

LEGAL MEMORANDUM

DATE: December 3, 2020

TO: Mike Applegarth, Executive Director for the Sandy City Council

FROM: Chase A. Andrizzi, Herriman City Attorney

SUBJECT: City Council Use of Outside Legal Counsel

INTRODUCTION

This legal memorandum primarily addresses whether the Sandy City Council may contract for, or otherwise employ, legal services outside of those provided by the appointed City Attorney. This topic raises a number of issues that this memorandum will attempt to address. However, given the breadth of the potential items for discussion related to the underlying question, some relevant and applicable topics may not be addressed herein. Additionally, there is a lack of underlying and supporting case law on the specific question at hand. The majority of the related case law focuses, instead, on the relationship between the branches of government and their individual roles. As such, the majority of the analysis contained herein will depend upon a legal and practical application of State and City Codes.

BRIEF SUMMARY

There are no constitutional or statutory provisions that per se prohibit the Sandy City Council (the “Council”) from staffing their own outside legal counsel. City code requires that the appointed City Attorney advise and assist the Council. However, the City Attorney is a member of the Mayor’s cabinet and is directly responsible to the Mayor, and not the Council, for the legal affairs of the City. The Council may not give direct orders to the City Attorney or other executive staff (including deputy attorneys). And while the Mayor may not entirely prohibit the Council from seeking information or assistance from administrative staff, he may create administrative procedures which limit or otherwise restrict the Council’s access to the City Attorney.

Additionally, the Sandy City Code (the “City Code”) authorizes the Council to hire staff to assist the Council in carrying out its legislative powers and duty to create policy. Accordingly, the Council may hire outside legal counsel to assist in these efforts. Outside legal counsel is, like all other legislative staff under the Council’s management, subject to the limitations and requirements of applicable budget appropriations and may be hired and dismissed by the Council or its executive director, as the case may be. The use of outside legal counsel, independent of the City Attorney, by the Council promotes the separation of powers and advances the independent and equal authority of the legislative and executive branches of government.

The remainder of this memorandum analyzes, in detail, seven specific issues and topics related to question of whether the Council may contract or otherwise employ outside legal counsel. The specific issues are addressed individually in the subparts below.

ANALYSIS

1. CAN THE SANDY CITY COUNCIL HAVE THEIR OWN LEGAL COUNSEL SEPARATE FROM THE CITY ATTORNEY?

In analyzing this question, it is useful to review the individual powers of the Council and Mayor as well as the duties and functions of the City Attorney. This subpart will also review whether the Council may directly enter into contracts.

A. Powers and role of the Council.

Sandy City (the “City”) operates under a Council-Mayor form of government as described in UTAH CODE ANN. § 10-3b-201 *et seq.*¹ As such, the City’s municipal powers under this form of government are broken into two branches: a seven-member council ; and the Mayor along with his administrative departments.² These two distinct branches of government are intended to be separate, independent, and equal.³

The Council wields a number of powers. These powers, along with some other legislative duties, are established in both State and City Codes.⁴ The primary power wielded by the Council, however, is its legislative power which is the power to create and enact policy.⁵ The power to execute or administer policy is left to the Mayor and his administration.⁶

In exercising these powers, the Council has been directly authorized, subject only to the limitations and requirements of applicable budget appropriations, to “appoint and remove such assistants and support staff as may be necessary to perform such functions and duties as may be assigned to them by the City Council.”⁷ And while the City Code does not expressly describe the management of such support staff, the City Code does refer to them as “legislative branch employees,” thereby suggesting that they are under the management and control of the Council or its executive director, as the case may be.⁸

For purposes of this memorandum, it is also appropriate to look at a few specific powers of the Council that fall within the scope of its broad legislative powers. The Council, for instance, is expressly permitted to adopt, by ordinance, a municipal administrative code which “divid[es] the municipality’s administrative service into departments, divisions, and bureaus and defin[es] the functions and duties of each department, division, and bureau.”⁹ The Council may also, by ordinance, “creat[e], consolidate[e], or abolish[] departments, divisions, and bureaus.”¹⁰ And while the Council has no immediate management control over the Mayor’s staff,¹¹ the Council may “make suggestions or recommendations” to the administration.¹²

