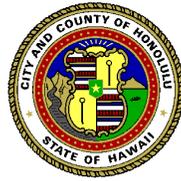


**ETHICS COMMISSION  
CITY AND COUNTY OF HONOLULU**

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KIRK CALDWELL  
MAYOR



JAN K. YAMANE  
EXECUTIVE DIRECTOR  
AND LEGAL COUNSEL

**ETHICS COMMISSION  
CITY AND COUNTY OF HONOLULU**

Date and Place:       October 16, 2019  
                              Kapālama Hale  
                              Conference Room 153, 1<sup>st</sup> Floor  
                              925 Dillingham Boulevard  
                              Honolulu, Hawai‘i 96817

Present:                Hon. Victoria Marks (ret.), Chair  
                              Michael Lilly, Esq., Vice Chair

Peter S. Adler, Commissioner  
Hon. Riki Amano (ret.), Commissioner  
Lynette Lo Kanda, Commissioner  
David B. Monk, Commissioner  
Hon. Allene Suemori (ret.), Commissioner

Jan K. Yamane, Executive Director and Legal Counsel (EDLC)  
Laurie Wong-Nowinski, Associate Legal Counsel (ALC)  
Janice K. Yonamine, Investigator (INV)  
Kristine Bigornia (TA), Legal Clerk III (LCIII)

Moana Yost, Deputy Corporation Counsel,  
Department of the Corporation Counsel (COR)

Christina Jedra, Reporter, Civil Beat  
Sandy Ma, Executive Director, Common Cause  
Natalie Iwasa, Member of the Public

**MINUTES OF THE ETHICS COMMISSION MEETING**

I.       Call to Order, Public Notice, Quorum

Chair Marks called the meeting to order at 11:31 a.m., declaring quorum with Commissioners Adler, Amano, Monk, and Kanda present.

## II. New Business

### A. Chair's Report

#### 1. Announcements, Introductions, Correspondence, and Additional Distribution

Chair Marks acknowledged that the Commission received three written testimonies from the following individuals: Ms. Lynne Matusow; Ms. Sandy Ma, Executive Director of Common Cause Hawai'i; and Ms. Barbara Polk.

#### 2. For Action: Approval of Open Session Minutes of August 21, 2019

**Commissioner Monk made and Commissioner Kanda seconded a motion to approve the open session minutes of August 21, 2019. The motion carried unanimously.**

### B. Executive Director and Legal Counsel's Report

#### 1. Staff Work Reports Summary

The EDLC acknowledged staffing challenges over the reporting period, but stated that LCIII and INV continued to manage their workloads. INV attended the second part of the B.A.N.K (Blueprint, Action, Nurture, and Knowledge) training on decoding personalities and ALC spent more time on Outreach/Education.

#### 2. Statistics

- a. Website Sessions – August (380) and September (386) 2019

#### 4. Education and Outreach

- a. Ethics Training Program (FY19–FY20) – Update

The ALC stated that the training program is complete and that the Department of Information Technology (DIT) is uploading it on the ethics learning management platform. Unfortunately, DIT personnel have changed, so delays are inevitable.

Chair Marks asked if staff met with the new person, the ALC confirmed. Before the change, the prior DIT staff introduced ethics staff to the newly assigned DIT staff. The ALC continued that the tentative release of the training will be at the end of October or beginning of November.

At 11:35 a.m., Vice Chair Lilly joined the meeting.

- b. Twitter – Update
- c. E-Newsletter – August 2019 – Update

The ALC stated that at the last meeting, staff was tasked to list pros and cons on managing Facebook and Twitter accounts. INV and LCIII assisted ALC on developing the list. She reminded the Commission that our Twitter feed can be viewed on our website.

The ALC obtained and described Twitter analytics from the last 28 days. The Commission's twitter account earned 10,500 *impressions*, which are the number of times a tweet appears on user timelines or search results. Staff tweet various topics, such as the notices on Honolulu City Lights fundraising guidelines, including a new one featuring Managing Director Amemiya posing with Elf the Ethics Elf and Paz the Ethical Pumpkin.

Commissioner Kanda asked if staff received any questions after the newsletter was sent out. The ALC confirmed that she received two calls for clarifications.

COR Deputy Yost asked if you can comment on Twitter. The ALC confirmed with limited characters.

The LCIII explained what Facebook is and its capabilities, from uploading a photo album, selling belongings, sharing comments and thoughts, etc. With Twitter, users share their interests or dis-interests via a *tweet* with a limited amount of characters.

The LCIII stated that the ALC's tweets include *hashtags*. The ALC explained that hashtags (indicated by the pound sign) pull up various posts with the same tag, such as #ethicsHNL, #govwatchdog, #integrity.

The ALC and LCIII continued by comparing and contrasting different social media platforms, including Facebook, Instagram, and Twitter. The INV added that Facebook is more for connecting with family and friends.

At 11:45 a.m., Commissioner Suemori joined the meeting.

