

MEMORANDUM

TO: Management and Fiscal Policy Committee

FROM: *MR* Michael Faden, Senior Legislative Attorney *RF*
Robert H. Drummer, Legislative Attorney

SUBJECT: **Worksession:** Bill 33-09, Inspector General - Attorney

Bill 33-09, Inspector General - Attorney, sponsored by Councilmember Ervin, Council President Andrews, and Councilmembers Navarro, Floreen, and Knapp, was introduced on September 15. The Management and Fiscal Policy Committee held an initial worksession on the Bill on October 5.

Background

The Office of the Inspector General is a Legislative Branch Office created in 1997 to serve as a watchdog for County government operations. County Code §2-151(a) establishes the following goals for the Inspector General (IG):

- (1) review the effectiveness and efficiency of programs and operations of County government and independent County agencies;
- (2) prevent and detect fraud, waste, and abuse in government activities; and
- (3) propose ways to increase the legal, fiscal, and ethical accountability of County government departments and County-funded agencies.

Under current law, the County Attorney provides legal services to the Inspector General and must approve a request from the Inspector General to employ independent special legal counsel. Bill 33-09 would authorize the Inspector General to employ or retain an independent attorney, with Council approval, without the approval of the County Attorney when necessary to perform his or her duties. The Bill does not limit the issues for which the Inspector General may employ or retain outside counsel or the time period of any such employment or retainer.

Public Hearing

Inspector General Thomas Dagley testified in support of the Bill at the Council's October 6 public hearing. He was the only speaker.

October 5 Committee Worksession

County Attorney Leon Rodriguez attended the Committee worksession on October 5, commented on the issues raised by this Bill, and explained the amendments proposed in his October 5 memorandum. See ©9-13.

Issues

1. What is the Bill's fiscal impact?

The Office of Management and Budget's fiscal impact statement concluded that Bill 33-09 will have no fiscal impact on the County. See ©7. The Inspector General's FY10 Budget includes \$127,000 for outside consulting services. The IG indicates that this current appropriation would be sufficient to cover the retention of outside counsel authorized by the Bill. Obviously, the cost of outside counsel will depend on the number of hours needed to perform the work the Inspector General assigns and the hourly rate of the attorney selected.

2. Should the Inspector General be able to retain independent outside counsel without the County Attorney's approval?

The Inspector General is often required to independently investigate sensitive or controversial issues involving the operation of the Executive Branch of County government. The County Attorney, as *the* chief legal advisor for the Executive and all Executive Branch departments and instrumentalities of the County under Charter §213 and *a* legal advisor to the Council, will sometimes be unable to represent the Inspector General because of a conflict of interest with regard to an investigation of an Executive Branch agency or other Executive action. Charter §108, anticipating this situation, expressly authorizes the Council to "provide by law for special legal counsel to assist, advise, or represent any office of the legislative branch in the exercise of its duties" without the County Attorney's approval.¹ Bill 33-09 would give the Inspector General, which is an office of the legislative branch (see County Code §1A-203(b)), the same authority to retain independent outside counsel, subject to Council approval, that is currently enjoyed by the Ethics Commission under Code §19A-5(f)(4).

The Inspector General and the County Attorney met after the October 5 Committee worksession to discuss the County Attorney's comments and proposed amendments. The County Attorney proposed that the Bill require the County Attorney to give the Council comments on the need for outside counsel and the qualifications of the counsel selected by the Inspector General. After further discussions, the County Attorney and the Inspector General agreed to support the following amendment, which gives the County Attorney a reasonable opportunity to comment on the qualifications of the person or firm that the Inspector General wants to employ or retain:

Amend ©2-3, lines 24-35 as follows:

- (3) The Inspector General may employ and be represented by a special legal counsel who is not subject to the authority of the County Attorney, or may obtain legal services from persons outside the Office of the County Attorney, without the approval of the County Attorney if:
- (A) the Inspector General finds that obtaining independent legal services is necessary to effectively perform his or her duties; [[and]]
 - (B) the County Attorney has had a reasonable opportunity to comment on the qualifications of the person or firm that the Inspector General has selected to provide those services; and
 - (C) the County Council approves the Inspector General's decision to obtain independent legal services and appropriates sufficient funds to cover the cost of the legal services.

