

# A Performance Audit of the San Juan County Commission

Office of the Legislative  
Auditor General

Report to the **UTAH LEGISLATURE**





**LEGISLATIVE  
AUDITOR GENERAL**

## **Audit Subcommittee**

President J. Stuart Adams, Co-Chair  
President of the Senate

Senate Evan J. Vickers  
Senate Majority Leader

Senator Luz Escamilla  
Senate Minority Leader

Speaker Brad R. Wilson, Co-Chair  
Speaker of the House

Representative Mike Schultz  
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## **Audit Subcommittee of the Legislative Management Committee**

President J. Stuart Adams, Co-Chair | Speaker Brad R. Wilson, Co-Chair

Senator Luz Escamilla | Senator Evan J. Vickers

Representative Angela Romero | Representative Mike Schultz

April 12, 2023

TO: THE UTAH STATE LEGISLATURE

Transmitted herewith is our report:

“A Performance Audit of the San Juan County Commission” Report #2023-02.

An audit summary is found at the front of the report. The scope and objectives of the audit are included in the audit summary. In addition, each chapter has a corresponding chapter summary found at its beginning.

This audit was requested by the Audit Subcommittee.

We will be happy to meet with appropriate legislative committees, individual legislators, and other state officials to discuss any item contained in the report in order to facilitate the implementation of the recommendations.

Sincerely,

Kade R. Minchey, CIA, CFE

Auditor General

[kminchey@le.utah.gov](mailto:kminchey@le.utah.gov)



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### BACKGROUND

The release of emails from a San Juan County commissioner in the fall of 2022 created concern that the Open and Public Meetings Act may have been violated by two county commissioners. These commissioners elicited the services of a private attorney to help them write county resolutions and receive legal advice pertaining to county business.

#### **FINDING 1.1**

Unconventional Observance of Open Public Meetings Act Increased the Potential Risk of Violating Statute.

#### **RECOMMENDATION 1.1**

The San Juan County Commission should pass an ordinance that details policies and procedures governing open meetings and goes beyond state statute to expressly forbid a quorum of commissioners to meet and discuss any commission business without first making a public notice of the meeting.

#### **FINDING 2.1**

The Use of Private Counsel Instead of the County Attorney Decreased Transparency of the Commission's Work.

#### **RECOMMENDATION 2.1**

The San Juan County Commission should pass an ordinance requiring commissioners to complete a yearly individual disclosure form that, lists their potential conflicts of interest and acknowledges the completion of annual training on the Open and Public Meetings Act, the County Officers and Employees Disclosure Act, the Utah Public Officers' and Employees' Ethics Act, and the Government Records Access and Management Act.

#### **RECOMMENDATION 2.2**

The San Juan County Commission should pass an ordinance that requires the disclosure of potential conflicts of interests at each commission meeting that is open to the public.

#### **RECOMMENDATION 2.3**

The San Juan County Commission should pass an ordinance that delineates the ethical behavior expected of county employees by expanding on state statute and requiring the disclosure of any pro bono legal services in relation to commission and county business.



### CONCLUSION

Based on our combined experience of auditing a wide variety of public entities, the actions by the two county commissioners are unique in their disregard for transparency in the handling of some of their business. We believe the issues we identified warrant additional measures by the county in the future to demonstrate transparency to the citizens of the county, to restore trust, to protect county officers and to ensure that commission business is open and sufficiently transparent.





# Some Actions by Former San Juan County Commissioners Are Questionable

## 1.1 Unconventional Observance of the Open and Public Meetings Act Increased Potential Risk of Violating Statute

Our review of over 150 emails, along with interviews of county professionals and other knowledgeable parties, raised concerns about two of the three county commissioners meeting privately to discuss county business. These actions raised the risk of violating the Open and Public Meetings Act (OPMA), the intent of which is to conduct deliberations openly. While legal analysis could not definitely determine that any laws were broken, the commissioners' unconventional actions put them in a potentially compromising position.



**While legal analysis could not definitely determine that any laws were broken, the commissioners' unconventional actions nevertheless put them in a potentially compromising position.**

Based on our combined experience of auditing a wide variety of public entities, the actions by the two former San Juan County Commissioners are unique in their disregard for transparency to the residents of the county. While we could not document any definitive violations of law, we believe the issues we identified warrant additional measures by the county to prevent similar actions in the future, to restore public trust and to ensure transparency. Such measures should include a new policy detailing extra safeguards beyond state law, to keep county business open and transparent.

### Frequent Private Commissioner Meetings to Discuss County Agendas May Not Have Been in Keeping with the Intent of OPMA

OPMA generally requires that whenever a quorum of commission members meets to discuss government business, a public notice must be made if the meeting fits the statutory definition of an open meeting. In San Juan County, there are only three commissioners, so two commissioners make a quorum--and thus a plurality of potential votes. One of these commissioners released his emails in September 2022 in response to a request based on the Government Records Access and Management Act (GRAMA). The emails reveal that several private meetings were held between two San Juan County commissioners and their private counsel to discuss future commission agendas and positions on agenda items.



Early in their new term, these two commissioners received the following email from their private counsel, recommending they meet regularly to discuss commission agenda items.

