public officer or public employee and to the comptroller or other disbursing officer who issues warrants or checks to pay the person for the person's services as a public officer or public employee. If the default or refusal occurs before any court or body whose presiding judge or officer may not be required by the legislature to make and file such a certificate, then (1) the presiding judge or officer may make and file the certificate, and (2) the attorney general of the State, upon learning of the default or refusal, shall make and file the certificate if the presiding judge or officer of the court or body has not filed the same. **Upon receiving a certificate,** (A) the appointing or employing authority shall remove or discharge the person from office or employment, and (B) **the comptroller or other disbursing officer shall make no further payments of public funds to the person, except to pay the person the salary, wages, bonus, or other compensation to which**

**the person otherwise would be entitled if the person were voluntarily terminating the person's office or employment on the day the order is served on the comptroller or other disbursing officer.**

Section 78-10 (emphasis added). In this case certification is unnecessary. Not only has the former Mayor's spokeswoman Beth Tokioka admitted that "Carvalho invoked his Fifth Amendment right against self-incrimination during a 2012 interview regarding a county gas card audit investigation", but I have enclosed a copy of the minutes from the investigation. The following excerpt is from page two.

05. After having the opportunity to consider [you rights against self-incrimination and to remain silent], do you wish to make a statement or invoke the use of those rights?

A. Upon the advice of my legal counsel, I chose not to say anything.

Mr. Carvalho asserted his Fifth Amendment right not to answer questions in connection with the investigation. Pursuant to Haw.Rev.Stat. §78-9 ("If any person subject to sections 78-8 to 78-11, after lawful notice or process . . . having appeared refuses to testify or to answer any question regarding (1) the government, property or affairs of the State or of any political subdivision thereof, . . . on the ground that the person's answer would tend to incriminate the person, . . . the person's term or tenure of office or employment *shall terminate* and the office or employment shall be vacant[.]), Mr. Carvalho is no longer the Mayor of Kauai.

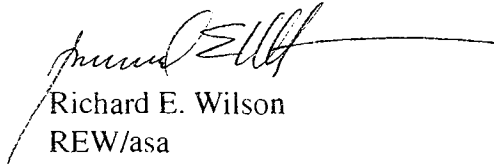
Section 78-10 is clear on its face and you do not have discretion in this matter. As the Director of Finance, you are required to comply with § 78-10 and cease paying former Mayor Carvalho any public funds, *i.e.*, his former salary.

If, however, you refuse to comply with statute, I strongly suggest you request appointment of independent counsel to advise you. The County Attorney's office has a glaring conflict of interest (having advised the former Mayor to invoke his Fifth Amendment right not to answer questions) and cannot provide you with any advice or guidance.

Please give me a call if you have any questions.

Steve Hunt  
February 20, 2014  
Page 3 of 3

Very truly yours,

A handwritten signature in black ink, appearing to read "Richard E. Wilson", with a long horizontal line extending to the right.

Richard E. Wilson

REW/asa

(enclosures)

cc: Michael G. Sheehan  
Kauai County Council

RECORD OF INTERVIEW

INTERVIEWER:

INTERVIEWEE:

Kenneth Chang

Bernard P. Carvalho

DATE OF INTERVIEW: February 1, 2012

RECORDED INTERVIEW OF MAYOR BERNARD P. CARVALHO

MR. CHANG: Today's date, February 1, 2012, interview being conducted at 4444 Rice Street, Lihue, Kauai, 96766, in Mayor Bernard P. Carvalho's conference room. Present in this interview will be Alfred B. Castillo, Jr., County Attorney, Paul Wong of McCorriston, Miller, Mukai, MacKinnon and Kenny Chang, the interviewer.

01. MR. CHANG: For the record, would you state your full and correct name.

A. MR. CARVALHO: Bernard P. Carvalho, Jr.

02. Where are you employed?

A. County of Kauai.

03. And your title?

A. Mayor.

04. Thank you. At this time, I'd like to turn the further portion of this interview to Paul Wong.

MR. WONG: Mayor Carvalho, thank you for taking the time to speak with us this afternoon--- meet with us this afternoon. Mr. Chang and I have been retained by the Auditor's Office of the County of Kauai to further their Kiamalu Consulting & Investigations Agency, LLC investigation regarding a fuel audit that they've been conducting and we had specific questions regarding your alleged use of fuel card number 23066. Before proceeding I want to inform you that you have certain constitutional rights, the first among them is the right against self incrimination that is you have the right to remain silent, you do not have to talk to us, you can refuse to make a statement and go further with this interview. I would also inform you that if you do choose to waive that right anything that you say this afternoon may, can and may be used against you if this matter were to proceed to a court hearing. I understand that Mr. Castillo as County Attorney is here to provide legal counsel should there be any questions. Do you understand the rights that are afforded to you under the constitution?



