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# FCPS Audit Report: 22-1003 – Legal Audit with Management Responses

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December 2022

Prepared by  
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## Executive Summary

Office of Auditor General (OAG) conducted the Legal Audit in accordance with the Fiscal Year (FY) 2022 audit plan amended by the Fairfax County School Board (School Board). This audit was performed in accordance and with generally accepted government auditing standards. In addition, this audit was conducted in consultation with an independent external counsel, Harrell & Chambliss LLP.

Office of Division Counsel (ODC) is the in-house legal office for the school system. ODC attorneys provide services in the following areas, including but not limited to, advising the School Board, Superintendent, the Leadership Team, principals, and program managers on a variety of legal issues; drafting policies, regulations, legislation, contracts and other legal documents; representing the Superintendent in administrative hearings and in other proceedings before federal and state regulatory agencies; conducting research and gather evidence to advise, defend, or initiate legal action; negotiating with opposing counsel to resolve disputes involving employees and students; training staff members regarding legal issues and requirements; and coordinating the work of outside counsel and monitoring legal fees of outside counsel.

The audit objectives and the relevant scope period are listed below:

1. Examine the Fairfax County Public Schools' (FCPS) ODC processes and controls when external legal counsel is engaged, specifically regarding (a) types of matters, (b) review and payment of the external legal counsel invoices, and (c) School Board oversight.

The scope period for the review of the processes and controls for this objective is June 1, 2020, through December 31, 2021.

2. Evaluate, on a sampling<sup>1</sup> basis, if there are any indicators of fraud, waste and abuse (in accordance with the definition of School Board Policy 1107 "Fraud, Waste, and Abuse") involved in the types of matters handled by the external legal counsel.

The scope period for the review of external counsel invoices for this objective is June 1, 2020, through December 31, 2021.

3. Identify if there are any gaps in the FOIA process regarding request(s) of external legal counsel invoices.

The scope period for the review of FOIA requests for external legal counsel invoices is November 2021 through December 2021 to evaluate the adequacy of corrective actions implemented by ODC and the FOIA Office.

For Objective 1, OAG identified three moderate risk findings which are summarized below. For Objective 2, OAG did not identify any indicators of fraud, waste and abuse related to external counsel invoices. As it relates to Objective 3, OAG did not identify any gaps in the FOIA request process for external counsel invoices since corrective actions were implemented. ODC concurs with the findings and recommendations included in this report.

### ➤ **Finding 1 – Maintaining Appropriate Documentation of Processes and Controls for Managing External Counsel and Legal Fees**

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<sup>1</sup> Any ongoing investigations or legal proceedings are excluded from the sampling. Matters in which the OAG has requested to consult with external legal counsel will not be reviewed for this audit.

OAG noted that the controls and processes related to managing external legal counsel were not formally documented. OAG recommends ODC develop standard operating procedures for key business processes.

➤ **Finding 2 – Establishing Requirements for Contractual Agreements and Billing Practices**

OAG noted that retainers and/or engagement agreements are not on file or may not exist with external counsel firms. OAG also noted potential concerns with unstructured and inconsistent billing practices of external counsel firms. OAG recommends ODC establish a practice of requiring retainers or engagement agreements and/or consider establishing external legal counsel guidelines that outlines billing policies.

➤ **Finding 3 – Effectively Managing and Tracking Legal Costs**

OAG noted that ODC is in the process of analyzing the staffing workload in-house to determine cost savings due to the reorganization. OAG also noted that the current process for tracking legal fees does not include information to present a comprehensive view of case outcomes or compared to measures cost savings and is a manual process. OAG recommends ODC explore developing an annual report that provides a comprehensive view of legal costs, and the value and achievements of ODC. OAG also recommends ODC continue to conduct a workload analysis of current staff and identify areas to reduce the costs of external counsel. OAG recommends ODC consider exploring the options for tracking costs by case via a case management system.

OAG appreciates the cooperation and courtesies extended to our staff by the ODC and the Office of Communication and Community Relations (OCCR).

## **Background, Scope and Objectives, and Methodology**

### **Background**

Office of Division Counsel (ODC) is the in-house legal office for the school system. ODC attorneys provide services in the following areas, including but not limited to, advising the School Board, Superintendent, the Leadership Team, principals, and program managers on a variety of legal issues; drafting policies, regulations, legislation, contracts and other legal documents; representing the Superintendent in administrative hearings and in other proceedings before federal and state regulatory agencies; conducting research and gather evidence to advise, defend, or initiate legal action; negotiating with opposing counsel to resolve disputes involving employees and students; training staff members regarding legal issues and requirements; and coordinating the work of outside counsel and monitoring legal fees of outside counsel.