**Private counsel's email to commissioners:  
March 18, 2019**

At the meeting last Friday, we agreed that it will foster better communications if we have a weekly conference call to discuss strategy and issues that will come up Commission meetings. [Commissioner A], [Legal Assistant], [name withheld] and I agreed that we will hold these meetings at 3 p.m. on Monday every week. On the day before the Commission meeting, we will discuss items on the Commission agenda and make sure we are all on the same page regarding those items. I sent out a calendar invitation for these conference calls.

Further, email evidence strongly suggests that at least on four occasions (November 16, 2020, September 23, 2021, December 13, 2021, and April 27, 2022), the two commissioners met with their private counsel and others to discuss commission meeting agendas and positions to take. Emails also suggest that on eight other occasions, these two commissioners were sent invitations to meet with their private counsel to discuss business before the commission. Emails also indicate at least five other occasions where it was suggested that the commissioners and private counsel meet to discuss county commission business.

In a February 16, 2021 letter to county officials, the San Juan County attorney expressed concern that the commissioners might be violating OPMA. After the emails were released, another county official we spoke with voiced concern that the commissioners were privately meeting to discuss commission business and limiting transparency and public arguments and discussion in the meetings. One



**One of the commissioners involved admitted to meeting with the other commissioner and their attorney to discuss resolutions.**

of the commissioners involved admitted to meeting with the other commissioner and their attorney to discuss resolutions. The former San Juan assistant county attorney said he gave both commissioners OPMA training in 2020 and 2022, and both commissioners in question said they had the training.

Some emails we reviewed suggest that during the meetings with the commissioners' private counsel, specific commission agenda items were discussed, and votes or positions were decided, as shown in the following emails.



### Private counsel's email to commissioners:

August 28, 2020

Commissioner [name withheld] and Commissioner [name withheld] – Can you be on a short call Monday, at 3 p.m. or 4 p.m.? We can review the SJCO Comm'n agenda and discuss any of the items that might be controversial and/or need special attention.

May 17, 2021

Please join a zoom call at 1pm TODAY, Monday, May 17, to discuss the Redistricting Resolution to hire [name withheld] as SJCO's consultant.

December 8, 2021

It is vitally important for [Commissioner A] and [Commissioner B] to be in complete and final agreement regarding which plans they will vote for before the meeting on the 21st.

Private Counsel to Commissioner [name withheld]

December 15, 2021

During our Monday discussion on Redistricting, both you and Commissioner [name withheld] indicated that you support:

- [name withheld] Option B for County Commission districts
- NNHRC Plan for County School Board districts

The Motion that you should make is: "I move to approve [name withheld] Option B for County Commission Districts and to approve the NNRHC (Navajo Human Rights Comm'n) plan for School Board Districts". As [Private Attorney] noted, it's super important that you two stay united on this issue...

The meetings referenced in these emails raise the potential risk of inappropriate observance of OPMA. A legal analysis of OPMA by the Office of Legislative Research and General Counsel (OLRGC) states:

*The communications were arguably inconsistent with legislative policy articulated in OPMA ("It is the intent of the Legislature that...political subdivisions...conduct their deliberations openly." Utah Code 52-4-102(2)).*

However, when it comes to a quorum of just two persons, OPMA statutes are less clear. The Office of Legislative Research and General Counsel concluded that:

*Because of ambiguities in OPMA, [it cannot be concluded] definitively that the San Juan County Commission or the two commission members violated any provisions of OPMA.*

See Appendix A for the OLRGC's full analysis.

We believe that the appearance of conducting county business beyond the public realm elevated the risk of violating OPMA. The San Juan County Commission needs to demonstrate greater caution when engaging in meetings that could be perceived by the public as concealing deliberations meant for the public.




**RECOMMENDATION 1.1**

The San Juan County Commission should pass an ordinance that details policies and procedures governing open meetings and goes beyond state statute to expressly forbid a quorum of commissioners to meet and discuss any commission business without first making a public notice of the meeting.

### **2.1 The Use of Private Counsel Instead of the County Attorney Decreased Transparency of Commission’s Work**

In our review of commissioner correspondence and interviews with county professionals, we did not find definitive evidence that any laws were broken. However, in our opinion, we found enough concern that warrants additional safeguards in county ordinance to ensure transparent governance. We are concerned that by using private counsel instead of the county attorney’s services, county commissioners reduced the transparency of commission activities and increased the potential for undue influence in commission business, as evidenced by the following facts:

- Commissioners accepted thousands of dollars in pro bono legal services.
- Commissioners’ private counsel sought payment from a special interest group for legal services given to commissioners.
- A commissioner submitted a resolution for the county to hire the private counsel from whom he was receiving pro bono services.

 **We are concerned that by using private counsel instead of the county attorney’s services, county commissioners reduced the transparency of commission activities and increased the potential for undue influence in commission business.**

The San Juan County Commission should go beyond the requirements in statute to ensure sufficient transparency of county business. To address these concerns, we recommend that the San Juan County Commission pass ordinances requiring:

- Commissioners to complete a yearly individual disclosure form that, lists their potential conflicts of interest and acknowledges the completion of required annual training.
- Commissioners to disclose potential conflicts of interests at each commission meeting that is open to the public.
- The delineation of ethical behavior expected of county employees, which expands on state statute and requires the disclosure of any pro bono legal services related to commission and county business.