A. Yes, I do.

05. After having the opportunity to consider those rights do you wish to make a statement or invoke the use of those rights?

A. Upon the advice of my legal counsel, I chose not to say anything.

06. Those are all the questions I have.

MR. CHANG: Okay, interview concluded at 1443 hours on February 1, 2012.

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**COPY**

February 6, 2014

Jennifer S. Winn, Esq.  
Deputy County Attorney  
4444 Rice Street, Ste. 220  
Lihue, Hawaii 96766

Re: *Your letter of February 3, 2014*

Dear Ms. Winn:

Thank you for your letter, or should I say, retread of Mr. Castillo's January 29, 2014 letter sent to Messrs. Taylor and Mickens.

Putting aside that your office has a conflict of interest in representing the former Mayor and Haw.Rev.Stat. §78-10(The removal or discharge of any person from office or employment under sections 78-8 to 78-11 **shall not be reviewable** by any court, officer, or agency of the State or county)(emphasis added),<sup>1</sup> you need to be more specific in your response.

You say that the statute is "arguably not applicable to the situation in question[.]" What do you mean? Perhaps you can be more specific by answering these three simple questions.

Question No. 1 – Do you admit that the former Mayor refused to answer certain questions during the investigation undertaken by the County Auditor regarding the Fuel Audit ("gas card scandal") on the ground that his answer would tend to incriminate him?

Question No. 2 – Do you admit that the County Attorney advised the former Mayor on whether or not to assert his Fifth Amendment right during the investigation undertaken by the County Auditor regarding the Fuel Audit?

Question No. 3 – Do you admit that the questions which the former Mayor refused to answer during the investigation undertaken by the County

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<sup>1</sup> By responding to your letter Mr. Sheehan is not waiving any objection to your and your Office's conflict of interest or your inability to shield the former Mayor from the operation of the material provisions of Chapter 78.

Jennifer S. Winn, Esq.  
February 6, 2014  
Page 2 of 2

Auditor regarding the Fuel Audit concerned “the government, property or affairs of the State or of any political subdivision thereof”?

Your responses (a simple “yes” or “no”) would go a long way to clearing this matter up.

I do appreciate your willingness to “review any documentation that [I] would like to provide.” What a relief; that’s very reassuring. In the same vein I am willing to review your answers to the aforementioned three simple questions. Please be advised that we will eventually obtain a transcript of the proceeding.

Lastly, your office should refrain from meddling in this matter, *e.g.*, directing Mr. Hunt to “take no action at this time.” You have absolutely no authority to direct anyone to do anything.

If you have any questions, you’re always welcome to give me a call.

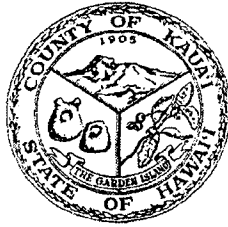
Very truly yours,



Richard E. Wilson  
REW/asa

cc: Michael G. Sheehan

**Bernard P. Carvalho, Jr.**  
Mayor



**Alfred B. Castillo, Jr.**  
County Attorney

**Nadine K. Nakamura**  
Managing Director

**Jennifer S. Winn**  
First Deputy

**OFFICE OF THE COUNTY ATTORNEY**

**County of Kaua'i, State of Hawai'i**

4444 Rice Street, Suite 220, Līhu'e, Hawai'i 96766-1300  
TEL (808) 241-4930 FAX (808) 241-6319

February 3, 2014

**COPY**

Richard E. Wilson, Esq.  
Law Offices of Richard E. Wilson, LLC  
850 Richards St., Suite 600  
Honolulu, Hawai'i 96813

Re: Section 78-9, Hawai'i Revised Statutes

Dear Mr. Wilson:

Your January 30, 2014 letter re: Section 78-9, Hawai'i Revised Statutes has been referred to me by Mayor Carvalho.

We have reviewed available documentation related to this matter. It is our position that Section 78-9, Hawai'i Revised Statutes, is arguably not applicable to the situation in question, and may be unconstitutional. We are prepared to review any documentation that you would like to provide.

Sincerely,

Jennifer S. Winn  
First Deputy County Attorney

850 Richards St., Ste. 600  
Honolulu, Hawaii 96813  
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**COPY**

January 30, 2014

Former<sup>1</sup> Mayor Bernard Carvalho  
County of Kauai  
4444 Rice Street, Ste. 235  
Lihue, Hawaii 96766

Re: *Haw.Rev.Stat. §78-9*

Dear Former Mayor Carvalho:

I correspond on behalf of my client, Michael G. Sheehan, a landowner and resident of Kauai. Mr. Sheehan is very concerned about your actions and asked me to pen this letter.