The ALC shared that she has been in contact with the New York City Conflicts of Interest Board's (NYC-COIB) outreach coordinator to discuss social media at the Council of Government Ethics Laws (COGEL) conference in December. She asked him his thoughts on Facebook, and he expressed that Facebook is not effective and difficult for government organizations to use because paid advertisements control whether a post will show up for viewing. Government does not pay for ads so government posts do not show up on users' feeds.

Commissioner Monk asked if there is a way to link both Twitter and Facebook. The INV stated that the issue is not linking the accounts, the issue is managing the accounts when people respond to posts. She continued that the ALC is the only staff working on Twitter; depending on the platform, people react differently to the same content.

The EDLC stated that Twitter works for staff because it is not resource intensive. She has heard others comment on how active the Commission's social media manager

is; in fact, the Commission has no social media manager. The Commission's staff attorney updates and tweets on an almost-daily basis to keep engagement high with followers. The EDLC concluded that managing another social media platform will take staff away from core duties—at present, one platform is as much as we can handle.

Commissioner Kanda summarized that it goes back to being short-staffed, and the EDLC confirmed.

Commissioner Amano suggested that staff should continue to manage only Twitter until staff resources grow.

## 5. Legislation

### d. For Discussion: City Ethics Laws

#### i. Clarify Who Can Initiate a Complaint

The EDLC stated that Chair Mark requested this agenda item. Staff received three written testimonies from separate individuals: Ms. Lynne Matusow, Ms. Sandy Ma, Executive Director of Common Cause Hawaii, and Ms. Barabara Polk.

Chair Marks asked Ms. Ma or Ms. Iwasa wanted to testify; both responded in the negative and requested to listen to the discussion before testifying.

Chair Marks stated during the Strategic Planning process, it became clear that some of the laws needed to be updated, amended, and changed. Besides the financial disclosure and lobbying laws, the laws on complaints and confidentiality need to be changed.

Chair Marks explained that the Commission was established by State Constitution. From that, the Revised Charter of Honolulu (RCH) and Revised Ordinances of Honolulu (ROH) govern the Commission. The definition of complaint is that it must be written and signed by the complainant unless the Commission, not the Commission's staff, initiates the complaint. The Ethics Commission's Rules of Procedure (ECRP), provide that staff can also initiate complaints, which exceeds the statutory authority. She suggested amending the law to include the "Commission's staff."

Commissioner Kanda asked if someone files a complaint not in writing, will it be accepted. Chair answered that staff has accepted such complaints, but it is open to challenge. Chair Marks recited the sentence: "The commission shall not consider any complaint that is not submitted in writing and signed by the complainant, except that it may consider one initiated by the commission." ROH 3-6.7(a). Chair Marks concluded adding "or the Commission's staff" would clarify and protect the whole process since definitions distinguish the Commission from the Commission's staff.

Vice Chair Lilly agreed with the suggested language, stating that in the past, complaints have been initiated by staff based on non-written complaints, which the ALC confirmed. He continued that some of our most significant investigations were from anonymous

sources. Vice Chair Lilly concluded we need to have language for staff to act on any information that gives rise to the need to initiate a complaint.

Commissioner Adler asked would it be fair to say that having a written or signed complaint is also a way of reducing retaliatory complaints. Although he does not know the percentage of such complaints, it is one of his concerns. Chair Marks stated that if the Subject challenges and requests a hearing, the Reporter may want to remain confidential.

Commissioner Adler asked if we can have an in-camera complaint in executive session. Chair Marks answered we would get into due process issues.

Vice Chair Lilly asked if the Commission initiates a complaint based on a confidential, anonymous source, how would the Commission proceed. Chair Marks stated that the staff initiating the written complaint must sign the complaint, and then begin preliminary investigation.

The ALC shared her research on similar jurisdictions. After intake, staff signs off on the formal complaint form, thus initiating the “complaint.” Chair Marks clarified that the staff signing off becomes the Complainant; the ALC confirmed.

Commissioner Adler asked if this is the current practice; the ALC replied that we have a formal intake process.

The EDLC suggested that the language may have been in place because anonymous complaints make it difficult, if not impossible, to follow-up because you cannot contact the Complainant for more information.

The ALC stated that other jurisdictions have a balance provision either in the rules of procedure or law that states what circumstances should occur prior to the staff initiating a complaint for safety measures.

Commissioner Amano asked if in the past, the Commission initiated a complaint; the ALC stated, historically, it was delegated to staff.

Commissioner Amano suggested changing the language from initiated by the Commission to the Commission’s staff. She explained that having the ability to initiate complaints complicates prosecution because the Commission is judge and jury and that eliminating the Commission from the beginning creates a clean process.

Commissioner Adler asked if a Commissioner submits a complaint to staff, should staff report its findings to the Commissioner. Commissioner Amano stated if the Commissioner is not the Complainant, then it should stay with staff until the matter is before the Commission.

The ALC suggested that the Commission cite ECRP 1.14 and formally delegate duties.

Commissioner Alder stated that the Commission needs to establish checks and balances on staff.

