

Response to Questions on the FY 2011 Budget

Request By: Supervisor Cook

Question: How much does the County spend each year on outside legal counsel, divided by type of service (collection, legal advice, litigation, etc.)?

Response: Please see the attached response from County Attorney David P. Bobzien.




County of Fairfax, Virginia

MEMORANDUM

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DATE: November 17, 2009

TO: Susan Datta, Director
Department of Management and Budget

FROM: David P. Bobzien, County Attorney
Office of the County Attorney 

SUBJECT: Response to Question From Supervisor Cook Regarding Outside Counsel

Question:

How much does the County spend each year on outside legal counsel, divided by type of service (collection, legal advice, litigation, etc.)?

Response:

Since my appointment as County Attorney in 1992, it has been my policy to staff this Office with the expertise that is needed to serve the Board of Supervisors (Board) and County agencies; however, there are at times certain circumstances that either require outside counsel or where it is in the best interest of the County to engage counsel with specialized legal expertise.

In reviewing documentation for the past four years, this Office has hired outside counsel in only the following circumstances: (1) when there was a conflict or (2) when there was a need for a particularized expertise in an area of law.

I. Conflicts

A. Conflict Between County Parties

The Personnel Section of this Office, among other things, defends the County and its employees against all claims and lawsuits arising from personal injury, civil rights violations, and discrimination claims. When a personal injury claim is made against a County employee acting within the scope of his or her employment, that employee's conduct may not rise to negligence, but such conduct may nonetheless violate a County policy or agency regulation such as a General Order. When the

employee is disciplined for such violations, this Office represents the County and/or its agencies' managers by providing legal advice regarding such discipline, including representing County management in any grievance or other proceeding arising out of the discipline. Accordingly, when this Office represents interests that are adverse to that employee, we must hire outside counsel to represent the employee in any subsequent civil action against that employee. Similarly, in civil rights claims, often the County and several individual managers are named as defendants, and in some of those cases, there are conflicts between the representation of all defendants by this Office due to the facts of the case. One recent example of this type of circumstance is in *Culosi v. Fairfax County, et al.* In this lawsuit, the Culosi estate filed suit against Fairfax County, Chief David M. Rohrer, Lieutenant James Kellam, and Officer Deval Bullock. Because one of our attorneys represented the Police Department supervisory staff in the disciplinary proceedings against Officer Bullock, this Office could not represent him in the lawsuit.

FY2006	FY2007	FY2008	FY2009	FY2010
\$31,378	\$47,019	\$44,909	\$52,741	\$28,167

B. Assistant County Attorney Sued Or Becomes The Subject Of A Lawsuit

This Office has on occasion hired outside counsel when one of our attorneys has been sued or when the actions and legal advice of an attorney is the subject of the lawsuit and the attorney may become a witness. This Office hired outside counsel to represent our attorney in a case where he filed a zoning enforcement lawsuit and the defendant filed a counterclaim against that attorney. This Office could not represent the attorney, and therefore outside counsel was hired. In the case of *Dunn, McCormack & MacPherson v. Board of Supervisors*, attorney Brian McCormack filed a *Petition for Writ of Mandamus To Enforce FOIA*, where he was seeking documents regarding the termination of his contract with the Fairfax County Housing and Redevelopment Authority (RHA). Specifically, McCormack was seeking documents regarding any legal advice one of our attorneys gave to the RHA regarding the termination of the contract. Due to the nature of the allegations, this matter was referred to outside counsel. More recently, McCormack filed a lawsuit against former Chairman Gerald E. Connolly alleging that Connolly had, by actions based on personal spite, ill will, and malice toward McCormack, caused the termination of the RHA's contract with McCormack. Again, due to the potential conflict, this matter was referred to outside counsel.

FY2006	FY2007	FY2008	FY2009
\$10,637	\$4,423	\$0	\$3,858

C. Conflicts Between The Board And The Zoning Administrator

On one occasion, this Office had to obtain outside counsel because a former Zoning Administrator asked this Office for legal advice, which was given but not followed, and subsequently the Board voted to challenge that Zoning Administrator's decision. This was a rare and very costly event that is not likely to be repeated. In another unusual circumstance, a Planning Commissioner filed a lawsuit against six Fairfax County police officers. Because this Office advised the police in their investigation and one member of the Board was a potential witness in the case, this Office could not represent the defendant police officers, so outside counsel was necessary.