B. Powers and Role of the Mayor and Administration.

The Mayor controls the executive branch of the City’s municipal government and is therefore responsible for administering the policies created by the Council. This administration of policy involves the application of law to particular individuals or groups based on individual facts and circumstances.¹³ The Mayor is required to appoint, based upon the advice and consent of the Council, a City Attorney to assist him in executing and administering the policies of the Council.¹⁴ The Mayor may also, subject to budget constraints as established by the Council, “create any other administrative office that the mayor considers necessary for good government of the municipality.”¹⁵ While the Mayor may not expressly prohibit his staff, including the City Attorney, from providing information or assistance to the Council, he may implement administrative procedures that limit the Council’s access to such administrative staff.¹⁶

¹ See Sandy City Code § 4-1-3.

² See Utah Code Ann. § 10-3b-201.

³ See *id.*

⁴ See Utah Code Ann. § 10-3b-203; see also Sandy City Code 3-1-2.

⁵ See *Martindale v. Anderson*, 581 P.2d 1022, 1027 (stating that “legislative powers are policy making power, while executive powers are policy execution powers).

⁶ See *id.*

⁷ Sandy City Code § 3-1-6.

⁸ Sandy City Code § 3-1-6(b).

⁹ Utah Code Ann. § 10-3b-203(1)(b)(i). The City’s Administrative Code is codified in Title 4 of the Sandy City Code.

¹⁰ Utah Code Ann. § 10-3b-203(1)(b)(ii)(A).

¹¹ See Utah Code Ann. § 10-3b-203(1)(c)(iii).

¹² Utah Code Ann. § 10-3b-203(1)(b)(iii).

¹³ See *Baker v. Carlson*, 2018 UT 59, ¶ 14, 437 P.3d 333, 336 (citing *Carter v. Lehi City*, 2012 UT 2, 269 P.3d 141).

¹⁴ See Utah Code Ann. § 10-3b-202(1)(c)(iii).

¹⁵ Utah Code Ann. § 10-3b-202(1)(d)(i)(B)(I).

¹⁶ See Sandy City Code § 4-2-2(b).

The Mayor is also authorized to “exercise control of and supervise each executive or administrative department, division, or office of the [City]”¹⁷ while also “regulat[ing] and prescrib[ing] the powers and duties of each other executive or administrative officer or employee of the [City].”¹⁸ In addition to the powers and duties set forth in State Code, the Mayor is authorized under the City Code to “fire, discharge, remove, suspend or otherwise appropriately discipline officers, department heads, administrative assistants...and other persons in the executive branch of City government....”¹⁹

C. Duties and Functions of the City Attorney.

The Sandy City Attorney (the “City Attorney”) is appointed by the Mayor, subject to the advice and consent of the Council.²⁰ The City Attorney is “the chief legal officer of the City” and is “responsible to the Mayor and City Administrator for the proper administration of the legal affairs of the City.”²¹ In addition, the City Attorney is to “attend all City Council meetings” and has a duty to “furnish legal advice, counsel and assistance to the Mayor, City Council and all other City officers, boards, commissions and agencies, in relation to their duties and the business of the City.”²² Notwithstanding the City Attorney’s duty to furnish such legal advice, “the City Attorney shall not be responsible in any way for counsel who has not been specifically retained by the City Attorney; is not paid from funds controlled by the City Attorney; or is not under the actual direction of the City Attorney’s Office.”²³

D. Contract Power of the City Council.

State Code does not expressly authorize or prohibit the Council in a council-mayor form of government from directly entering into contracts. City Code establishes that the Council *may* enter into agreements for the purposes of staffing legislative employees.²⁴ In *Carter v. Lehi City* (2012 UT 2, 269 P.3d 141), however, the Utah Supreme Court broadly held that a “government decision[] to enter into a contract with a specific entity [is] not legislative.”²⁵ The apparent conflict between the City Code regarding the Council’s authority to enter into employment-related contracts and the holding in *Carter* is easily resolved.

