


MEMORANDUM

TO: Management and Fiscal Policy Committee

FROM:  Michael Faden, Senior Legislative Attorney

SUBJECT: **Worksession:** Expedited Bill 37-10, Ethics – Ethics Commission - Staff

Expedited Bill 37-10, Ethics – Ethics Commission - Staff, sponsored by the Management and Fiscal Policy Committee, was introduced on June 15. A public hearing was held on July 13.

Bill 37-10, which resulted from the Committee's review of the Commission's operating budget, would:

- authorize the Ethics Commission, rather than the Chief Administrative Officer, to appoint and remove the Commission's staff director/chief counsel, who would replace the current Commission Executive Director;
- require the staff director/chief counsel to be a lawyer licensed to practice in Maryland, and authorize the staff director/chief counsel to advise and represent the Commission independent of the County Attorney;
- clarify the working relationship between the Commission and the County Attorney;
- authorize the staff director/chief counsel to appoint, supervise, and remove other Commission staff; and
- exempt Commission staff from membership in a collective bargaining unit.

The Committee's purpose in introducing these amendments was to enhance the independence and value of the Commission.

All speakers at the hearing, including the current and former chairs of the County Ethics Commission and the staff director of the Anne Arundel County Ethics Commission, supported this Bill as introduced (see testimony, ©9-14). The County Executive did not testify or send a representative to the hearing.

Fiscal Impact The OMB fiscal impact statement, shown on ©6-8, estimated that the fiscal impact of this bill, mainly replacing the current Commission Executive Director with a new staff director/chief counsel, could range from a cost of \$11,450 to a savings of \$66,000, depending on the pay grade of the new employee.

Issues

The significant policy issues presented by this Bill include:

1) Who should select the Commission's staff? This Bill, following the model of the County Merit Systems Protection Board (see County Code §33-4A), allows the Commission to select its chief staff member, who in turn would select, through the merit system process, all other Commission staff. Under the current law, all Commission staff are appointed or assigned by the Chief Administrative Officer after receiving the Commission's recommendation.

2) Who should supervise the Commission's staff? This Bill places the Commission staff director under the "general supervision" of the Commission, rather than the Chief Administrative Officer as in the current law (see ©2, lines 9-12, 15-17). The staff director then supervises any other staff members. (Neither the current law nor the Bill speak to the number of other staff members; that is decided in the operating budget.)

3) Should the staff director be required to be lawyer? Unlike the current law, Bill 37-10 would require the Commission's staff director to be a lawyer licensed to practice in Maryland. The Bill also authorizes the Commission staff director to advise and represent the Commission and investigate potential violations of the ethics law without the approval or supervision of the County Attorney, as allowed by Charter §410. Betsy Dawson, Executive Director of the Anne Arundel County Ethics Commission (see testimony, ©11-12) summarized the advantages of having an in-house lawyer on the Commission's staff. The County Attorney might counter that legal counsel who are not directly employed by the office or department they serve, as is the case with all of the County Attorney's staff, could offer a more detached perspective while still faithfully executing their duties to their client.

4) Should the staff director be a merit system employee or, alternatively, be hired or fired at the Commission's pleasure? Bill 37-10 would make the Commission's staff director/chief counsel (as well as the other Commission staff) a merit system employee, meaning that the staff director would be hired competitively and could be fired only for good cause. Merit system status would give the staff director a certain measure of independence from the Commission itself, which depending on the circumstances could be a positive or negative result. The worst case imaginable outcome of this legislation could either be a rogue Commission abetted by a compliant staff director or a rogue staff director who undercuts the Commission's orders; in Council staff's view, neither is a likely result, and either could be dealt with by legislative or judicial corrective measures. The important point, in our view, is that this Bill would give the Commission the staffing tools it needs to accomplish its assigned purposes.

Council staff recommendation: enact Bill 37-10 as introduced.

This packet contains:

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F:\LAW\BILLS\1037 Ethics Commission Restructuring\MFP Memo.Doc

Expedited Bill No. 37-10
Concerning: Ethics – Ethics Commission
– Staff
Revised: 6/11/10 Draft No. 4
Introduced: June 15, 2010
Expires: December 15, 2011
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Management and Fiscal Policy Committee

AN EXPEDITED ACT to:

- (1) revise the process to appoint and remove staff for the Ethics Commission;
- (2) require the Commission staff director to be an attorney;
- (3) modify how the Commission may receive legal advice and services;
- (4) exempt staff of the Commission from any collective bargaining unit; and
- (5) generally amend County law related to the Ethics Commission.