Prior to FY21, ODC staff only included four in-house lawyers and two support staff and therefore required the office to rely on external counsel to provide litigation and other legal services as needed. In FY21, ODC began reorganizing and added two 0.5 assistant division counsel positions, two 1.0 staff attorney positions, and a 1.0 senior paralegal position. ODC is currently working to fill the vacancy for one of the two staff attorney positions. The additional staff has allowed for matters related to special education and procurement to be handled in-house. Additionally, ODC is also looking to handle more personnel matters in-house.

The organizational charts that show the staffing level of ODC as of July 2020 is located in [Appendix A](#) and as of June 2022 is located in [Appendix B](#).

### **Engagement of External Counsel Firms**

The School Board retains external counsel firms to help defend FCPS in court when being sued or believes that it should file suit and to help provide advice in areas where ODC lacks expertise or staff. The School Board approves an annual resolution to retain external counsel firms to help provide legal services. ODC is responsible for selecting the external counsel firms to be included in the annual resolution and has the authority to retain other external counsel firms, as needed. Contracts for legal services are exempt from competitive procurement under the Virginia Public Procurement Act.

### **External Counsel Firms – Types of Matters**

The external counsel firms that were approved in the annual resolution for the audit scope period and typically handle matters are as follows:

- Hunton Andrews Kurth, LLP is assigned to general legal advice and litigation matters. This is a larger firm with the staff and expertise and are typically assigned to complex labor-intensive litigation.
- Blankingship & Keith, P.C. is assigned to general legal advice and litigation services. This firm specializes in special education and personnel matters.
- Michael E. Kinney, P.L.C. is assigned general legal advice and litigation services including personnel and Title IX matters.
- Sands Anderson P.C. is assigned to general legal advice and litigation services including special education and personnel matters.
- Jackson Lewis P.C. is assigned to general legal advice and litigation services such as personnel matters.
- Wehner & York P.C. is assigned to general legal advice and litigation services.

## **External Counsel Fees and Costs**

ODC is responsible for the review and approval of external counsel invoices while adhering to the FCPS direct payment process. The legal fees billed<sup>2</sup> to FCPS by external counsel firms that were assigned to provide general legal advice and litigation services totaled \$9,197,859. This amount reflects the services incurred monthly during the audit period of June 1, 2020 through December 31, 2021. Exhibit A below details the amounts by the external counsel firms.

### ***Exhibit A, Legal Fees by External Counsel Firms***

<b>External Counsel Firms</b>	<b>Legal Fees</b>
<b>Hunton Andrews Kurth LLP</b>	\$6,024,951.63
<b>Blankingship &amp; Keith P.C.</b>	\$2,053,689.96
<b>Michael E Kinney P.L.C.</b>	\$490,478.04
<b>Sands Anderson P.C.</b>	\$288,571.10
<b>A Consulting Firm</b>	\$121,763.75
<b>Jams Inc</b>	\$69,305.39
<b>Collaborative Strategies LLC</b>	\$49,132.97
<b>Jackson Lewis P.C.</b>	\$39,148.15
<b>Wehner &amp; York P.C.</b>	\$38,600.00
<b>Bancroft McGavin Horvath</b>	\$22,218.46
<b>Total</b>	<b>\$9,197,859.45</b>

Other legal expenses that were billed to FCPS by vendors that provided legal services, such as courier services, legal software, and court reporting totaled \$57,733<sup>3</sup> for the services incurred during the audit scope period.

## **Updates to the School Board**

ODC provides regular updates to the School Board.

## **FOIA Request for External Counsel Invoices**

Effective July 1, 2022, the FOIA Office, under the Office of Communication and Community Relations (OCCR), is responsible for documenting, tracking, coordinating, and responding to all Virginia Freedom of Information Act (VFOIA) and Family Educational Rights and Privacy (FERPA) requests received by FCPS. Before July 1, 2022, FERPA requests were handled by the Office of Special Education Procedural Support under the Department of Special Services.

If records are exempt from disclosure and need to be redacted, the FOIA Office conducts a review for student information that is exempt due to FOIA and FERPA. The FOIA Office then submits the records to the ODC for review and redaction of any other applicable exemptions such as attorney client privileged information and personnel information.