¹For some of the policy reasons advanced in support of the 2002 amendment to the County Charter which inserted the quoted language, and more specifically their intent to apply it to the Inspector General, see the 2001 memo's from current and former Council Presidents to the Charter Review Commission on ©14-17.

3. When should this Bill take effect?

In discussing when to schedule this Bill for Council action, the Committee Chair and Council President agreed that it should be made an Expedited Bill so that it will take effect as soon as it becomes law, thus making up for any delay in Council consideration. This can be done by inserting the following after ©3, line 36, and making conforming changes in the title and other references:

Sec. 2. Expedited Effective Date. The Council declares that this Act is necessary for the immediate protection of the public interest. This Act takes effect on the date when it becomes law.

Council staff recommendation: enact the Bill with both amendments.

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Bill No. 33-09
Concerning: Inspector General - Attorney
Revised: 8-10-09 Draft No. 1
Introduced: September 15, 2009
Expires: March 15, 2011
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmember Ervin, Council President Andrews and Councilmembers Navarro, Floreen and Knapp

AN ACT to:

- (1) authorize the Inspector General to employ or retain an independent attorney; and
- (2) generally amend the County law regarding the Inspector General.

By amending

Montgomery County Code
Chapter 2, Administration
Section 2-151, Inspector General

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

27 outside the Office of the County Attorney, without the approval
28 of the County Attorney if:

29 (A) the Inspector General finds that obtaining independent
30 legal services is necessary to effectively perform his or her
31 duties; and

32 (B) the County Council approves the Inspector General's
33 decision to obtain independent legal services and
34 appropriates sufficient funds to cover the cost of the legal
35 services.

36 * * *

37 *Approved:*

38 _____
Philip M. Andrews, President, County Council Date

39 *Approved:*

40 _____
Isiah Leggett, County Executive Date

41 *This is a correct copy of Council action.*

42 _____
Linda M. Lauer, Clerk of the Council Date

LEGISLATIVE REQUEST REPORT

Bill 33-09

Inspector General - Attorney

DESCRIPTION: Authorizes the Inspector General to employ or retain an independent attorney.

PROBLEM: In some circumstances, because of institutional differences or otherwise, the Inspector General may find that obtaining independent legal services is necessary to effectively perform his or her duties.

GOALS AND OBJECTIVES: Continue to improve the efficiency and effectiveness of the Office of the Inspector General.

COORDINATION: Office of Inspector General, County Attorney, County Council

FISCAL IMPACT: To be requested.

ECONOMIC IMPACT: Minimal

EVALUATION: To be researched

EXPERIENCE ELSEWHERE: To be researched

SOURCE OF INFORMATION: Michael Faden, Senior Legislative Attorney, 240-777-7905

APPLICATION WITHIN MUNICIPALITIES: Applies only to County Inspector General.

PENALTIES: Not applicable



MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

VALERIE ERVIN
COUNCILMEMBER
DISTRICT 5

Memorandum

To: Councilmembers
From: Valerie Ervin
Date: August 11, 2009
Subject: Legislation to allow the Inspector General to request independent legal counsel from the County Council

As you know, in 1997, the County Council passed legislation to create the Inspector General's Office to serve as a watchdog to detect and prevent fraud, waste, and abuse in County Government. County Code Section 2-151(a) provides that the goals of the Inspector General are to:

1. review the effectiveness and efficiency of programs and operations of County government and independent County agencies;
2. prevent and detect fraud, waste, and abuse in government activities; and
3. propose ways to increase the legal, fiscal, and ethical accountability of County government departments and County-funded agencies.

The legislative history of the creation of this office shows that then-Councilmember, and now County Executive, Leggett was the driving force behind the creation of this office. The Inspector General's office takes on sensitive and sometimes controversial issues related to various County departments and County-funded agencies. For example, the Inspector General's Office is currently investigating whether an assistant fire chief received special treatment by police officers when he was allegedly stopped for driving under the influence.