Carter broadly reviewed the powers of the legislative and executive branches of municipal government in the context of the “people’s power to legislate” by initiative.²⁶ In addressing the initiative question, the Court only analyzed the legislative and executive powers in order to determine “whether [an] initiative would be a proper exercise of legislative power if enacted by the legislature.”²⁷ In fact, the Court in *Carter* acknowledged that it is difficult to “delineat[e] the legislative power with clear, bright lines.”²⁸ Accordingly, the Court’s holding described above should not be taken as absolute and a legislative contract that is executed for the sole purpose of assisting the Council in carrying out its legislative authority is likely proper.²⁹

Turning now to the question at hand: a different, more narrow inquiry may be helpful. Specifically, can outside legal counsel, independent of the City Attorney, assist the Council in exercising its legislative powers? If so, can the Council contract with the outside legal counsel for those services?

In light of the foregoing discussion, and within the parameters set forth within the State and City Codes, the answer leans strongly towards “yes.” Council’s hiring of outside legal counsel is proper so long as such legal counsel is limited to the

¹⁷ Utah Code Ann. § 10-3b-202(1)(d)(v).

¹⁸ Utah Code Ann. § 10-3b-202(1)(d)(vi).

¹⁹ Sandy City Code § 4-2-2.

²⁰ See Sandy City Code 4-4-3 (establishing the City Attorney as the head of the Legal Department); see also Sandy City Code 4-4-5 (b)(1) (establishing the City Attorney as the chief legal officer of the City and responsible to the Mayor and City Administrator for the property administration of the legal affairs of the City).

²¹ Sandy City Code § 4-4-5(b)(1).

²² Sandy City Code § 4-4-5(b)(1)(b)-(c).

²³ Sandy City Code § 4-4-5(b)(1)(d).

²⁴ See Sandy City Code § 3-1-6(b).

²⁵ *Carter v. Lehi*, 2012 UT 2, ¶ 67, 269 P.3d 141, 158.

²⁶ *Carter*, 2012 UT 2, ¶ 2, 269 P.3d at 145.

²⁷ *Carter*, 2012 UT 2, ¶ 20, 269 P.3d at 148.

²⁸ *Carter*, 2012 UT 2, ¶ 35, 269 P.3d at 151.

²⁹ *Carter*, 2012 UT 2, ¶ 38, 269 P.3d at 152 (“simply stated, legislative powers are policy making powers....”)

implementing of public policy and assisting the Council in carrying out its other legislative authority. Council, who is authorized by City Code to enter into employment-related agreements, is also likely authorized to enter into a professional services agreement for outside legal counsel for the same or similar purposes (carrying out legislative authority) as other legislative staff and as permitted by City Code.

2. WHAT ARE THE LEGAL LIMITATIONS, IF ANY, ON THE SERVICES OUTSIDE COUNSEL CAN RENDER TO THE CITY COUNCIL?

There are no statutory or other legal limitations on outside legal services rendered on behalf of the Council other than those described above. As stated previously, the primary power wielded by the Council is its legislative power which is the power to create and enact policy.³⁰ Expanding upon the prior discussion, outside legal counsel would be limited, just like other legislative support staff, to the carrying out of the Council's legislative authority and primary function of creating policy. With that limitation in mind, the Council could easily and clearly define the scope of outside legal counsel's services in a professional services agreement and thereby allow outside legal counsel to operate within the capacity of that limitation.

3. WHAT IS THE LEGAL RELATIONSHIP BETWEEN OUTSIDE COUNSEL AND THE BODY OF THE CITY COUNCIL? WHO IS THE CLIENT AND WHAT IS THE RESPONSIBILITY FOR OUTSIDE COUNSEL TO COMMUNICATE WORK PRODUCT WITH INDIVIDUAL COUNCIL MEMBERS VERSUS THE BODY? WHAT IS THE PROCESS FOR REQUESTING SERVICES FROM OUTSIDE COUNSEL?

A. Relationship between Outside Legal Counsel and the Council as a Whole

The Council is clearly authorized to hire support staff to help the Council carry out its legislative authority.³¹ Any outside legal counsel hired by the Council would likely fit within the category of "support staff" as that term is used in City Code.³² City Code does not explicitly prohibit the Council from having support staff on a contract basis. Accordingly, outside legal counsel, even on a contract basis, would likely be subject to the rules and regulations established by the Council for the management of its support staff. Additionally, however, the Council could (and likely should) enter into some form of a professional services agreement with the independent legal counsel further defining the nature of the relationship between the parties.