### **Part of OAG's audit includes reviewing of a specific incident that happened regarding a FOIA request involving ODC as described below:**

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<sup>2</sup> These amounts were obtained from FOCUS, the Fairfax County Unified System, and reflect the amounts incurred and allocated to Legal Services (526050) and Other Professional Services (526075) commitment items. Legal Services includes expenditures for attorney services provided by external or independent legal counsel. Other Professional Services includes services performed by consultants who have specialized knowledge about certain areas.

<sup>3</sup> Amounts per vendor totaled under \$11,000 individually.

A request from a citizen for “*All outsourced counsel legal services invoices and paid legal services invoices from June 1, 2020 to August 12, 2021*” was received by the FOIA Office on August 13, 2021. ODC determined that approximately 1,300 pages were determined to be relevant in the initial search. On August 27, 2021, the requestor paid the advanced cost estimate and the FOIA Office advised ODC to proceed with the record search, retrieval, redaction and to produce the records to the FOIA Office for final production to the requester.

However, the responsive records (over 1,000 pages of legal invoices) were not fully reviewed by ODC. In order to meet the VFOIA’s timeline, ODC’s staff submitted the partially redacted invoices to the FOIA Office. On September 13, 2021, the FOIA Office assumed that an attorney had reviewed the records and provided the documents to the FOIA requester, unaware that legal review was incomplete. On September 15, 2021, ODC was notified by an external counsel representing one of the students whose information had not been fully redacted of this issue.

### **FOIA Legal Review Process and Organizational Updates**

As a result of the oversight with the August 13, 2021 request, changes aimed at preventing a recurrence were made to both the FOIA Office and ODC.

1. ODC and the FOIA Office established new processes to confirm complete legal reviews prior to records release. All records released from ODC to the FOIA Office will require a two-level review by ODC (paralegal and staff attorney) and a third level review by the FOIA Office as well as confirmation, in writing, from either Division Counsel or Deputy Division Counsel that documents have been fully reviewed and are available for public release.
2. ODC and the FOIA Office implemented two new applications intended to improve the FOIA process.
  - a. SmartFile, a document sharing tool, has audit features available to track when records are being downloaded by requesters.
  - b. Logikcull, a legal ediscovery software, that aligns requests across FERPA, FOIA and legal teams.
3. ODC hired staff attorneys and an additional paralegal to assist with reviewing documents for appropriate redactions before they are released in response to FOIA. Further, four new positions were included in the approved FY23 budget within the FOIA office to assist with document review and FOIA response. The FOIA Office and the FERPA Office under Department of Special Services have also merged into one office as of July 1. This office is housed in OCCR and supported by ODC.

## Scope and Objectives

OAG conducted this performance audit in accordance with the FY22 Audit Plan amended by the School Board and in consultation with an independent external counsel, Harrell & Chambliss LLP. This audit was conducted in accordance with the Generally Accepted Government Auditing Standards (GAGAS), with the exception of peer review. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings, observations and conclusions based on our audit objectives.

The audit objectives and the relevant scope period are listed below:

1. Examine the FCPS' ODC processes and controls when external legal counsel is engaged, specifically regarding (a) types of matters, (b) review and payment of the external legal counsel invoices, and (c) School Board oversight.

The scope period for the review of the processes and controls for this objective is June 1, 2020, through December 31, 2021.

2. Evaluate, on a sampling<sup>4</sup> basis, if there are any indicators of fraud, waste and abuse (in accordance with the definition of School Board Policy 1107 "Fraud, Waste, and Abuse") involved in the types of matters handled by the external legal counsel.

The scope period for the review of external counsel invoices for this objective is June 1, 2020, through December 31, 2021.

3. Identify if there are any gaps in the FOIA process regarding request(s) of external legal counsel invoices.

The scope period for the review of FOIA requests for external legal counsel invoices is November 2021 through December 2021 to evaluate the adequacy of corrective actions implemented by ODC and the FOIA Office.

As required by GAGAS, OAG assessed whether internal control was significant to the audit objectives. This assessment included the use of the Committee of Sponsoring Organizations of the Treadway Commission internal control framework. The framework includes five components: Control Environment; Risk Assessment; Control Activities; Information and Communication; and Monitoring; along with 17 related principles. OAG determined that all five components of internal control and the 17 related principles were significant to the audit objectives. OAG also utilized the Committee of Sponsoring Organizations of the Treadway Commission's Standards for Internal Control in the Federal Government<sup>5</sup> (Green Book) as audit criteria.

