

BAY COUNTY
DEPARTMENT OF CORPORATION COUNSEL



AMBER L. DAVIS-JOHNSON
Corporation Counsel

THOMAS L. HICKNER
County Executive

June 18, 2015

Cynthia Luczak
Bay County Clerk
515 Center Avenue
Bay City, Michigan 48708

Re: June 8, 2015 (received June 11, 2015) Request for Retention of Outside
Legal Counsel

Dear Ms. Luczak:

Thank you for your recent letter regarding your request to retain outside legal counsel. You have indicated in your letter that you wish to retain outside legal counsel for three (3) reasons:

- (1) "To ensure that the Bay County Clerk's office is afforded sufficient full-time staff to carry out its constitutional and statutorily mandated duties;
- (2) [T]o ensure that current and future employees of the Clerk's office are lawfully compensated for hours worked on behalf of the taxpayers of Bay County; and
- (3) [T]o investigate discriminatory behavior perpetrated against [your] official position and the Bay County Clerk's office by the Bay County Board of Commissioners."

You further indicate that you believe that these areas cannot be effectively addressed by Corporation Counsel because the issue may present "potential litigation" in the future and would therefore create a conflict of interest for the Corporation Counsel Department.

As you are aware, Bay County's Civil Counsel Guidelines provide a specific process for the retention of outside legal counsel. Specifically, any request to retain outside counsel must comply with Section 3.B, which reads as follows:

3. Retention of Outside Counsel:

- B. Any request to Corporation Counsel for retention of outside counsel must:
 - (i) Be submitted in writing;
 - (ii) Be reasonable and necessary;

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- (iii) Explain the need to retain outside counsel;
- (iv) Set forth the reasons why the Department cannot or may not handle the matter;
- (v) Indicate that the County Entity has verified that there are sufficient funds available in the portion of the Department's budget allocated to retention of outside legal counsel and, if sufficient funds are not available in the Department's budget, that the County Entity requesting the retention has the funds or will have the funds to pay for the outside legal services and shall identify the account from which the outside legal services will be paid.

The Guidelines further mandate that Corporation Counsel make a determination that the requesting County Entity's need to retain outside counsel is reasonable, necessary and appropriate. (See Sections 3.A.(i) and 3.B.(ii)).

Section 4 of the Civil Counsel Guidelines also addresses the procedure to retain outside counsel in the event that County Entities are adverse parties due to litigation between two separate County Entities. Section 4.B. of the Guidelines further reads as follows:

The Department reserves the right, WITH THE EXCEPTION OF any legal action filed by the district, probate or circuit courts asserting the court's inherent power doctrine, to obtain an independent legal opinion from outside counsel as to whether there exists a non-frivolous, legal basis to proceed with legal action against the defendant County Entity. In the event the independent outside counsel opines that there is no non-frivolous, legal basis to proceed with legal action, Corporation Counsel, in his or her discretion, may decline to retain outside counsel for the plaintiff County Entity or may retain such counsel only upon a reservation of rights pending a legal determination of the County's responsibility to retain outside counsel.

I have reviewed your request and the stated reasons you believe that outside counsel is necessary. After serious consideration, I do not find that the stated reasons or concerns arise to a level that constitutes a conflict of interest such that the Department of Corporation Counsel cannot address your concerns. There is currently no pending litigation between County Entities, and you have in fact identified a need to determine whether your office is receiving sufficient funding in order to ensure that the Clerk's office can carry out its constitutionally and statutorily mandated duties. It is in fact the responsibility of this office to investigate such inquires and to further advise the Board of Commissioners if they are failing to fulfill their legal responsibilities

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in adequately staffing the County Offices. This is an appropriate function of the Department of Corporation Counsel.

In order to make a fully informed decision as to whether the Board of Commissioners has provided a serviceable level of funding to allow your office to fulfill constitutionally or statutorily mandated services, more information is required. To that end, I have requested that the Board approve the retention of an independent firm to study the work processes and the work flow of the Clerk's office to provide an opinion as to whether the office is sufficiently staffed to provide the level of services required. Although such a study was conducted in 2010, significant changes have occurred since that time, including loss of a full time staff member in your office, the availability of computerized purchase of vital records, and changing responsibilities regarding gun boards and concealed pistol permits. The Personnel and Human Services Committee approved my request at its most recent meeting on June 16, 2015 and referred the matter to the Way and Means Committee for approval of the necessary budget adjustment. I have included with this correspondence a copy of my memorandum to the Committee requesting the retention of such an independent firm.

In addition, although I do not agree that a conflict exists in this matter (at least at this juncture), in an effort to avoid any appearance of impropriety, this Department will be retaining the law offices of Gilbert, Smith & Borrello, P.C. to provide an independent opinion as to whether the noted *potential* legal claim/issue has merit sufficient to justify the retention of outside counsel. Attorneys Amy L. Lusk and Andre Borrello from that office will be working on this matter. They will be providing me with a list of additional information that they believe is necessary for them to effectively evaluate the merit of your potential issue in addition to the work/office study that has been requested at the Personnel and Human Services Committee meeting earlier this week.

Ms. Lusk or Mr. Borrello may be contacting you in the near future to confer with you and your staff regarding your current workload and statutorily or constitutionally required duties and where and why you believe current staffing is insufficient. Please remember during these consultations that there exists no attorney client privilege between you and the attorneys at the offices of Gilbert, Smith and Borrello, who have been retained by the Department of Corporation Counsel.

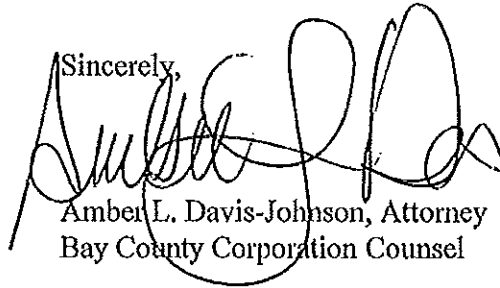
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Thank you for bringing this matter to my attention. I hope that we are able to resolve this issue to everyone's satisfaction such that the residents of Bay County are receiving the best possible services for their tax dollars. Please feel free to contact me with any additional questions.

Sincerely,



Amber L. Davis-Johnson, Attorney
Bay County Corporation Counsel

Enclosure

cc: Tom Hickner, County Executive
Ernie Krygier, Chairman, Bay County Board of Commissioners
Amy Lusk/Andre Borrello
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