## Accepting Thousands of Dollars of Pro Bono Legal Council Could Elevate Risk of Influencing the Discharge of Commission Duties

The use of pro bono private counsel, which may have been paid by a local special interest group, gives the appearance that county business is being unduly influenced. Beginning in November 2018 and continuing well into 2022, the two commissioners' private counsel provided them with pro bono legal services. This work for the commissioners was referred to as "kitchen cabinet work" by their private counsel. In an email to a local special interest group, and forwarded to the commissioners, the private counsel sought payment from the local special interest group for their work with the commissioners.

### Email from private counsel to local special interest

February 18, 2019

We've discussed having [local special interest group] pay for [private counsel's] invaluable advice and counsel to the new Commissioners to help them navigate, at all levels, the current San Juan County government structure...  
Past Kitchen Cabinet Work (November 6, 2018 – Feb. 7, 2019):  
[firm name withheld] fees and costs at \$350/hour for [private attorney]; \$225/hour for [firm name withheld] associates = \$27,265.00

From the emails we obtained, we cannot determine if the private counsel received any payment for their pro bono services from any special interest group. This email notes that three months of these pro bono services cost \$27,265. Because the pro bono legal assistance continued for nearly four years, the cost of these services could represent many more thousands of dollars. In our opinion, accepting such a benefit over a prolonged period of time heightens concerns about the lack of transparency and warrants additional measures in county ordinance to protect against future behavior.



**Three months of these pro bono services cost \$27,265 and continued for nearly four years.**

In February 2021, one of these two commissioners submitted a resolution during a county commission meeting to recommend hiring their private counsel to represent the county in a negotiated agreement. In other words, the commissioner tried to get the private attorney a consulting job working for the county. The county attorney had warned the commissioners of the many conflicts of interests related to this action. However, despite being informed of these concerns the commissioner still submitted the resolution to be included on the meeting agenda. The passage ordering the hiring of the private counsel was eventually struck from the resolution before being passed. The commissioner's attempt to hire his private counsel for county work may have been influenced by his having received pro bono legal work over an extended period. Also, proper disclosures of this relationship would have provided greater transparency.



The commissioners receiving thousands of dollars in pro bono legal services, the possible payment of these services by special interest groups, and the attempt by one of the commissioners to find county employment for their private counsel are troubling findings. Due to these and other concerns, it is our opinion the commissioners may have placed themselves in a position to be unduly influenced by their private counsel. Had the commissioners used the county attorney's services instead, there would have been more transparency through GRAMA requests of publicly held documents and more accountability due to the fact that the county attorney is elected via public elections.



**It is our opinion the commissioners may have placed themselves in a position to be unduly influenced by their private counsel.**

### **Greater Transparency through Disclosure and Extra Measures beyond State Law Are Needed to Avoid Future Potential Conflicts of Interest**

We obtained the 2022 disclosure forms from two commissioners, who listed no conflicts of interests; no 2022 disclosure form was obtained from one of the commissioners who contracted with private counsel. We recommend that the San Juan County Commission pass an ordinance requiring commissioners to complete a yearly individual disclosure form that lists their potential conflicts of interests and acknowledges the completion of annual training on the Open and Public Meetings Act, the County Officers and Employees Disclosure Act, the Utah Public Officers' and Employees' Ethics Act, and the Government Records Access and Management Act.

To further ingrain the need for proper disclosure, we also recommend that San Juan County follow Grand County in requiring that commission members disclose conflicts of interest at the beginning of each commission meeting.



**Since the two commissioners in question were not reelected in 2022, the risks and concerns of using pro bono legal counsel in a similar manner have been reduced.**

Since the two commissioners in question were not reelected in 2022, the continuing risks and concerns of using pro bono legal counsel in a similar manner have been reduced. However, to limit the likelihood of commissioners using pro bono legal services in place of county attorney services in the future, we recommend that the San Juan County Commission pass a similar ordinance that was passed by the Grand County Commission in 2019, titled "An Ordinance Establishing Policies and Procedures

Governing Professional Ethics and Conflicts of Interest of Grand County Officers and Employees." In that ordinance, Grand County reiterates statute and outlines acceptable behavior by county employees. In a similar ordinance, the San Juan Commission should expand on state statute to delineate ethical behavior expected by county employees and require the disclosure of pro bono legal services obtained related to commission and county business.





### **RECOMMENDATION 2.1**

The San Juan County Commissioners should pass an ordinance requiring commissioners to complete a yearly individual disclosure form that lists their potential conflicts of interest and acknowledges the completion of annual training on the Open and Public Meetings Act, the County Officers and Employees Disclosure Act, the Utah Public Officers' and Employees' Ethics Act and the Government Records Access and Management Act.

### **RECOMMENDATION 2.2**

The San Juan County Commission should pass an ordinance that requires the disclosure of potential conflicts of interests at each commission meeting that is open to the public.