Charter Section 108 provides:

The Council may employ or retain special legal counsel to assist it in the exercise of its powers, and may provide by law for special legal counsel to assist, advise, or represent any office of the legislative branch in the exercise of its duties. Any special legal counsel employed or retained under this section shall be subject to appropriation and is not subject to Section 213.

However, the County Council has not enacted the enabling legislation that would allow the Inspector General to request outside legal counsel. Currently, the Inspector General is subject to decisions made by the County Attorney related to securing outside legal counsel that may be necessary to effectively perform the duties of the office.

I am proposing the attached legislation, which would enable the Inspector General to request special legal counsel directly from the County Council. The County Attorney's Office would still be the first stop for legal representation. If there are instances where either the Inspector General or the County Attorney believes that the County Attorney's Office could not provide effective legal representation, this bill would allow the Inspector General to come to the County Council for the authority to obtain special legal counsel, subject to appropriation.

This is not a new way of doing business. In fact, the County Code already allows the Ethics Commission to request special legal counsel from the County Council in this manner. *Montgomery County Code § 19A-5(f)(4)*.

Please let Sonya know if you are interested in cosponsoring this legislation. My goal is to introduce this bill on September 15.



051498

OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett
County Executive

Joseph F. Beach
Director

MEMORANDUM

September 28, 2009



2009 SEP 28 PM 1:52

RECEIVED
MONTGOMERY COUNTY
COUNCIL

TO: Phil Andrews, President, County Council
FROM: Joseph F. Beach, Director
SUBJECT: Council Bill 33-09, Inspector General - Attorney

The purpose of this memorandum is to transmit a fiscal impact statement to the Council on the subject legislation.

LEGISLATION SUMMARY

The proposed legislation authorizes the Inspector General to employ or retain an independent attorney, with Council approval, without the approval of the County Attorney. In some circumstances, because of institutional differences or otherwise, the Inspector General may find that obtaining independent legal services is necessary to effectively perform his or her duties.

FISCAL SUMMARY

The anticipated fiscal impact to the County will be dependent on the type and quantity of legal services arranged by the Inspector General. The hourly rate charged by the outside counsel may vary significantly, depending on the experience and qualifications of the selected firm. The bill authorizes the Inspector General to "employ and be represented by a special legal counsel, or obtain legal services from persons outside the Office of the County Attorney." The bill requires the County Council approve the Inspector General's decision to obtain independent legal services and appropriate sufficient funds to cover the cost of the legal services. The Inspector General advised that the funding level authorized by the Council for the Office of Inspector General's fiscal year 2010 budget for consulting services (\$127,000) were sufficient to address legal services requirements identified to date.

ECONOMIC IMPACT STATEMENT

The Department of Finance reviewed the bill and determined that there is no economic impact to the County. The Department of Finance reached this conclusion after discussing the bill with the current Inspector General.

Office of the Director

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Phil Andrews, President, County Council
September 28, 2009
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The following contributed to this analysis: David Platt, Department of Finance, Tom Dagley, Inspector General, John Cuff, Office of Management and Budget, and Marc Hansen, Office of County Attorney.

JEB:jc

Attachment

c: Timothy L. Firestone, Chief Administrative Officer
Kathleen Boucher, Assistant Chief Administrative Officer
Jennifer Barrett, Director, Department of Finance
Leon Rodriguez, County Attorney
Mike Coveyou, Department of Finance
David Platt, Department of Finance
John Cuff, Office of Management and Budget



Isiah Leggett
County Executive

Leon Rodriguez
County Attorney

OFFICE OF THE COUNTY ATTORNEY

MEMORANDUM

TO: Montgomery County Council

FROM: Leon Rodriguez
County Attorney 

DATE: October 5, 2009

RE: County Attorney Comments on Bill No. 33-09

The Office of the County Attorney submits this memorandum to the County Council as an aid in its consideration of Bill No. 33-09, which, if enacted, would authorize the Inspector General to employ or retain an independent attorney where deemed necessary by the Inspector General and where approved by the County Council. The Office of the County Attorney is committed to ensuring that the Montgomery County Office of the Inspector General receives high quality legal service in a manner that preserves and advances its independent mission.