It is Mr. Sheehan's understanding that in your capacity as Mayor of Kauai, you refused, following lawful notice, to answer questions asked of you regarding the "property and/or affairs" of the County of Kauai on the ground that your answer would tend to incriminate you.<sup>2</sup> More specifically, you refused on the advice of counsel<sup>3</sup> to answer questions in connection with an investigation undertaken by the County Auditor regarding the Fuel Audit ("gas card scandal"). Pursuant to Haw.Rev.Stat. §78-9, you are no longer the Mayor of Kauai.

Haw.Rev.Stat. §78-9 states as follows:

**If any person subject to sections 78-8 to 78-11, after lawful notice or process, wilfully refuses or fails to appear before any court or judge, any legislative committee, or any officer, board, or commission, or having appeared refuses to testify or to answer any question regarding (1) the government, property or affairs of the State or of any political subdivision thereof, or (2) the person's qualifications for public office or employment, or (3) the qualifications of any officer or employee of the State or any political subdivision thereof, on the ground that the person's answer would tend to incriminate the person, or refuses to testify or to answer any such question without right, the person's term or tenure of office or employment shall terminate and the office or**

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<sup>1</sup> While you have yet to formally resign, by operation of law **you are no longer the Mayor of Kauai.**

<sup>2</sup> See, Taylor and Mickens January 13, 2014 letter submitted as testimony for the executive session regarding the Ernie Pasion matter.

<sup>3</sup> At the time you were being represented by County Attorney Al Castillo.

**employment shall be vacant**, and the person shall not be eligible to election or appointment to any office or employment under the State or any political subdivision thereof. To the extent that the State is without authority to require, under the constitution or laws of the United States, compliance by any public officer or public employee herewith, sections 78-8 to 78-11 shall not apply to the officer or employee, but the sections shall apply to the extent that they or any part thereof can lawfully be made applicable.

As Mayor at the time, you were a person subject to sections 78-8 to 78-11. *See*, §78-8(**The persons subject to sections 78-8 to 78-11 are those elected to** or appointed or employed in **the government of** the State or **any county**, or in any political subdivision thereof, or appointed to or employed in any office or employment any part of the compensation of which is paid out of public funds.)(emphasis added).

The procedure for your removal is as follows:

If any person subject to sections 78-8 to 78-11 refuses to appear or refuses to testify under any of the circumstances contemplated in section 78-9, **the presiding judge or officer of the court or body before which the default or refusal occurs shall certify the fact thereof to the appointing or employing authority having cognizance of the person as a public officer or public employee and to the comptroller or other disbursing officer who issues warrants or checks to pay the person for the person's services as a public officer or public employee. If the default or refusal occurs before any court or body whose presiding judge or officer may not be required by the legislature to make and file such a certificate**, then (1) the presiding judge or officer may make and file the certificate,<sup>4</sup> and (2) **the attorney general of the State, upon learning of the default or refusal, shall make and file the certificate if the presiding judge or officer of the court or body has not filed the same**. Upon receiving a certificate, (A) the appointing or employing authority shall remove or discharge the person from office or employment, and (B) the comptroller or other disbursing officer shall make no further payments of public funds to the person, except to pay the person the salary, wages, bonus, or other compensation to which the person otherwise would

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<sup>4</sup> Assuming that the officer is unable or unwilling to make and file a certificate, we will obtain a transcript of the proceeding and forward it to the Attorney General for disposition.

Former Mayor Bernard Carvalho

January 30, 2014

Page 3 of 3

be entitled if the person were voluntarily terminating the person's office or employment on the day the order is served on the comptroller or other disbursing officer.<sup>5</sup>

Section 78-10.

Your tenure as Mayor has ended.

Mr. Sheehan's sole question is how do you intend to proceed? You can acknowledge that you are no longer the Mayor of Kauai pursuant to §78-9, and so advise the Council. That would be Mr. Sheehan's preferred avenue. At least you would be able to control the news release and leave 4444 Rice Street on your own terms. The alternative is for Mr. Sheehan to obtain the relevant transcript, provide it to the Attorney General and then demand your removal in compliance with §78-10. If you choose the latter, you will have no control over the situation and it will be a media circus. Mr. Sheehan would, of course, advise the media that you refused to voluntarily leave which required him to seek your removal. The choice is yours.

If we do not hear from you by the close of business, February 5, 2014, we will proceed accordingly, and without further notice to you.

Very truly yours,



Richard E. Wilson

REW/asa

cc: Michael G. Sheehan

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• You will then be entitled to your final paycheck.