B. Who is the Outside Counsel's Client and what is the responsibility for outside counsel to communicate work product with individual Council Members versus the body?

In addition to the scope of the relationship between the client and the legal counsel, a proper professional services agreement would define who the outside legal counsel's client will be. There are no statutory or other legal requirements dictating who from the body of the Council may be represented by outside legal counsel. For purposes of discussion, however, it is advisable that the outside legal counsel represent the body of the Council as a whole, and not its individual members. City Code supports this position in that it requires all other legislative support staff who field questions from individual Council Members to make such information available to the full body of the Council.³³ The specifics of this, however, could be spelled out in a professional services agreement.

In terms of the outside legal counsel's obligation to disclose an individual Council Member's information or request to the body of the Council: the outside legal counsel is bound by a professional duty to maintain the confidentiality of his/her client's information.³⁴ As such, the issue of whether that confidentiality extends to individual Council Members or simply the Council as a whole will depend upon the nature of the agreement with the outside legal counsel with regard to the identity of

³⁰ See *Martindale v. Anderson*, 581 P.2d 1022, 1027 (stating that "legislative powers are policy making power, while executive powers are policy execution powers).

³¹ See Sandy City Code § 3-1-6.

³² *Id.*

³³ See Sandy City Code § 4-2-2(b) ("A Council Member receiving work product from staff shall promptly share such information or work product with all Council Members").

³⁴ See Utah R. Professional Conduct 1.6.

the “client.” If the client is the Council as a whole (which is the most likely scenario and advisable as set forth above), the outside legal counsel will have a duty to supply the full Council with any work product generated for or on behalf of individual Council Members.

C. What is the process for requesting services from outside counsel?

As with the other details related to the relationship between the Council and outside legal counsel, there are no statutory or other legal requirements regarding how those outside legal services may be solicited by the client. Those details may be spelled out in the professional services agreement between the Council and the outside legal counsel. In an attempt to organize and streamline the Council’s request(s) for services from the outside legal counsel, however, it may be advisable to funnel requests for services through the Council’s executive director. Alternatively, the Council as a whole may decide that it would be appropriate for individual Council Members to approach the outside legal counsel independent of the rest of the body. In this case, the Council should adopt clear rules and procedures about the manner, if any, in which those interactions will be communicated to the rest of the Council. *See* Section 3.B. above.

4. CAN THE COUNCIL IMPOSE ITS OWN RESTRAINTS ON THE USE OF OUTSIDE COUNSEL?

As outlined above, the use of outside legal counsel by the Council is only permissible if such outside legal services are rendered in fulfillment of the Council’s legislative authority. Within that scope, the Council may wholly enact its own procedures and restraints upon the use of the outside legal counsel independent of any oversight by the Mayor’s office.³⁵ It would be appropriate to define these restraints in a professional services agreement as well as in internal procedures which govern the Council’s legislative support staff and personnel.

5. WHAT HAPPENS IF THERE IS A SPLIT IN THE COUNCIL AND THE MAJORITY IS OPTING TO TAKE THE ADVICE OF OUTSIDE COUNSEL? CAN THE MINORITY RETAIN THEIR OWN LEGAL COUNSEL?

In analyzing this question, it is important to identify the nature of the “split” in Council. It is not uncommon, for instance, that a political body, or some of its members, create policy that goes against the advice of its legal counsel. This form of a “split” does not necessarily create a conflict between the Council and the legal counsel. There is no challenge to the legal counsel’s character, qualifications, or even the accuracy of the legal advice presented. Instead, the Council may simply be “split” upon the application of the legal advice to the policy at issue. This form of a “split” should be of minor concern for purposes of this memorandum.

Conversely, a “split” in Council which is based upon the underlying legal advice provided by the outside legal counsel presents a more significant issue. Here, individual Council Members may feel that the outside legal counsel is, among other things, dishonest, incompetent, or providing the Council with inaccurate or incomplete advice. If only a minority of the Council feels this way, however, they will not be able to hire alternative outside legal counsel without a majority vote of the Council.