## Methodology

To satisfy the audit objectives, the audit team performed the following:

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<sup>4</sup> Any ongoing investigations or legal proceedings are excluded from the sampling. Matters in which the OAG has requested to consult with external legal counsel will not be reviewed for this audit.

<sup>5</sup> Standards set forth by US Government Accountability Office provides the overall framework for establishing and maintaining an effective internal control system. The Green Book may be adopted by state, local, and quasigovernmental entities, as well as not-for-profit organizations, as a framework for an internal control system.



- Interviewed key personnel from ODC to gain an understanding of the types of matters handled by external counsel.
- Understood and evaluated the design and operating effectiveness of controls implemented by ODC related to the processes for the selection and contracting of external counsel firms, billing and payment of external counsel legal fees, and oversight and monitoring of services provided by external counsel.
- Performed a test of legal invoices, on a sampling basis, to review for incidences of fraud waste, and abuse.
- Determined sufficiency of information to ensure adequate School Board oversight.
- Evaluated the measures taken during the reorganization of ODC in order to mitigate legal costs and reliance on external counsel firms.
- Reviewed applicable laws, rules, regulations related to public requests for FCPS records pursuant to the Virginia Freedom of Information Act and any applicable FCPS policy and regulation that exempts the material from disclosure.
- Interviewed key personnel from ODC and the FOIA Office to gain an understanding of the processes related to FOIA requests that require legal review and redaction of confidential information and the specifics of the events related to the August 13, 2021 request for external legal invoices.
- Performed a test of controls, on a sampling basis, to identify gaps in the FOIA process related to external counsel invoices included in the August 13, 2021 FOIA request incident.
- Determined if corrective actions implemented for the FOIA process are sufficient to prevent future occurrences of inadvertent disclosure.

## Sample Selection

### External Counsel Invoices

The OAG obtained the population of external counsel invoices for the legal services that were incurred during the audit scope period. The OAG utilized IDEA, a data analysis tool, to stratify the sample population of the external counsel invoices. The stratified random sample consisted of the five external counsel firms with the most legal fees, in total, during the audit scope period. The population of the stratified sample consisted of 223 invoices totaling \$8,979,454.48. The OAG selected a sample of 50 invoices totaling \$2,325,972.60 from the stratified sample population. The detail of the total legal fees and invoices for each external counsel firms included in the sample selected are detailed in Exhibit C below.

### ***Exhibit C, Sample Selection by External Counsel Firms***

<b>External Counsel Firms</b>	<b>Total Costs</b>	<b>Total Invoices</b>
Hunton Andrews Kurth LLP	\$1,543,373.09	10
Blankingship & Keith P.C.	\$612,563.09	5
Michael E Kinney P.L.C.	\$121,605.00	26
Sands Anderson P.C.	\$27,631.42	8
FTI Consulting Inc	\$20,800.00	1
<b>Total</b>	<b>\$2,325,972.60</b>	<b>50</b>

OAG tested the effectiveness of the processes and controls for the review payment of external counsel invoices related to Objective 1 and evaluated invoices to identify instances of fraud waste and abuse for Objective 2.

For sampling purposes, the OAG intended on excluding invoices from the sample that included any ongoing investigations or legal proceedings and matters in which the OAG has requested to consult with external legal counsel. However, the OAG noted that many instances the external counsel firms included all matters into a comprehensive monthly invoice that may have included services related to those matters. Therefore, for this testing, the OAG performed a macro level review of the invoices as a whole.

#### Recently Closed Litigation Cases

To test the processes and controls related to types of matters under Objective 1, OAG obtained a listing of pending and closed litigation cases. OAG selected six out of the 11 recently closed litigation cases. For the six cases, OAG selected the specific invoice detail for those cases for the months of July 1, 2021 to December 31, 2021. To test the types of matters under Objective 1, OAG performed a detailed reviewed of the transactions and services incurred to assess the reasonableness of hours, services and costs. OAG also evaluated the case outcomes and the sufficiency of monitoring and information provided to ensure proper oversight. OAG also reviewed these cases invoices for instances of fraud, waste, or abuse to satisfy Objective 2.