### **RECOMMENDATION 2.3**

The San Juan County Commission should pass an ordinance that delineates the ethical behavior expected of county employees by expanding on state statute and requiring the disclosure of any pro bono legal services related to commission and county business.





# Complete List of Audit Recommendations





# Complete List of Audit Recommendations

This report made the following four recommendations.

## **Recommendation 1.1**

The San Juan County Commission should pass an ordinance that details policies and procedures governing open meetings and goes beyond state statute to expressly forbid a quorum of commissioners to meet and discuss any commission business without first making a public notice of the meeting.

## **Recommendation 2.1**

The San Juan County Commission should pass an ordinance requiring commissioners to complete a yearly individual disclosure form that, lists their potential conflicts of interest and acknowledges the completion of annual training on the Open and Public Meetings Act, the County Officers and Employees Disclosure Act, the Utah Public Officers' and Employees' Ethics Act, and the Government Records Access and Management Act.

## **Recommendation 2.2**

The San Juan County Commission should pass an ordinance that requires the disclosure of potential conflicts of interests at each commission meeting that is open to the public.

## **Recommendation 2.3**

The San Juan County Commission should pass an ordinance that delineates the ethical behavior expected of county employees by expanding on state statute and requiring the disclosure of any pro bono legal services in relation to commission and county business.





# Appendix





**A. Office of Legislative Research and General  
Counsel's Legal Opinion**





# Office of Legislative Research and General Counsel

John Q. Cannon, Director  
Victoria Ashby, General Counsel

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February 8, 2023

Jesse Martinson  
Office of the Legislative Auditor General  
Utah State Capitol Complex  
House Building, Suite 315  
Salt Lake City, Utah 84114

Subject: San Juan County audit

Dear Jesse,

You asked my opinion concerning certain actions of two of the three San Juan County Commission members and whether those actions may have violated Utah Code or other provisions.

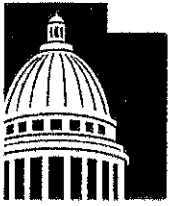
## Actions

The actions you describe fall into three categories:

- (1) communications (in person, by group video conference and phone call, and by email) over a several-year period of time between the two commission members and a private attorney or the attorney's legal assistant, including communications relating to votes or actions anticipated to be taken at upcoming commission meetings, actions taken at prior commission meetings, and recommendations about resolutions for the commission's consideration as well as draft communications for the two commission members and recommendations about whom the county should hire and fire;
- (2) the two county commission members receiving free legal advice from the private attorney (it appears that the attorney was compensated, from funds provided by private organizations, for at least some of the work the attorney performed for the two commissioners), potentially influencing the county commission members in the discharge of their official duties, and the commission members facilitating a contract for redistricting work between the county and a contractor recommended by the private attorney, based at least in part on the influence of the attorney; and
- (3) an apparent contract between the two commission members and the private attorney for work the attorney performed for the two commission members, without the formal approval of the full commission and without any kind of a competitive process.

As to the first category of actions, you asked whether any of the actions violate any provision of Title 52, Chapter 4, Open and Public Meetings Act ("OPMA"). With respect to OPMA, you specifically asked about the meaning of Utah Code Section 52-4-210.

As to the second category of actions, you asked whether any of the actions violate specific provisions of Title 17, Chapter 16a, County Officers and Employees Disclosure Act ("Disclosure Act"). You also asked whether the commission members obtaining legal advice from a private attorney, rather than from the county attorney, constitutes a violation of the law.



As to the third category of actions, you asked whether those actions violate any provision of Title 63G, Chapter 6a, Utah Procurement Code (“Procurement Code”) or other applicable procurement provisions.

**(1) Did Communications Between Commission Members  
and a Private Attorney or Legal Assistant Violate OPMA**

Short answer

Because of ambiguities in OPMA, I am unable to conclude definitively that the San Juan County Commission or the two commission members violated any provisions of OPMA. It is questionable whether the communications between the two commission members and the private attorney or the attorney’s legal assistant constitute a “meeting,” as defined in OPMA, subjecting the communications to the requirements of OPMA.

Discussion

The Utah Code contemplates two kinds of county commission meetings. Utah Code Section 17-53-204 refers to “regular meetings” and requires the county commission to provide by ordinance for the holding of those meetings. In addition, Utah Code Section 17-53-205 authorizes a county commission to hold a “special meeting” if an order calling the special meeting is signed by the commission chair or by a majority of the commission members.

It appears that the communications between the two commission members and the attorney or legal assistant do not constitute either a “regular meeting” under Utah Code Section 17-53-204 or a “special meeting” under Utah Code Section 17-53-205. From the information you provided, it appears that the formalities contemplated in those two sections were not followed for the communications in question. The communications were not part of a “regular meeting” provided for under ordinance and were not part of a “special meeting” called pursuant to a signed order.

Despite that, the question remains whether the communications between the two commission members and the attorney or legal assistant, although not apparently intended as a regular meeting or a special meeting of the full commission, are nevertheless subject to the requirements of OPMA<sup>1</sup> because the communications constitute a “meeting” under OPMA. If the communications between the two commissioners and the attorney or legal assistant constitute a “meeting,” as defined in OPMA, then the county commission, acting through the two commissioners, would be in violation of OPMA because the requirements under OPMA applicable to a “meeting” do not appear to have been met with respect to those communications.