To remedy this, the Council could consider an amendment to the existing Council rules of order and procedure³⁶ to allow for a minority, or some other number, of Council to hire their own legal counsel to be funded by the Council. Such a rule would need to be carefully crafted so as to clearly define the circumstances and scope of the additional outside legal counsel’s services.³⁷

³⁵ *See* Sandy City Code § 3-1-6 regarding the role and management of “legislative branch employees.”

³⁶ *See* Utah Code Ann. § 10-3-606 regarding rules of order and procedure.

³⁷ While the Council may consider such a rule, it is not advisable for reasons which go beyond the scope of this memorandum. To list one, however: Elected officials are not individually entitled to the legal advisors of their choosing. Municipal budgets simply do not allow for multiple (or up to seven in this case) independent lawyers to serve each of the seven members of a City Council. Even if the budget could provide for such services, would the potential of receiving seven different legal positions better assist the Council as a whole in creating effective policy?

6. WHEN IS THE ATTORNEY-CLIENT PRIVILEGE WAIVED BETWEEN OUTSIDE COUNSEL AND THE CITY COUNCIL? WHAT ARE THE LEGAL CONSEQUENCES IF AN INDIVIDUAL CITY COUNCIL MEMBER INAPPROPRIATELY DISCLOSES PRIVILEGED INFORMATION?

Lawyers are bound by a professional duty to maintain, in strict confidence, all information related to the representation of their clients.³⁸ Additionally, the Utah Rules of Evidence establish that “a client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications if the communications were made for the purpose or in the course of obtaining or facilitating the rendering of legal services to the client....”³⁹

When a legal privilege is waived, whether by the Council as a whole or an individual Council Member, the information that was previously confidential is subject to disclosure and dissemination. There are a few ways that the Council (or even an individual Council Member) may waive privilege. The most extreme is through the crime/fraud exception which states that if a client uses legal counsel’s advice to commit a crime or fraud, the privilege is waived. More commonly, however, a client waives privilege if the client discloses privileged communications to a third party. A waiver may also occur “as to the communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.”⁴⁰

Because the Council is required to conduct the people’s business openly,⁴¹ it is likely that the majority of the legal advice received by the Council will be given in open meetings, on the record, and therefore will not be privileged.⁴² Moreover, depending upon the nature of the communication, email or text messages between the Council (or individual Council Members) and the outside legal counsel may be subject to disclosure under the Government Records Access and Management Act (GRAMA). In that light, there are few communications that are truly “confidential” and therefore subject to the protections of privilege as set forth in Rule 504 of the Utah Rules of Evidence.

In terms of the outside legal counsel’s requirement to maintain in confidence an individual Council Member’s communications with the outside legal counsel: the outside legal counsel is bound by a professional duty to maintain the confidentiality of his/her *client’s* information.⁴³ As such, the issue of whether that confidentiality (and privilege) extends to individual Council Members or simply the Council as a whole will depend upon the nature of the agreement with the outside legal counsel with regard to the identity of the “client.” If the client is the Council as a whole (which is the most likely scenario and advisable as set forth above), the outside legal counsel likely will not be able to maintain the confidentiality of discrete conversations with individual Council Members and will likely otherwise have a duty to supply the full Council with the details of any such communications with individual Council Members.⁴⁴

It should be noted, however, that the creation and waiver of privilege is a question of law that is very fact-specific. Accordingly, it is difficult to provide specific examples of when privilege is waived, particularly in a scenario like the one at issue here where the Council as a whole, or the individual Council members, may actually be the client. For purposes of this memorandum, however, it is sufficient to maintain that privilege is waived if the Council, or any individual Council Member, discloses to a third party any confidential communication between the Council and the outside legal counsel.

7. IF THE COUNCIL HAS INDEPENDENT OUTSIDE LEGAL COUNSEL, DOES DOING SO IN ANY WAY DIMINISH THE LEGAL OR ETHICAL OBLIGATIONS OF THE APPOINTED CITY ATTORNEY?