OAG was able to exclude invoices from the sample that included any ongoing investigations or legal proceedings and matters in which OAG has requested to consult with external legal counsel.

#### FOIA Request for External Counsel Invoices

For Objective 3, OAG reviewed the invoices included in the FOIA request that was partially redacted to understand the root cause of the issue. OAG also selected the only other FOIA request for external counsel invoices that occurred during the scope period. The FOIA request included *“any and all 1) legal invoices from August 1, 2021 to December 16, 2021 related to and/or identifiable the requestor and the requestor’s children 2) investigation invoices from August 1, 2021 to December 16, 2021 related to and/or identifiable the requestor and the requestor’s children”*

#### OAG Organization

OAG is free from organizational impairments to independence in our reporting as defined by government auditing standards. OAG reports directly to the School Board through the Audit Committee. We report the results of our audits to the Audit Committee. The reports are made available to the public via the FCPS website, unless it is prohibited from public disclosure.

## Audit Findings, Recommendations, and Management's Responses

The finding(s) within this report has been attributed a risk rating in accordance with established risk criteria as defined in Table 1.

**Table 1 – Risk Criteria**

Type	Description
High	One or more of the following exists: <ul style="list-style-type: none"><li>• Controls are not in place or are inadequate.</li><li>• Compliance with legislation and regulations or contractual obligations is inadequate.</li><li>• Important issues are identified that could negatively impact the achievement of FCPS program/operational objectives.</li></ul>
Moderate	One or more of the following exists: <ul style="list-style-type: none"><li>• Controls are in place but are not sufficiently complied with.</li><li>• Compliance with subject government regulations or FCPS policies and established procedures is inadequate, or FCPS policies and established procedures are inadequate.</li><li>• Issues are identified that could negatively impact the efficiency and effectiveness of FCPS operations.</li></ul>
Low	One or more of the following exists: <ul style="list-style-type: none"><li>• Controls are in place but the level of compliance varies.</li><li>• Compliance with government regulations or FCPS policies and established procedures varies.</li><li>• Issues identified are less significant but opportunities exist that could enhance FCPS operations.</li></ul>

For Objective 1, OAG identified three moderate risk findings which are detailed below. For Objective 2, OAG did not identify any indicators of fraud, waste and abuse related to external counsel invoices. As it relates to Objective 3, OAG did not identify any gaps in the FOIA request process for external counsel invoices since corrective actions were implemented.

## **Finding 1: Maintaining Appropriate Documentation of Processes and Controls for Managing External Counsel and Legal Fees**

**Risk Rating:** *Moderate – Issues are identified that could negatively impact the efficiency and effectiveness of FCPS operations.*

### **Condition:**

ODC is responsible for coordinating, overseeing and negotiating fees of external counsel. During our audit, OAG obtained an understanding of the processes and controls related to managing external counsel and the payment of legal fees. OAG noted that the controls and processes related to managing external legal counsel were not formally documented. These processes included and were not limited to:

- The process to manage contracts, retainers, and engagement agreements with external counsel.
- The process to assign cases to external counsel firms.
- The process to review invoices internally and track legal fees.
- The process to provide regular updates to the School Board.

### **Criteria:**

- OAG's mission is to independently determine whether the ongoing processes for controlling fiscal and administrative operations and performance throughout FCPS are adequately designed, functioning in an efficient, effective manner, and fully accountable to its citizens of Fairfax County.
- According to the Standards for Internal Control in the Federal Government (Green Book), Principle 3 – Establish Structure, Responsibility, and Authority under the Control Environment element states the following:
  - 3.09 Management develops and maintains documentation of its internal control system.
  - 3.10 Effective documentation assists in management's design of internal control by establishing and communicating the who, what, when, where, and why of internal control execution to personnel. Documentation also provides a means to retain organizational knowledge and mitigate the risk of having that knowledge limited to a few personnel, as well as a means to communicate that knowledge as needed to external parties, such as external auditors.
  - 3.11 Management documents internal control to meet operational needs. Documentation of controls, including changes to controls, is evidence that controls are identified, capable of being communicated to those responsible for their performance, and capable of being monitored and evaluated by the entity.

### **Cause:**

Before FY21, ODC's staff included four attorneys and two support staff. A prescribed process for maintaining documentation and managing external counsel legal fees was not the focus at the time.