The definition of “meeting” under OPMA has three elements: a “meeting” is defined as “[1] the convening of a public body . . . [2] with a quorum present . . . [3] for the purpose of discussing . . . or acting upon a matter over which the public body . . . has jurisdiction. . .” (Utah Code Section 52-4-103).

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<sup>1</sup> OPMA requires a meeting of a public body to be “open to the public.” Utah Code Section 52-4-201. (OPMA allows a public body to close a meeting if certain requirements are met. Utah Code Section 52-4-204). OPMA also requires the public body to provide 24 hours’ public notice of a meeting (Utah Code Section 52-4-202) and to keep written minutes and a recording of the meeting (Utah Code Section 52-4-203).



# Office of Legislative Research and General Counsel

John Q. Cannon, Director  
Victoria Ashby, General Counsel

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For purposes of this analysis, I am assuming that elements 1 and 3 are met; that is, I am assuming that the communications involving the two commission members constitute the convening of a public body for the purpose of discussing a matter over which the public body has jurisdiction.<sup>2</sup> However, ambiguity in OPMA provisions raises questions as to whether element 2 (“with a quorum present”) is met.

Ordinarily, two members of a three-member public body constitute a quorum under OPMA.<sup>3</sup> However, the definition of “quorum” under OPMA also includes this language: “‘Quorum’ does not include a meeting of two elected officials by themselves when no action, either formal or informal, is taken.” Utah Code Section 52-4-103(11)(b).

This language creates ambiguity as to whether two members of a three-member county commission engaging in the communications at issue constitute a “quorum” for purposes of determining whether the communications constitute a “meeting.” First, the use of the term “meeting” in the “quorum” definition is confusing and circular. (A “meeting” is defined as convening “with a quorum present,” yet the definition of “quorum” uses the term “meeting” in providing that a quorum does not include a “meeting” of two elected officials under certain circumstances.) Second, the language of Utah Code Section 52-4-103(11)(b) states that the term “quorum” does not include a meeting of two elected officials “by themselves.” It is not clear whether “by themselves” is intended to refer to circumstances when the two elected officials meet with no one else present or to circumstances when the elected officials are the only members of the public body present. Finally, the “quorum” exclusion applies to a meeting of two elected officials “when no action, either formal or informal, is taken.” Utah Code Section 52-4-103(11)(b). It is not clear what is meant by “formal or informal” action. If “formal” action means action that is binding on the commission, it appears that no “formal” action was taken during the communications. And what constitutes an “informal” action is not clear. The combination of “informal” with “action” seems rather oxymoronic: “action” denotes something is done, while “informal” suggests that there has not been an action.

Because of the ambiguity of the “quorum” language of Utah Code Section 52-4-103(11)(b), it is uncertain whether element 2 of the definition of “meeting” (“with a quorum present”) was met. It is therefore questionable whether the communications constitute a “meeting” subjecting the communications to the provisions of OPMA. If the communications do not constitute a “meeting,” as defined in OPMA, then OPMA requirements do not apply and cannot have been violated. Nevertheless, the communications were arguably inconsistent with legislative policy articulated in OPMA (“It is the intent of the Legislature that . . . political subdivisions . . . conduct their deliberations openly.” Utah Code Section 52-4-102(2)).

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<sup>2</sup> I note that it is also questionable whether the two commissioners’ actions constitute “the convening of a public body” under OPMA. “Convening” is defined in OPMA as the calling together of a public body “by a person authorized to do so.” Utah Code Section 52-4-103(3). As indicated above, the calling of a special meeting of the county commission – arguably a “convening” – may be done only by an order signed by the commission chair or members calling the special meeting. Utah Code Section 17-53-205. It appears the communications at issue were not pursuant to a signed order calling a special meeting of the county commission.

<sup>3</sup> “Quorum” means a simple majority of the membership of a public body. . . .” Utah Code Section 52-4-103(11)(a).



Utah Code Section 52-4-210 does not change this analysis. That section states that nothing in OMPA “shall be construed to restrict a member of a public body from transmitting an electronic message to other members of the public body at a time when the public body is not convened in an open meeting.” That language suggests that none of the other provisions or requirements of OPMA restrict a county commission member’s ability to transmit an electronic message to other members of the county commission outside the time when the commission is convened in an open meeting. There is nothing in Utah Code Section 52-4-210 limiting the content of electronic messages between commission members, so arguably the electronic message could be part of an exchange of communications relating to substantive matters over which the commission has jurisdiction.

**(2)(a) Did Free Legal Advice from the Private Attorney Violate the Disclosure Act**

Short answer

It is possible that a fact finder could determine that the commission members knowingly accepted a gift, in the form of free legal advice from the private attorney, and that the gift tended to influence them in the discharge of their official duties, in violation of Utah Code Section 17-16a-4(1)(c). It is also possible that a fact finder could determine that the two commission members received compensation, in the form of free legal advice from the private attorney, for assisting the redistricting contractor in a transaction involving the county and that the commission members’ failure to comply with applicable disclosure requirements violated Utah Code Section 17-16a-5(1). These determinations will depend on all the relevant facts relating to the potential gift or compensation.