FY2006	FY2007	FY2008	FY2009	FY2010
\$20,636	\$73,772	\$39,770	\$8,859	\$10,725.92

II. Outside Expertise

A. Local Counsel

On occasion, this Office has retained outside counsel in other jurisdictions because there are no attorneys in this Office admitted to practice law in that jurisdiction. This Office has retained outside counsel on three such occasions. Outside counsel was hired in two bankruptcy proceedings in the Southern District of New York to collect back taxes owed to the County. In *Phillip Moore v. Fairfax County, et al.*, an excessive force case was filed in the District Court of Maryland. Local Maryland counsel was needed to file a motion to change venue to the Eastern District of Virginia. In *Alliance for Community Media v. F.C.C.*, the Board authorized the filing of a petition seeking judicial review of a Federal Communications Commission order regarding cable franchising by local franchising authorities. The proceedings for this matter were filed in the United States Court of Appeals for the Sixth Circuit. Because there are no attorneys in this Office admitted to practice law in the Sixth Circuit, we had to retain local counsel.

FY2006	FY2007	FY2008	FY2009
\$12,828	\$1,262.50	\$16,643	\$4,950

B. Specialized Expertise

As stated above, occasionally a circumstance occurs for which a particularized expertise is needed in an area of law not routinely practiced by any of the attorneys in our Office. For example, this Office needed to defend different County agencies regarding two separate fatalities that occurred, causing the state's Occupational Health and Safety Office to allege multiple OSHA violations against those County agencies. This Office determined that in order to provide the best legal representation and defense of these violations, an attorney with expertise in OSHA violations and its regulations was needed. Therefore, this Office hired expert

outside counsel to defend these cases. These two fatality cases and the violations against the County associated therewith are, thankfully, not routine occurrences; therefore, the need for an attorney with OSHA expertise is not likely to recur with sufficient frequency to have an attorney on staff. It seems prudent to hire outside counsel in these types of isolated cases.

This Office will also from time to time hire outside counsel to provide advice on non-routine matters that arise under the Internal Revenue Code. While there are attorneys on staff who can provide legal advice on some areas of the IRS Code, when there are matters requiring more expertise than is available on staff, this Office hires outside counsel to provide more complex tax advice. For example, this Office retained outside counsel to review all three County retirement plans regarding compliance with the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) regulations to determine what, if any, changes may be required to maintain the qualified plan status of the County's retirement plans. This Office also retained outside counsel to address a number of legal issues arising under federal income tax law concerning the application of 26 U.S.C. § 415 to the service retirement allowances paid under the County's three retirement systems.

FY2006	FY2007	FY2008	FY2009	FY2010
\$1,927	\$14,967	\$8,983	\$14,234	\$16,094

Outside counsel is also retained by certain County agencies and some separate legal entities, and such counsel is often paid out of a particular enterprise fund or as part of the costs of the transactions. For example, the County hires bond counsel when needed in issuing bonds; however, such counsel is paid out of the proceeds of those bonds. When the acquisition of land is necessary for the County's sewer system, outside counsel may be hired using sewer funds to conduct the eminent domain proceedings. The RHA directly hires outside counsel in a number of instances including bond transactions, federal tax credits and other matters, representation of other legal entities, such as partnerships and corporations created by the RHA, risk-sharing financing with the federal Department of Housing and Urban Development, and tenant evictions. The County's Department of Management and Budget also directly hires outside counsel to prepare transactional documents associated with various public-private partnerships under the Public-Private Educational Facilities and Infrastructure Act, and the Fairfax County Police Officers' Retirement System directly retains outside counsel for general legal advice; however, because these agencies or entities directly retain such counsel, this Office is usually not involved and therefore is not aware of the associated costs.

It should also be noted that the Board of Supervisors has on a few occasions authorized the reimbursement of outside counsel for employees who have been criminally charged or investigated for an act committed in the discharge of official duties, pursuant to Virginia Code Section § 15.2-1521 (2008), which states:

If any officer or employee of any locality is investigated, arrested or indicted or otherwise prosecuted on any criminal charge arising out of any act committed in the discharge of his official duties, and no charges are brought, or the charge is subsequently dismissed, or upon trial he is found not guilty, the governing body of the locality may reimburse the officer or employee for reasonable legal fees and expenses incurred by him in defense of the investigation or charge, the reimbursement to be paid from the treasury of the locality.

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