**Effect:**

- Since ODC is expanding in-house staff, the lack of documented procedures may lead to inability to hold employees accountable and inconsistency in the application of processes.
- Undocumented processes may reduce knowledge management that will be maintained in the organization.

**Recommendation:**

1. OAG recommends ODC develop standard operating procedures for key business processes.

**Management Responses (Actions and Due Date):**

ODC concurs with Finding No. 1 and the recommendation of OAG. ODC thanks OAG for its independent review and its collaborative recommendations.

As the ODC office expands, we agree that it is valuable to document current operating procedures to ensure consistency and continuity of operations.

ODC senior staff also currently review monthly invoices received from outside counsel for evidence of duplication, churning, and other potential fraud, waste and abuse.

ODC concurs that those current operating procedures outlined above that are not currently documented, should be.

- ODC has either already documented or will document the following processes, by October 1, 2022.
  - The process to manage contracts, retainers, and engagement agreements with external counsel.
  - The process to assign cases to external counsel firms.
  - The process to review document internal invoice and track legal fee.
  - The process to provide regular updates to the School Board.

## **Finding 2: Establishing Requirements for Contractual Agreements and Billing Practices**

**Risk Rating:** *Moderate – Issues are identified that could negatively impact the efficiency and effectiveness of FCPS operations.*

### **Condition:**

ODC may use a variety of approaches to contract for legal services: 1) umbrella contracts for services rendered on an as needed basis; 2) specific engagement agreements for the case; or 3) an agreement for the initial engagement that covers all services subsequently provided by that firm. ODC also negotiates hourly rates with external counsel firms via email communication on an annual basis.

During our testing of 50 sampled invoices for the top five firms, we noted the following related to 49 invoices of four out of the five firms:

1. A retainer exists but is not current for the four invoices covering general matters provided by the first firm. In addition, an engagement agreement did not exist for the other four invoices related to services provided for a special education case.
2. Retainers and/or engagement agreements not on file between FCPS and the second firm for the five invoices related to services consisting of special education cases, personnel matters, and other general matters.
3. Retainers not on file to cover the various general matters indicated on the ten invoices for the third firm. While, engagement agreements were established to cover the litigation services provided for some cases, these agreements did exist for all cases included on the ten invoices.
4. Retainers and/or engagement agreements not on file for the 26 invoices related to services provided by the fourth firm consisting of personnel, general and Title IX matters.

Additionally, for one of the five firms sampled, we noted potential concerns with unstructured and inconsistent billing practices such as timeliness of hours billed for services or cases varied across the external counsel staff. For instance, one attorney billed for services that occurred in May 2021 on the invoice related to July 2021 services.

Furthermore, during our testing of the six closed litigation cases, we noted that there are no parameters established to identify what is allowable for the reimbursable expenses. For instance, the invoices of one firm that was assigned to two of the sampled cases included costs to be reimbursed for out-of-town travel time and expenses. The invoices also included costs related to litigation support vendors, which appears to be a general description of various legal costs.

### **Criteria:**

According to the Standards for Internal Control in the Federal Government (Green Book), Principle 10 – Design Control Activities under the Control Activities element states the following:

- 10.03 Management designs appropriate types of control activities for the entity's internal control system. Control activities help management fulfill responsibilities and address identified risk responses in the internal control system. Two relevant examples of common control activity categories include:

- Proper authorization of transactions - Transactions are authorized and executed only by persons acting within the scope of their authority. This is the principal means of assuring that only valid transactions to exchange, transfer, use, or commit resources are initiated or entered into. Management clearly communicates authorizations to personnel.
- Appropriate documentation of transactions and internal control - Management clearly documents internal control and all transactions and other significant events in a manner that allows the documentation to be readily available for examination. The documentation may appear in management directives, administrative policies, or operating manuals, in either paper or electronic form. Documentation and records are properly managed and maintained. An entity's internal control is flexible to allow management to tailor control activities to meet the entity's special needs. The specific control activities used by a given entity may be different from those used by others based on a number of factors. These factors could include specific threats the entity faces and risks it incurs; differences in objectives; managerial judgment; size and complexity of the entity; operational environment; sensitivity and value of data; and requirements for system reliability, availability, and performance.

**Cause:**

Formal guidance for the use of contractual agreements and expectations related to billing practices of external counsel firms have not been established.

**Effect:**

- Proper documentation was not available to validate the approved hourly rate and scope of the representation indicated in the invoices for the external counsel staff that provided services.
- While OAG did not identify instances in which hours billed were duplicated or excessive reimbursable expenses, not having established billing requirements with external counsel firms increases the risk of exposure to loss and may lead to unnecessary legal fees.