Discussion

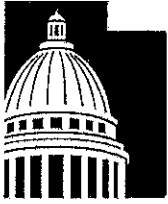
You indicated that a private attorney provided free legal advice to the two county commission members relating to their work as county commissioners. (Apparently at least some compensation was paid to the attorney by private organizations.) You asked whether the commission members’ acceptance of the attorney’s free legal advice constitutes a violation of the Disclosure Act, specifically Utah Code Section 17-16a-4(1)(c) (relating to the acceptance of a gift) or Utah Code Section 17-16a-5(1) (relating to receiving compensation for assisting in a transaction involving the county).

I. Possible Violation of Gift Provisions of the Disclosure Act

Utah Code Section 17-16a-4(1)(c) makes it an offense of the Disclosure Act for an elected officer to “knowingly receive, accept, [or] take . . . any gift . . . if the gift . . . tends to influence the officer in the discharge of the officer’s official duties.”

First, it should be noted that it is not unusual for an elected officer to receive input from someone outside of government to assist the elected officer in the discharge of the officer’s duties. Sometimes that input may come from someone with professional expertise who shares the individual’s expertise freely with the elected officer to influence the officer to take a course of action consistent with the input provided by the individual. A fact finder would likely consider this sharing of expertise to be a normal and benign part of the process of government.

There does not appear to be a bright line between that kind of situation and the situation where an elected officer receives what could be called a gift, in the form of free legal services, that tends to



influence the officer in the discharge of the officer's official duties.<sup>4</sup> Nevertheless, it is possible for a fact finder to conclude that by accepting free legal advice from the attorney, under the circumstances and over the period of time you describe, the two commission members knowingly accepted a gift and that the gift tended "to influence the officer[s] in the discharge of [their] official duties." Utah Code Section 17-16a-4(1)(c). Whether the free legal advice is truly a "gift," whether the two commission members knowingly accepted the gift, and whether the gift tended to influence the commission members will depend on all the facts surrounding the gift<sup>5</sup> and what the commission members did in response to the gift. But if a fact finder determines that acceptance of free legal advice was a "gift," that the commission members knowingly accepted the gift, and that the gift tended to influence the commission members in the discharge of their official duties, they could be found to have violated the Disclosure Act.

## II. Possible Violation of Disclosure Requirement of the Disclosure Act

Utah Code Section 17-16a-5(1) states that an elected officer may not receive compensation "for assisting any person . . . in any transaction involving the county" unless the officer fulfills certain disclosure requirements.

This provision constitutes a disclosure requirement. It does not prohibit an elected officer from receiving compensation for assisting another in a transaction involving the county; it simply requires the elected official to disclose information about the transaction.

The two commission members' acceptance of free legal advice from the attorney could be determined to be the receipt of "compensation" under Utah Code Section 17-16a-5. If their receipt of that "compensation" was for "assisting any person or business entity [e.g., the redistricting contractor] in any transaction involving the county," those circumstances could trigger the disclosure requirements of Utah Code Section 17-16a-5. If the required disclosures were not made, the two commission members could be found to have violated the Disclosure Act.

## III. Consequences of Violating the Disclosure Act

Under Utah Code Section 17-16a-10, a "person who knowingly and intentionally violates" the Disclosure Act "is guilty of a class A misdemeanor and shall be . . . removed from office." As indicated above, it is possible the two commissioners could be found to have violated either the gift provision or the compensation disclosure provision of the Disclosure Act. If so and if those violations were done "knowingly and intentionally," the commission members would be subject to a class A misdemeanor and removal from office.

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<sup>4</sup> I note that the statute does not require a showing that the gift result in some kind of improper influence, just that the gift "tends to influence the officer in the discharge of the officer's official duties."

<sup>5</sup> Those facts might include whether it was the gift itself (the free nature of the legal advice) or the content of the legal advice (not the fact that it was free) that tended to influence the commission members.



**(2)(b) Was it a Violation of Law for the Commission Members to Obtain Legal Advice from a Private Attorney Rather Than from the County Attorney**

Short answer

The actions of the two commission members seeking advice from a private attorney rather than the county attorney on county matters appear to be in conflict with the intent of certain statutory provisions and Utah Supreme Court case law. However, whether the commission members' actions constitute a direct violation of the law is not clear.

Discussion

Under Utah Code Section 17-18a-501(4), the county attorney is "the civil legal advisor to the county." The county attorney represents the county as an organization and does not represent a county commission or county officer. Utah Code Section 17-18a-802(1) and (2). When it comes to giving direction to a county attorney regarding civil matters, the county acts "through the county elected officers in accordance with the officers' duties and powers in accordance with law," Utah Code Section 17-18a-802(2)(c), but the county is the county attorney's client.