By amending

Montgomery County Code
Chapter 19A, Ethics
Section 19A-5

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:

Sec. 1. Section 19A-5 is amended as follows:

19A-5. Ethics Commission

* * *

(f) **Administrative Support.**

(1) The Commission must be allocated merit system staff, separate office space, equipment, and supplies within the limits of the Commission's appropriations. [The Chief Administrative Officer appoints or assigns staff to the Commission after receiving a recommendation from the Commission. Subject to the general supervision of the Chief Administrative Officer, assigned] Commission staff serve at the Commission's direction [of the Commission] to perform duties assigned by the Commission. The Commission must appoint a staff director/chief counsel to perform duties assigned by the Commission, and may remove the staff director/chief counsel. Subject to the general supervision of the Commission, the staff director/chief counsel must appoint and supervise and may remove other Commission staff. The appointment, retention, and removal of all Commission staff must be subject to applicable merit system laws and regulations. The staff director/chief counsel must be an attorney licensed to practice law in Maryland, and may advise and represent the Commission without the approval or supervision of the County Attorney.

(2) The Commission may ask the County Attorney to provide an opinion on any legal issue relating to the Commission's duties.

(3) The County Attorney must, on request of the Commission, provide the Commission with legal services. [However, the

County Attorney may employ special legal counsel to the Commission under Section 213 of the Charter.] The County Attorney must provide an attorney to prosecute a case before the Commission under Section 19A-10 unless the Commission assigns or retains a different attorney or other staff member to perform that function. An individual attorney in the office of the County Attorney who is assigned to provide general legal advice to the Commission must not be an investigator under Section 19A-9 or prosecute a case before the Commission under Section 19A-10 for one year after the attorney's Ethics Commission assignment ends.

* * *

Sec. 2. Section 33-102 is amended as follows:

33-102. Definitions.

The following terms have the meaning indicated when used in this [article]
Article:

* * *

(4) *Employee* means any person who works for the County government, except:

* * *

(G) an employee who works for:

- (i) the Office of the County Executive;
- (ii) the Office of the Chief Administrative Officer;
- (iii) the County Council;
- (iv) the Office of the County Attorney;
- (v) the Office of Management and Budget;
- (vi) the Office of Intergovernmental Relations;

- (vii) the Office of Human Resources; [or]
 (viii) the Merit System Protection Board; or
 (ix) the Ethics Commission;

* * *

Sec. 3. Expedited Effective Date; Transition.

The Council declares that this legislation is necessary for the immediate protection of the public interest. This Act takes effect on the date when it becomes law. The position of Executive Director of the Ethics Commission is abolished by operation of law on the date that the Commission appoints a staff director/chief counsel, as authorized by County Code Section 19A-5(f), as amended by Section 1 of this Act.

Approved:

Nancy Floreen, President, County Council

Date

Approved:

Isiah Leggett, County Executive

Date

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council

Date

LEGISLATIVE REQUEST REPORT

Expedited Bill 37-10

Ethics – Ethics Commission – Staff

DESCRIPTION:	Would revise the process to appoint and remove staff for the Ethics Commission; require the Commission staff director to be an attorney; modify how the Commission may be provided legal advice and services; and exempt staff of the Commission from any collective bargaining unit.
PROBLEM:	Recent proposed budget actions arguably could have undermined the effectiveness and independence of the Ethics Commission and its staff.
GOALS AND OBJECTIVES:	To enhance the independence of the Ethics Commission and its staff from other elements of County government by authorizing the Commission to select its staff director, who could also function as the Commission's in-house attorney.
COORDINATION:	Ethics Commission, County Attorney, Office of Human Resources
FISCAL IMPACT:	To be requested.
ECONOMIC IMPACT:	Minimal.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	To be researched.
SOURCE OF INFORMATION:	Michael Faden, Senior Legislative Attorney, 240-777-7905
APPLICATION WITHIN MUNICIPALITIES:	Applies only to County Ethics Commission.
PENALTIES:	Not applicable



OFFICE OF MANAGEMENT AND BUDGET


Isiah Leggett
County Executive

Joseph F. Beach
Director

MEMORANDUM

June 30, 2010

TO: Nancy Floreen, President, County Council

FROM: Joseph F. Beach, Director 

SUBJECT: Expedited Bill 37-10, Ethics Commission - Staff

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

LEGISLATION SUMMARY

The proposed bill would do the following:

- (1) Authorize the Ethics Commission, rather than the Chief Administrative Officer, to appoint or remove the Commission's staff director/chief counsel, who would replace the current Commission's Executive Director;
- (2) Require the staff director/chief counsel to be a lawyer licensed to practice in Maryland, and authorize the staff director to advise and represent the Commission independent of the County Attorney;
- (3) Clarify the working relationship between the Commission and the County Attorney;
- (4) Authorize the staff director/chief counsel to appoint, supervise, or remove other Commission staff; and
- (5) Exempt Commission staff from being a member in a collective bargaining unit.