**Recommendation:**

2. OAG recommends ODC establish a practice of requiring retainers or engagement agreements that detail hourly rate, scope of services, and billing terms.
3. OAG recommends ODC consider establishing external legal counsel guidelines that outline billing policies and expectations for reimbursable expenses.

**Management Responses (Actions and Due Date):**

ODC agrees that, particularly as outside litigation against the school division has increased and more cases are referred to outside counsel, it would be helpful to incorporate uniform processes around retainers/engagement agreements, as well as a document that outlines billing policies and expectations.

- ODC will create an annual review process to ensure that all broad, umbrella-type retainer agreements reflect updated, approved billing rates. This process will be documented internally.

Due Date: October 1, 2022

- ODC will establish guidelines to determine which matters should require a separate engagement agreement outside of a typical, firm-based retainer. Likely parameters will include size of the case and preliminary estimate of fees.

Due Date: October 1, 2022

- ODC will establish an addendum for all law firm retainer agreements that establishes policies and expectations for reimbursable expenses.

Due Date: December 13, 2022



### **Finding 3: Effectively Managing and Tracking Legal Costs**

**Risk Rating:** *Moderate – Issues are identified that could negatively impact the efficiency and effectiveness of FCPS operations.*

#### **Condition:**

During the audit, OAG noted that a total of \$8.9 million in legal fees and costs was incurred for the top five external counsel firms to provide services, for the time period from June 1, 2020 to December 31, 2021. The hourly rates the external counsel firms charge for partners and other legal staff can vary from \$130 to \$795 which continue to increase on an annual basis.

Currently, ODC is working to reduce the reliance on external counsel in order to reduce legal costs by bringing more cases in-house on areas such as special education and employment matters. ODC has recently hired staff that handle procurement law cases. To an increasing degree, it takes price into consideration when selecting which firm to give work. For example, as a means to contain costs, ODC has begun pivoting away from the assignment of litigation cases to the higher priced external counsel firms. Additional changes to staffing structure are being considered to acquire in-house staff that has the necessary skillsets and expertise to handle other types of litigation.

Additionally, ODC tracks external legal fees by month. OAG observed the method to track the legal fees includes manually entering the fees from each invoice by vendor and case to an excel spreadsheet. OAG noted instances in which the manual process could result in errors and does not fully provide necessary information to analyze the legal services received.

#### **Criteria:**

According to the Standards for Internal Control in the Federal Government (Green Book), Principle 10 – Design Control Activities under the Control Activities element states the following:

- 10.03 Management designs appropriate types of control activities for the entity's internal control system. Control activities help management fulfill responsibilities and address identified risk responses in the internal control system. Four relevant examples of common control activity categories include:
  - Top level reviews of actual performance - Management tracks major entity achievements and compares these to the plans, goals, and objectives set by the entity.
  - Reviews by management at the functional or activity level - Management compares actual performance to planned or expected results throughout the organization and analyzes significant differences.
  - Management of human capital - Effective management of an entity's workforce, its human capital, is essential to achieving results and an important part of internal control. Only when the right personnel for the job are on board and are provided the right training, tools, structure, incentives, and responsibilities is operational success possible. Management continually assesses the knowledge, skills, and ability needs of the entity so that the entity is able to obtain a workforce that has the required knowledge, skills, and abilities to achieve organizational goals.
  - Establishment and review of performance measures and indicators - Management establishes activities to monitor performance measures and indicators. These may include comparisons and assessments relating different

sets of data to one another so that analyses of the relationships can be made and appropriate actions taken. Management designs controls aimed at validating the propriety and integrity of both entity and individual performance measures and indicators.

**Cause:**

- ODC is in the process of analyzing the staffing workload in-house to determine cost savings due to the reorganization.
- The current process for tracking legal fees does not include information to present a comprehensive view of case outcomes or compared to measures cost savings.
- The current process for tracking legal fees is manual and does not include the use of the current software used to track case progress.

**Effect:**

- This may reduce the ability to show how external counsel costs were effectively managed and delay identifying costs savings as a result of bringing legal services in-house.
- This may reduce transparency and result in the inability to provide quality information to the School Board to have the proper understanding or context for the costs of legal fees.
- The manual tracking of legal fees may lead to errors in reporting, inability to track costs by case and may also result in inability to properly budget for legal costs in future years.