In *Salt Lake County Commission v. Salt Lake County Attorney*, 985 P.2d 899 (Utah 1999), the Utah Supreme Court considered a dispute between the Salt Lake County Commission and the Salt Lake County Attorney. The Court echoed the statute then in effect and said that "the County Attorney is the legal adviser only to the County as an entity" and that the County "acts through the County Commissioners, agents of the County." *Id.* at 904. The Court said that the "County Attorney has an attorney-client relationship only with the County as an entity, not with the Commission or the individual Commissioners apart from the entity on behalf of which they act." *Id.* At 905. The Court concluded that "the Commission cannot hire outside counsel to advise it when it disagrees with the advice of the elected attorney, or when it does not like the manner in which that person performs the duties of the office." *Id.* at p. 907. The Court stated that "the right to hire outside counsel . . . arises only when the public attorney 'refuses to act or is incapable of acting or is unavailable for some other reason.'" *Id.*

The principles reflected in the applicable code sections and in the *Salt Lake County Commission* case suggest that the county, acting through its agents, the county commissioners, may not circumvent obtaining legal advice from the county attorney on a county matter unless the county attorney refuses to act or is incapable of acting or unavailable. Disagreeing with the county attorney or not liking how the county attorney performs her duties does not provide a sufficient basis for the county commission, acting as an agent for the county, to hire an outside attorney to advise the county.

The difficulty in applying those principles to the circumstances you have described is that the circumstances do not appear to squarely fall within the scope of the principles. First, unlike the facts of the *Salt Lake County Commission* case, the two San Juan County Commission members apparently did not engage the private attorney to provide legal advice to the county as an entity but to advise the two commission members individually. Second, it appears that no county funds were used to pay for the private attorney's legal advice.

Nevertheless, by declining to obtain the legal advice of the county attorney and instead seeking advice from an outside private attorney regarding matters relating to their work for the county, the two commission members seem to have acted in a way that conflicts with the intent of the statutory





provisions and is inconsistent with the principles enunciated by the Utah Supreme Court. Despite that, it is difficult to conclude that their actions were a direct violation of the law. And even if they were a violation of the law, the remedy appears to be limited to a declaratory judgment action, presumably filed by the county attorney, requesting the court to declare the commission members' actions to be a violation of the law and asking the court to enjoin the commission members from further seeking advice on county matters from an outside counsel. The likelihood of success of that kind of action appears questionable.

### **(3) Did the “Contract” With the Private Attorney Violate Procurement Provisions**

#### Short answer

If there were a contract with the private attorney, it appears to have been a contract between the attorney and the two commission members individually, not between the attorney and the county. In any event, even if any contract could be considered to be a contract with the county, there are not sufficient facts to determine whether any provision of San Juan County's purchasing policy was violated.

#### Discussion

San Juan County is not generally governed by the Procurement Code<sup>6</sup> but is governed by its own purchasing policy.<sup>7</sup> Generally speaking, however, a procurement code or policy applies only when there is an expenditure of public funds to acquire a good or service on behalf of the public entity. There does not appear to have been any expenditure of public funds in connection with the contract with the private attorney, so it is questionable whether any procurement or purchasing policy has application to the contract.

Even if the sparse provisions of the San Juan County purchasing policy apply, the procedures required under the policy to enter into a contract depend on the amount of the contract. Although the current purchasing policy appears to require some purchases of over \$15,000 to be put out for competitive bid (San Juan County Purchasing Policy, paragraph 4 under “Authorization Requirements for Purchases”), the policy requires an RFP (request for proposals) competitive process to be followed only if the purchase price exceeds \$50,000. San Juan County Purchasing Policy, paragraph 5 under “Authorization Requirements for Purchases.”

Without more details about whether there was in fact a contract, the parties to the contract, the circumstances concerning how the contract came about, and the amount to be paid under the contract and by whom, it is not possible to determine whether there was any violation of the San Juan County purchasing policy in the creation of, payment for, or implementation of the contract. And because the Procurement Code does not apply to San Juan County, there could not have been a violation of the Procurement Code.

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<sup>6</sup> The Procurement Code does not apply to “a public entity that is not a procurement unit.” Utah Code Section 63G-6a-107.6. The definition of “procurement unit” in the Procurement Code does not include a county that “adopts a procurement code by ordinance.” Utah Code Section 63G-6a-103(46) and (57). Because San Juan County has adopted its own purchasing policy, it is not a procurement unit subject to the Procurement Code.

<sup>7</sup> <https://sanjuancounty.org/hr/page/san-juan-county-purchasing-policy>



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If you have any questions concerning anything within this letter, please feel free to contact me.

Best regards,

A handwritten signature in black ink, appearing to read "Robert H. Rees", written in a cursive style.

Robert H. Rees  
Associate General Counsel



# Agency Response





# SAN JUAN COUNTY COMMISSION

Bruce Adams	Chairman
Silvia Stubbs	Vice-Chair
Jamie Harvey	Commissioner
Mack McDonald	Administrator

April 4, 2023

## Re: “A Performance Audit of the San Juan County Commission” Report #2023-02

To: The Utah State Legislature:

We want to thank you for the Performance Audit of the San Juan County Commission and the opportunity to provide a response to the findings. We also want to thank the Office of the Legislative Audit General and Staff who have worked at compiling the data, reading countless emails, those who interviewed staff, former staff, our Attorneys, as well as Commissioners.

We appreciate the recommendations described in the report and will follow those recommendations appropriately.