Office of the Director

FISCAL AND ECONOMIC SUMMARY

There is no direct economic impact as the bill clarifies the working relationship between the Ethics Commission, a proposed staff director, and the County Attorney's Office and requires the proposed staff director to be a licensed lawyer.

There is a potential fiscal impact due to the requirement that the staff director be an attorney. The Office of Human Resources (OHR) reported the proposed staff director could be a Grade 32 of the County's general salary schedule, the same as a legislative attorney position. OHR stated the proposed staff director position could also fall into one of the three pay grades (24, 27 and 32) for an Assistant County Attorney. The determination of the pay grade would require a classification study.

For the sake of this analysis, OMB will assume the proposed staff director will be either a grade 32, Assistant County Attorney position or a grade 24, Assistant County Attorney. The following analysis provides the fiscal impact at the midpoint and maximum of those pay grades. If the staff director is hired at the maximum of the 32 pay grade, with fringe benefits assumed at 30% of the director's salary, the fiscal impact will be a personnel cost increase of \$11,450 as shown on the chart below:

Grade 32 at Maximum		Salary	Benefits	Total PC
Current Budgeted Salary	MLS III	\$95,820	\$63,560	\$159,380 ¹
Under proposed Bill 37-10 at top of grade	Grade 32	\$131,410	\$39,420	\$170,830
Difference				\$11,450

If the staff director is hired at the midpoint of the 32 pay grade, with fringe benefits assumed at 30% of salary, the fiscal impact will be personnel cost savings of \$25,190.

Grade 32 at Midpoint	Classification	Salary	Benefits	Total PC
Current Budgeted Salary	MLS III	\$95,820	\$63,560	\$159,380
Under proposed Bill 37-10 at midpoint	Grade 32	\$103,220	\$30,970	\$134,190
Difference				-\$25,190

If the staff director is hired at the maximum of the 24 pay grade, with fringe benefits assumed at 30% of salary, the fiscal impact will be personnel cost savings of \$42,900.

Grade 24at Maximum	Classification	Salary	Benefits	Total PC
Current Budgeted Salary	MLS III	\$95,820	\$63,560	\$159,380
Under proposed Bill 37-10 at top of grade	Grade 24	\$89,600	\$26,880	\$116,480
Difference				-\$42,900

¹ The Executive Director's salary and fringe benefits are currently \$159,380.

Nancy Floreen, President, County Council
June 30, 2010
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Finally, if the staff director is hired at the midpoint of the 24 pay grade, with fringe benefits assumed at 30% of the director's salary, the fiscal impact will be personnel cost savings of \$66,000 as shown on the chart below:

Grade 24 at Midpoint	Classification	Salary	Benefits	Total PC
Current Budgeted Salary	MLS III	\$95,820	\$63,560	\$159,380
Under proposed Bill 37-10 at midpoint	Grade 24	\$71,830	\$21,550	\$93,380
Difference				-\$66,000

Should the current Executive Director not meet the minimum requirements for the proposed staff director, who is an attorney licensed to practice law in Maryland, there may be additional costs related to a leave payout.

The following contributed to and concurred with this analysis: Phil Weeda of the Office of Management and Budget, Lisa Craft, Office of Human Resources, and Barbara McNally, Ethics Commission.

JFB:brm

cc: Kathleen Boucher, Assistant Chief Administrative Officer
Fariba Kassiri, Assistant Chief Administrative Officer
Barbara McNally, Ethics Committee
Lisa Craft, Office of Human Resources
Phil Weeda, Office of Management and Budget



MONTGOMERY COUNTY ETHICS COMMISSION

Stuart D. Rick
Chair

Nina A. Weisbroth
Vice Chair

TESTIMONY BEFORE THE COUNTY COUNCIL JULY 13, 2010

Good Afternoon Council President Floreen and Council Members. Thank you for the opportunity to speak today about Bill 37-10, on behalf of the Montgomery County Ethics Commission. I am Stuart Rick, Chairman of the Montgomery County Ethics Commission.