The City Attorney is “the chief legal officer of the City” and is “responsible to the Mayor and City Administrator for the proper administration of the legal affairs of the City.”⁴⁵ In addition, the City Attorney attends the Council’s meetings and

³⁸ See Utah R. Professional Conduct 1.6(a).

³⁹ Utah R. Evidence 504(b).

⁴⁰ Utah R. Evidence 504(d)(5)

⁴¹ See Utah Code Ann. § 52-4-102.

⁴² Communications made in the presence of third parties are not confidential or subject to privilege.

⁴³ See Utah R. Professional Conduct 1.6.

⁴⁴ See Sandy City Code 4-2-2(b) (stating that work product from staff should be shared with all Council Members).

⁴⁵ Sandy City Code § 4-4-5(b)(1).

has an obligation to provide the Council with advice and assistance.⁴⁶ In this sense, it could be argued that the City Attorney represents two distinct clients within the City: (1) the Mayor; and (2) the Council. Notwithstanding the two potential clients, City Code dictates that the City Attorney answers only to the Mayor⁴⁷ and that the Council may not give the City Attorney any form of an order.⁴⁸

It is entirely possible that City Attorney – who is obligated to provide two separate, independent, but equal branches of the City’s government with advice and assistance – may be faced with a conflict of interest. A conflict of interest exists if “(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client...”⁴⁹

The use of outside legal counsel does not diminish the obligations of the City Attorney. If anything, outside legal counsel provides an opportunity for the City Attorney to avoid actual and potential conflicts of interest between the Mayor and the Council. Moreover, the City Attorney, independent of any advice rendered by outside legal counsel, is still obligated⁵⁰ to provide the Council with “legal advice, counsel and assistance.”⁵¹ It is entirely within the discretion of each Council Member to accept or disregard the legal advice they receive from either the City Attorney or outside legal counsel. In fact, it is entirely possible that the Council heed the City Attorney’s advice on one issue and the outside legal counsel’s advice on another. In this light, the Council’s use of outside legal counsel does not diminish the City Attorney’s statutory or ethical obligations to the Council.

Notwithstanding the City Attorney’s duty to furnish legal advice to the Council, “the City Attorney shall not be responsible in any way for counsel who has not been specifically retained by the City Attorney; is not paid from funds controlled by the City Attorney; or is not under the actual direction of the City Attorney’s Office.”⁵² Accordingly, the City Attorney may not direct or otherwise control the advice given by the outside legal counsel to the Council. Contrariwise, the Council may not give orders to the City Attorney⁵³ and, as such, the City Attorney’s advice to the Council may be unsullied by any interference or direction from the Council.

CONCLUSION

The Council may utilize outside legal counsel to assist the Council in exercising its legislative authority. The Council is authorized to directly enter into contracts with outside legal counsel for the rendering of such services. The Council should establish the scope of such services by contract or via policies and procedures applicable to its legislative staff and personnel. Outside legal counsel serving in this capacity reports directly to the Council and may not be controlled by the City Attorney. The City Attorney, however, is still obligated to provide the Council with legal advice and counsel on all legal affairs related to the Council’s duties. Finally, the Council should treat outside legal counsel as the lawyer for the entire body of the Council. Accordingly, it would not be inappropriate for individual Council Members to approach the outside legal counsel for advice so long as the individual members understood that such advice is likely not confidential and may be divulged to the Council as a whole.

⁴⁶ See Sandy City Code § 4-4-5(b)(1)(b)-(c).

⁴⁷ See Sandy City Code § 4-4-5(b)(1).

⁴⁸ See Utah Code Ann. § 10-3b-203(1)(c)(iii).

⁴⁹ Utah R. Professional Conduct Rule 1.7.

⁵⁰ The *obligation* to “advise, counsel and assist” the City Council is apparent in the language of Sandy City Code § 4-4-5(b)(1) which states that the City Attorney “*shall* have the following functions and duties....” (emphasis added).

⁵¹ Sandy City Code § 4-4-5(b)(1)(c).

⁵² Sandy City Code § 4-4-5(b)(1)(d).

⁵³ See Utah Code Ann. § 10-3b-203(1)(c)(iii).