**Recommendation:**

4. OAG recommends ODC explore developing an annual report that provides a comprehensive view of legal costs, and the value and achievements of the ODC.
5. OAG recommends ODC continue to conduct a workload analysis of current staff and identify areas to reduce the costs of external counsel.
6. OAG recommends ODC consider exploring the options for tracking costs by case via a case management system.

**Management Responses (Actions and Due Date):**

ODC concurs that a more comprehensive report of legal costs will be of value to the School Board and Superintendent. This report will allow the Board and Superintendent to see how ODC mitigates significant legal and financial risk to the Board and the school division.

- To ensure that the Board and Superintendent receive this report in a timely fashion, ODC will provide the first report by December 13, 2022, rather than waiting until the end of the fiscal year on June 30, 2023.

Due Date: December 13, 2022

ODC concurs with this finding and agrees that it will continue to conduct ongoing workload analyses of current staff to identify areas for cost reductions.

- As an on-going project, ODC will include this as a sub-section of its annual report.

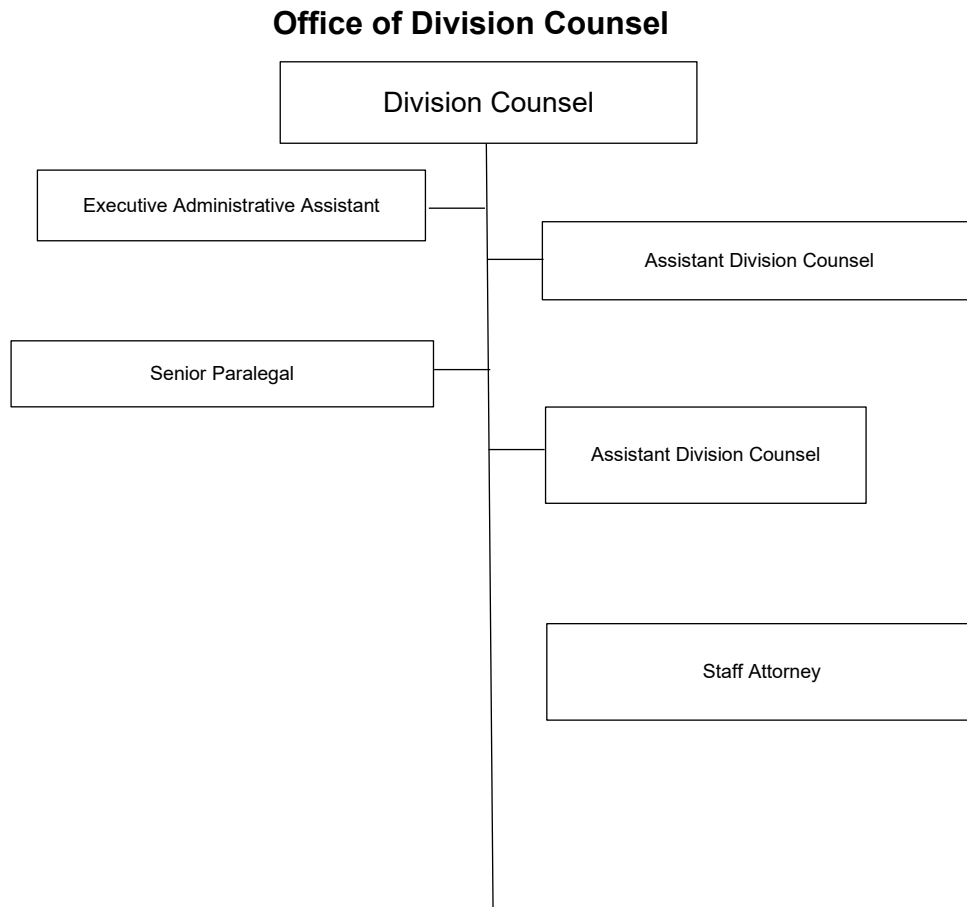
Due Date: June 30, 2023

ODC concurs that case management software could assist with tracking costs by case.

- As ODC upgrades ProLaw we will explore those possible functions directly with the vendor.

Due Date: June 30, 2023

## Appendix A: Office of Division Counsel Organizational Chart as of July 2020



## Appendix B: Office of Division Counsel Organizational Chart as of June 2022

### Office of Division Counsel