In response to the findings of the audit, we respectfully reply as follows:

### RECOMMENDATION 1.1 UNCONVENTIONAL OPMA

As we work to pass an ordinance that details policies and procedures governing open meetings in San Juan County that “goes beyond State statute”, we feel that the former Commissioners truly violated the Open and Public Meetings Act (OPMA).

Each year, our County provides annual training on OPMA, training provided by our County Attorney who cautioned the Commission. This training cautioned about the actions taking place and expressing violation concerns. OPMA training was also provided by the Attorney General’s office. OPMA training is also provided by various committees that Commissioners set on. However, even after said training, [Commissioner A] and [Commissioner B] (*Names Withheld*) continued to violate OPMA over and over by meeting as a quorum, carrying on electronic correspondence as a quorum, and making decisions outside of publicly noticed meetings as part of the “kitchen cabinet”.

Email evidence clearly demonstrates that they had these meetings or conversations where details and decisions were made outside of the public view, whether in-person, electronically, or by phone and were not transparent for our citizens.

We believe, although appearing unconventional, these were not unconventional acts but were deliberate. Deliberate with the intent to hide from the public what they were doing, hiding actions and favors for special interest groups, and hiding common deliberations which should always take place in front of an open public setting when considering ordinances, resolutions, and language therein.

Instead [Commissioner A] and [Commissioner B], through their emails, which were provided either knowingly or unknowingly, it is clear that conversations were taking place. Conversations where decisions were made prior to public meetings and where [Commissioner A] and [Commissioner B] were given a script of what actions to take, what to say as the motions, who should second the motions, what to do if the public comments, and instructions direction them that if [Commissioner C] makes the motion, “let the motion fail without a second”, etc....

**Recommendation:** As indicated in the audit, this happened on at the least “four occasions”. This is not unconventional but routine and deliberate and is a clear violation of OMPA, *Utah Code 52-4-102(2)*. This does not require an ordinance going beyond State statute; we suggest the audit pose a clear recommendation that these be further investigated, and as indicated in the State statute of OMPA, if found that there is evidence, enforce OMPA violations and file charges.

## RECOMMENDATION 2.1 USE OF PRIVATE COUNCIL

Existing San Juan County Commission Procedures policy states the following:

“Legal Counsel: The County Attorney shall act as the legal advisor to the County and the County Commission in their official capacity as County Commissioners (U.C.A. 17-18a501(4)).

Attorney/Client Relationship: The Commission, through official actions, may direct the County Attorney as to any legal matter where a client would ordinarily be able to direct the actions of the client’s attorney. In any instance where the County Attorney fails to carry out the lawful directive of the Commission as stated in an official action, the Chair may take action to report that failure to appropriate officials or entities if so authorized by a majority vote of the Commission.”

The actions indicated in this section were a clear violation of an existing policy which already exists “beyond State statute”. Creating another ordinance to state the same would be repetitive. The fact that [Commissioner A] and [Commissioner B] sought and were advised by pro bono or paid outside attorneys is a violation of this policy which also references State statute.

We feel that the email chain indicating specific dollar amounts owed for these services, or even pro bono services and actions: ordinances were proposed and provided to be passed, resolutions that were drafted and provided to be passed, election boundary redistricting of Commission and School District boundaries which were provided and passed, the attorney advise on how to govern the County, are all acts in violation of this policy and all unethical acts. All of which were a direct violation of governing professional and ethical conflicts of interests by [Commissioner A] and [Commissioner B].

**Recommendation:** At no point in time was a contract approved by the San Juan Board of Commissioners allowing for outside legal services to represent a quorum of its members either paid or pro bono. It is our recommendation that the audit include an investigation into violations of these actions, especially a contract with an attorney or firm outside of the State of Utah and investigate these attorney’s actions for violations of the Utah Rules of Professional Conduct.

We agree that since the two commissioners in question were not reelected in 2022, the risks and concerns of using pro bono legal counsel in a similar manner has been reduced. However, this implies

that any Commissioner, anywhere, who violates any State statute or County Policy, if they are voted out, they have amnesty for their actions.

These behind the door “kitchen Cabinet” meetings with their legal advisors have cost the taxpayers of San Juan County thousands of dollars. Actions which caused low morale, loss of qualified employees, years of disruption of governments services due to the actions of Commissioner A and Commissioner B.

## **CONCLUSION**

The Audit appears to suggest that because of the actions of [Commissioner A] and [Commissioner B] violating State Code and County Policies, without recourse, allows future Commissioners to act in these same manners without any threat of penalty. This only continues to hurt and compounds the amount of distrust that our citizens have in our elected leaders here in San Juan County and Utah as a whole.

If clear violations of Utah Code are not enforceable without a County Ordinance “taking it beyond State statute”, then strengthening Utah Code for OPMA or any other statute needs to take place at a State Legislative level. County ordinances should not be the strength to Utah Code and statutes. Citizens should not have to bear the financial burden of elected leaders who choose not to follow State Statute and will not follow the law after being trained and advised. Citizens should not have to wait 4 years for elections to correct the violations and misdeeds of an elected officials.



**Office of the Legislative Auditor General**

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