As a former federal prosecutor who specialized in cases of fraud against federal and state government and official misconduct, and as a former private attorney handling corporate compliance issues, I came to County Government with particular enthusiasm for supporting the work of the Office of the Inspector General. Consistent with this interest, my first article in *Legal Views* discussed the Inspector General's fraud hotline and existing legal remedies for fraud against County Government. Moreover, recognizing the interest in proactively preventing fraud, waste and abuse, the Office of the County Attorney initiated and lead the creation of the ARRA Compliance Committee, which will be working to ensure compliance in our implementation of stimulus grants

We welcome a dialogue as to how legal service can best be provided to an Inspector General under our system of municipal government. To further that dialogue, we provide some factual background that will hopefully be useful to the Council as it considers Bill No. 33-09.

The Role of the Office of the County Attorney.

The Office of the County Attorney is a separately chartered office of County Government. Section 213 of the County Charter provides that:

The County Attorney shall be the chief legal officer of the County, conduct all the law business of the County, be a legal advisor to the County Council, and be the legal advisor to the County Executive, all departments, and other instrumentalities of the County Government.

Under the broad and comprehensive mandate set forth in Section 213, the County Attorney has historically served as counsel to all organs of County Government, both in the executive and legislative branches of County government. Because a government is a single entity, it is common for local government law offices to be assigned a broad mission—as has been done in Montgomery County.

While the County Attorney may advise different components of County government and on occasion safeguard the confidences of one component from the other, the County Attorney in Montgomery County has only ever had one client -- County Government as a whole. This is a deeply embedded principle for me personally and for the career attorneys in my Office.

The Charter does recognize the authority of the County Council to separately engage legal counsel either for the Council itself or for its offices. As such, Section 108 of the Charter provides:

The Council may employ or retain special legal counsel to assist it in the exercise of its powers and may provide by law for special legal counsel to assist, advise or represent any office of the legislative branch in the exercise of its duties. Any special legal counsel employed or retained in this section shall be subject to appropriation and is not subject to Section 213.

Until now, Section 108 has primarily been utilized as the basis for the employment of legislative attorneys directly serving the Council. Those attorneys primarily provide legal advice related to legislative activities, and also provide advice on other legal issues that affect either the Council as a whole or individual council members. Additionally, on only one occasion, the Council has appointed special legal counsel for the Ethics Commission

Beyond those functions, all other legal service provided to the County is furnished either by the Office of the County Attorney or special counsel retained at the request of the County Attorney. In order to serve this broad mandate, the County Charter has given the County Attorney the authority to employ Associate County Attorneys. Presently there are forty-five (45) Associate County Attorneys. Each department of the Executive Branch and each office of

the Legislative Branch has an individually designated Associate County Attorney, who acts as counsel to that department or office. In addition to such specially designated counsel, each office or department may receive the services of other Associate County Attorneys depending on their specific legal needs. Finally, outside special counsel is occasionally retained and appointed by the Council at the request of the County Attorney.

Representing Organs of County Government with Adverse Legal Positions

Because of the centralized municipal counsel model contemplated under the County Charter, it does occasionally occur that different members of the Office of the County Attorney will each advocate on behalf of different organs of County Government with distinct legal positions and roles. Thus, Associate County Attorneys assigned to Child Welfare Services may attempt to obtain social service records related to a protected child's parents, a disclosure which may in turn be resisted in Court by another Associate County Attorney assigned generally to the Department of Health and Human Services. In other circumstances, Associate County Attorneys serve as legal advisors to quasi-judicial bodies such as the Board of Appeals and the Merit Systems Protection Board, while their colleagues may appear before those bodies on behalf of Executive branch departments.

Attorneys in these circumstances intimately understand and adhere their duty to maintain the confidences of and loyalty to the specific agency they are serving. Moreover, this model of municipal legal service is widely utilized and approved, including in Opinions of the Maryland Office of the Attorney General.