First, the members of the Commission want the Council to know we are deeply grateful for the Council's recognition of the importance of the Commission's mission, and for the Council's interest in the Commission's independence and its continued separate existence as a safe haven to anyone seeking confidential advice. We understand that these are the bases for the bill being considered today.

As you know, Bill 37-10 authorizes the Ethics Commission to appoint a staff director/chief counsel to advise and represent the Commission. This person will be a lawyer licensed to practice in Maryland, and will give the Commission new, in-house capabilities for its investigations, advisory and other services. Having its own in-house counsel will bring more insularity to the Commission, and should provide further

assurance to the Commission's stakeholders who have concerns about the confidentiality of the Commission's transactions.

The bill rejects a proposal in the FY11 budget proposal that would have placed the Commission's support services, including its Executive Secretary, into the County Attorney's Office as a cost savings measure. Of course, the County Attorney's Office will still be available to provide legal services, if requested by the Commission. In this regard, the Commission wants to publicly acknowledge the fine support it has received from the County Attorney's Office over the years, in particular from Ed Lattner of that office. We look forward to continuing to work with the County Attorney's Office, as needed.

Finally, it must be noted that enactment of this bill will mean the retirement of the Commission's Executive Secretary, Barbara McNally, and the end of her career of public service to Montgomery County. The bill provides that Barbara's position will be abolished when the Commission appoints its new staff director/chief counsel. Barbara has served the Commission with loyalty, dedication, and honor since its inception. She will be greatly missed as we move in this new direction.

The Commission has no objection to the enactment of this bill and the remaining Amendments, which will remove staff from bargaining unit status and give the Commission more discretion in the development of its programs and budget.

Thank you.



ANNE ARUNDEL COUNTY
ETHICS COMMISSION

July 13, 2010

Ms. Nancy Floreen, President
Members of the Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

Re: Support testimony: Bill 37-10

Dear President Floreen and Members of the Montgomery County Council:

I am here, with the approval of the Anne Arundel County Ethics Commission, to express my support for this important legislation. Our own county has adopted the model that you are now considering with this bill. As the commission's lawyer and executive director for the last 14 years, I can unequivocally say this model works.

Here are some of the reasons why I support this bill:

1. A commission staff attorney will give **full time and attention** to ethics commission business. Attorneys in the county attorney's office have many other competing priorities because they have different goals. Full time and attention is particularly important in enforcement cases, where preparation may take days or weeks and litigation may demand considerable full-time effort. It is also important that employees seeking advice receive prompt responses.
2. A commission staff attorney will tend to be **proactive** while a government attorney will tend to be reactive – partly as a function of competing priorities, but partly to avoid pressure from the administration.
3. A commission staff attorney will **regard the citizens of the county as the ethics commission's clients**. A government attorney tends to regard the administration as the client. The ethics law is designed to reassure *the public* that government business will be conducted impartially and with independent judgment.
4. A commission staff attorney will have **no ties to the county government administration**. This independence will ensure impartiality and discourage favoritism, and will protect the commission and its staff from overt or subtle attempts at intimidation.
5. A commission staff attorney will be able to provide a **legal perspective and authoritative ethics training** to all county employees and officials. Training needs to be

provided by the ethics commission because that is the organization that is charged with the administration and enforcement of the ethics law.

6. An independent commission attorney will help the ethics commission to achieve **credibility among county employees**. Whistleblowers and county employees seeking advice will be reluctant to come forward if they believe that their information will be relayed back to their departments. If employees do not trust the ethics commission they will not willingly seek advice nor value the advice they receive. In order for government employees and members of the public to fully embrace the ethics law, they must believe that the ethics commission is truly independent of the administration. In our county, there are several ways in which independence has been achieved:

- No more than four of the seven members may belong to one party;
- Commission members may not engage in political activity;
- Three of the seven members must be nominated by the county council, to be appointed by the county executive except for good cause; and
- Members may only be removed for good cause.

The legislation you are now considering will go far toward assuring an independent ethics commission. I believe that if you want county employees to support the ethics law, you must demonstrate that you support the ethics law. By enacting legislation that makes your ethics commission truly independent, you will be showing your employees – and the citizens of the county – that you really mean what you say.

Sincerely,



Betsy K. Dawson
Executive Director

County Council Public Hearing July 13, 2010

Re: Testimony of Laurie B. Horvitz Relating to Expedited Bill 37-10 – Ethics-Ethics Commission - Staff

President Floreen and County Council Members:

I am here to speak in *support* of proposed bill 37-10, relating to the Ethics Commission. I am a former Commissioner and a former two-term Chair of the Ethics Commission.