How we serve the Office of the Inspector General.

The work of the Inspector General is fraught with legal questions. Those questions relate first to scope of the Inspector General's investigative authority, and secondly to the legal framework applicable to the various subjects investigated by the Inspector General.

In the former category, questions arise about the subject matter that the Inspector General may investigate as well as the nature and scope of the investigative powers available to him. One such question is in litigation now, in the case of *Shropshire & Parker-Loan v. Montgomery County*. In this case, the Montgomery County Police Department advised the Fraternal Order of Police, that on advice of the County Attorney, it would be disclosing internal affairs records that had been requested by the Inspector General. The FOP sued, maintaining that such disclosure would violate the Maryland Public Information Act. The County Attorney is now defending that lawsuit, maintaining that the Inspector General is entitled to access to such records and that the Police Department is legally bound to disclose them.

In the second category, Inspector General reports often deal with highly technical areas of County law. Thus, in my brief tenure, the Inspector General has issued reports relating

respectively to development districts, disability retirement and government procurement. Historically, the Office of the County Attorney has not been asked to participate in the drafting of Inspector General reports until after they were released as initial drafts.

To my knowledge, since the Inspector General law was first passed in 1997, there has never been a written request for special legal counsel pursuant to Section 2-151(g)(2) of the County Code. Accordingly, the existing mechanism for considering requests for special legal counsel has never been implemented.

The Inspector General and I have frequently discussed the legal service needs of the Office of the Inspector General, and have agreed on the benefit of more robust attorney involvement in the Inspector General's work. We have also discussed the importance that a specially designated attorney act as the advocate for the Inspector General within my office. Based on these discussions, I directed that the attorney assigned to the Inspector General's office engage in routine meetings with the Inspector General's Office to discuss outstanding cases. Additionally, I have implemented a process where I, as County Attorney, rule on questions relating to the Inspector General's investigative authority, after hearing arguments as to the scope of that authority from the attorney specially designated to the Inspector General's office. Among the issues considered under this process are the Inspector General's authority under County law and the Maryland Public Information Act to inspect and utilize personnel records..

As a whole, the system has lead to an impartial adjudication of any issues related to the scope of the Inspector General's authority.

Considerations Under Bill 33-09

There are various models for the provision of municipal legal service, as there are multiple models for the work of Inspectors General. Thus, I support any discussion about how the Inspector General can receive the most effective legal service and how County government as a whole can receive effective legal service.

The provisions for special counsel appointment in Bill 33-09 are identical to those for special counsel appointment for the Ethics Commission under Section 19A-5(f)(4)(A). Under this provision, special counsel may be appointed for the Ethics Commission either to serve as legal advisors or as prosecutors. Unlike reports of the Inspector General, Ethics Commission determinations are subject to judicial review. This distinction points to some modifications of the current legislation that that the Council may wish to consider.

First, the legislation may benefit from inclusion of defined standards as to when the Inspector General can unilaterally seek appointment of outside counsel. One alternative would be to modify proposed new Section 2-151(g)(3)(A) to read as follows: "(A) the Inspector General finds that obtaining independent legal services is necessary to perform his or her duties,

where the County Attorney has a conflict of interest either under Chapter 19A or the Maryland Lawyers' Rules of Professional Conduct . . ."

Secondly, in order to ensure the quality of representation provided to the Inspector General, the Council may wish to consider adding a new section to the legislation providing that *"where the Inspector General has requested appointment of special counsel pursuant to Section 2-151(g)(3)(A)1, the Office of the County Attorney must furnish the County Council with comments on the basis for the request, and the qualifications of the proposed special counsel."*¹ The aim of such an amendment would be to ensure that Council has all perspectives before determining if there is a need for special counsel and that the proposed special counsel is competent and knowledgeable in the areas of law necessary to support the Montgomery County Office of the Inspector General.

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¹ Another alternative would be to maintain the current system, and simply authorize the Inspector General to seek appointment of special counsel directly in the event the County Attorney declines to seek such appointment.



MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

ISIAH LEGGETT

MEMORANDUM

November 29, 2001

TO: Kenneth Clark, Chairperson
Charter Review Commission

FROM: Isiah Leggett, Councilmember 

SUBJECT: Charter amendment to authorize independent legal counsel

Recent discussions between the Inspector General and the County Attorney have raised serious questions as to whether the Inspector General should be authorized to retain independent legal counsel without the approval of the County Attorney, as the County Ethics Commission currently is. The same question could reasonably be asked with respect to other agencies of County government which review and rule on actions of the Executive branch. I would like the Charter Review Commission to study this issue and give the Council your views on the merits of such a Charter amendment.

Let me offer a little background. As you may recall, in 1996 the Council amended that year's Question A, which revised Charter §410, to allow the Council by law to authorize the County Ethics Commission to retain its own legal counsel without the approval of the County Attorney. Any such retainer would be subject to appropriation and express Council approval. The voters approved Question A by a 78%-22% margin, and in 1997 the Council enacted the needed implementing legislation. Thus far, the Ethics Commission has not found it necessary to retain independent counsel, but the Charter provision has nonetheless been a valuable way to underscore and bolster that Commission's independence from the Executive branch.

The Office of the County Inspector General, created in 1997 by legislation which I sponsored, and made permanent in 2000, was directed by County Code §2-151(a) to:

- (1) review the effectiveness and efficiency of programs and operations of County government and independent County agencies;
- (2) prevent and detect fraud, waste, and abuse in government activities; and

- (3) propose ways to increase the legal, fiscal, and ethical accountability of County government departments and County-funded agencies.

The Inspector General is appointed for a 4-year term by the County Council but functions independently of both the Council and Executive. In pursuing these objectives, the Inspector General necessarily seeks information from departments in the Executive branch, which has frequently led to disagreements with those departments and the County Attorney. Under Charter §213 the County Attorney is the legal adviser for both Executive branch agencies and the Inspector General. The Inspector General has twice this year sought the County Attorney's permission under §213 to retain special counsel, and the County Attorney has twice refused that request. In my view, to perform as the law intends the Inspector General must be able to obtain (subject to appropriation) legal advice and representation that is not beholden to or influenced by any other agency of County government. The only way to give him that ability is to amend the Charter to expressly grant that authority. I hope you will consider such an amendment favorably.

Although the issue has not recently arisen, the same requirement for independent legal advice could apply to those quasi-judicial bodies, such as the County Board of Appeals, the Human Rights Commission, and the Merit Systems Protection Board, which review and rule on actions of the Executive branch of County government. Thus the same question should be asked with respect to them. To avoid repetitious Charter amendments, I think any provision that so empowers the Inspector General should likewise apply to these bodies.

I appreciate the Commission's consideration of this issue and know that you will give it your customary thorough review and objective analysis.

C: Councilmembers
County Attorney
Inspector General

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MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

MEMORANDUM

MARILYN J. PRAISNER
DISTRICT 4

December 11, 2001

TO: Charter Review Commission

FROM: Marilyn J. Praisner *MJP*
Councilmember

SUBJECT: Outside Counsel for Inspector General

I am writing to inform you that I support Councilmember Isiah Leggett's request that the Commission study a charter amendment to authorize independent legal counsel subject to appropriation for certain agencies of the County government, including the Office of Inspector General.

I agree with Councilmember Leggett that the recent correspondence between the County Attorney and the Inspector General have brought this issue to light and the situation requires resolving. Thank you for your consideration and I look forward to your response.

MJP:jln
C: Blair Ewing
Isiah Leggett
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MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

MEMORANDUM

December 18, 2001

TO: Charter Review Commission

FROM: Blair G. Ewing 
Councilmember At-Large

SUBJECT: Outside Counsel for the Inspector General

This is to inform you that I agree with and support Councilmember Isiah Leggett's recent request that the Charter Review Commission agree to an amendment to the Charter which would authorize an independent legal counsel subject to appropriation for certain agencies of the County Government, including the Office of Inspector General.

Thank you for your consideration of this issue. I look forward to hearing from you in the near future.