I applaud the Council's efforts to preserve the independence of the Ethics Commission and to improve its effectiveness.

In particular, I support several aspects of the bill.

First, I support language in the bill that will require the Commission to hire an attorney for its staff director position. Although this provision will mandate an unfortunate change in current staffing, it will ultimately enhance implementation of the Ethics Law. The skills of an in-house attorney will be very useful to the Commission. To date, the Commission has received valuable assistance from the County Attorney's Office. Under the new law, the Commission may still request services from the County Attorney's Office as needed. I must, however, express a strong preference for the Commission's use of in-house legal services in many circumstances. In the past, the Commission has been largely reliant upon the County Attorney's Office for legal advice. This practice is not ideal because the County Attorney's Office also provides legal assistance to the County departments that are the very subject of the Commission's decisions. The County Attorney's Office has often been placed in an untenable position when providing legal advice to the Commission about the conduct of others within County Government. Moreover, the County Attorney serves at the pleasure of the County Executive and, as such, may sometimes perceive ethics issues from a larger political and institutional perspective that is inconsistent with the very specific mandates of the Commission.

Second, I favor language in the bill that will require "separate" office space for the Commission. The Commission has, in fact, operated from a separate office for many years. The proposed legislation will ensure that such an office arrangement is preserved. A separate office allows the Commission to secure confidential files and to provide a private environment for communications with complaining parties, witnesses, and regulated personnel.

Third, I favor legislation that will provide the Commission with participation in the hiring of its own staff director.

Letter to County Council
July 13, 2010
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Accordingly, I recommend passage of Bill 37-10, and I thank the Council for its current efforts to improve the Ethics Law.

Sincerely,

A handwritten signature in cursive script, appearing to read "L. Horvitz".

Laurie B. Horvitz, Esq.
(301) 951-8400



Supplementary Packet

OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
County Executive

MEMORANDUM

July 15, 2010

TO: Nancy Floreen, President
Montgomery County Council

FROM: Isiah Leggett, County Executive

SUBJECT: Expedited Bill 37-10 Ethics Commission – Staff

RECEIVED
MONTGOMERY COUNTY
COUNCIL
2010 JUL 15 AM 10:45

The Ethics Commission plays a critical role in maintaining the public's trust that government officials make decisions in an objective and impartial manner. We all support the concept that the Ethics Commission should be independent. The independence of the Commission is predicated on the nature of the Commission—a bi-partisan body whose members cannot engage in political activity and who can only be removed for cause with the consent of the Executive and the Council. There is no evidence that the present staff arrangement (Commission staff assigned by the Chief Administrative Officer with work being assigned by the Commission) has impaired the independence or integrity of the Commission.

This legislation proposes to transfer responsibility for supervision of the Executive Director of the Ethics Commission from the Chief Administrative Officer to the Ethics Commission. However, it is not clear why such a radical change in the management of this function is warranted and what problems it is intended to address. For the past 25 years, the management of the County's Ethics oversight has been the responsibility of the CAO and this arrangement has worked effectively. While some may disagree with the findings and decisions of the Ethics Commission there is no question of their independence and effectiveness under the current structure.

As you consider this bill, I urge you not to increase the cost of this function to address an undefined problem during this very difficult economic environment.

In my FY11 Recommended Operating Budget, for the Ethics Commission, I proposed to abolish two administrative positions and transfer the Executive Director's position to the Office of the County Attorney to produce substantial savings by leveraging the administrative resources of the County Attorney's Office. As the fiscal impact analysis indicates, the cost of the new position envisioned in the legislation needs to be determined in the

classification process; it will most likely be a senior level attorney position at Grade 32 or possibly in the Management Leadership Service class. By restoring one of the administrative positions in the FY11 budget and proposing to create a senior level attorney position the costs of this function will be significantly higher than it would have been under my proposal.

In addition, with a Commission whose membership changes, it seems entirely probable that, over time, the Commission may come to rely exclusively on the executive director/general counsel for guidance—legal and otherwise. Expedited Bill 37-10 makes it a real possibility that, with the passage of time, the county attorney will no longer have a direct and regular role in providing advice to the Commission. Requiring that the Commission seek the advice of the county attorney would ensure that the Commission would have the benefit of legal advice from two sources (as the Council currently enjoys); in addition, the county attorney would bring to the Commission a government wide perspective that an executive director/general counsel will lack. I believe that retaining the current role played by the county attorney in providing legal advice to the Commission would help the Commission make better decisions.