Vice Chair Lilly explained the process as staff initiates a complaint and then preliminarily investigates. When staff is ready to report probable cause, the Commission decides whether or not to go forward. Vice Chair Lilly concluded that for checks and balances, the Commission needs to be proactive because it oversees the EDLC.

Commissioner Adler stated that it would be too late. Vice Chair Lilly understood, but like any other organization, the Commission needs to select the best people possible for the job.

**Chair Marks made and Vice Chair Lilly seconded a motion that the Commission delegate to Commission staff the ability to initiate complaints and that the Commission would take steps to amend the ROH 3-6.7.**

The ALC asked the Commission for time to research other jurisdictions with safety measures when staff initiates a complaint before making a final decision.

Ms. Iwasa, a member of the public, stated that she did not submit written testimony, but would like to testify on the items. She stated that she was glad that the Commission was discussing ways to improve the Commission and it is important for the Commission to accept complaints in different ways, which should include a hotline. She understands the challenges of following through with anonymous complaints, but reporters are concerned about retaliation. Ms. Iwasa stated that making a change in the ordinances takes three full readings between City Council and Committee meetings, which takes about three months. Charter amendments take longer.

Chair Marks commented that the RCH is amended every ten years. Ms. Iwasa stated that it can be done via a Council resolution and shared that she and others are currently working with the City Council to have a Charter amendment initiated.

Chair Marks stated that the City has a hotline for City employees that is triaged by three agencies: Equal Opportunity Office (Department of Human Resources); Internal Control Division (Budget and Fiscal Services), and the Ethics Commission.

Ms. Iwasa stated that she clicked links on the Commission's website and they pointed to a dead page. She recommended the hotline be available 24/7 to everyone, not only to City employees.

Ms. Ma, Executive Director of Common Cause Hawai'i, asked about ROH 3-6.7, how will this work with the Strategic Plan that states the Commission should consider

adopting a policy that the Commission may not initiate or proceed with its own official investigations while one is conducted by other agencies.

Chair Marks stated that it will be discretionary, explaining that the Commission does not have the authority to terminate a City employee; after investigation, staff provides its report and recommendation to the department. Complaints not within the Commission's jurisdiction are referred to the appropriate department. If a department is currently investigating, staff will decide whether to continue its own investigation or let the department investigate.

Ms. Ma stated that the Common Cause Hawai'i's position is that the Ethics Commission is the leader with the most expertise and experience in ethics so should be encouraged to do its own investigation, especially when complaints are filed anonymously and by whistleblowers.

Vice Chair Lilly clarified that it was a discussion item in the Strategic Plan, but that the Commission does not intend to relinquish jurisdiction over ethics violations.

The ALC provided historical context on the hotline, clarifying that staff requested that the hotline be available to the public, but all three agencies have limited resources. The hotline was established via Administrative Directive by the Executive Branch, so it is only available to city employees in the Executive Branch.

Chair Marks stated that she made a motion, Vice Chair Lilly seconded, is there any more discussion.

**Chair Marks amended her motion to delegate to staff the ability to initiate a complaint, and then wordsmith with additional input. Vice Chair Lilly seconded. The amended motion passed unanimously.**

Chair Marks stated that as a matter of process, a copy of the minutes regarding the amended motion should be attached to the file whenever staff initiates a complaint.

ii. Clarify Definition of "Confidential"

Chair Marks stated all of these discussions arose during the strategic planning process. Confidentiality is in ROH 3-6.12(a), "All advisory opinions, files, records, reports, writings, documents, exhibits, electronic records and other information prepared or received by the commission or its staff or consultants relating to a request for advice or a complaint shall be held in confidence and no information as to the contents thereof shall be disclosed...."

Chair Marks described recent situations when people talked about their complaint and its investigation during open session, but the Commission was not allowed to respond due to confidentiality laws.

The ALC stated that this is subject to the Uniformed Information Practice Act (UIPA).

Chair Marks and Commissioner Suemori expressed concern about the person whose complaint has been investigated and finished, but then talks about their complaint to the Commission in open meeting as if it is still on-going.

Chair Marks stated that the INV contacted the State Department of Commerce and Consumer Affairs, Regulated Industries Complaints Office (RICO), and it discloses outcomes. There is no clear language that allows the Commission to do this.

Vice Chair Lilly stated when Advisory Opinions are issued, everyone involved is kept confidential.

Chair Marks added that the Commission cannot disclose what process the INV followed to reach a conclusion. Chair Marks proposed that the Commission be allowed to disclose the process and outcome of an investigation.

Ms. Ma expressed that there could be a chilling effect and reprisals if an investigation's outcome is published.

Commissioner Suemori clarified that the Commission would not be identifying anyone, stating that it is chilling when the Commission is not allowed to describe its process; further, if the Commission proceeds in this manner, it would be transparent with the public about the Commission's work.

The ALC added that sometimes a complaint with no merit and insufficient evidence is investigated and closed, but the Reporter is not satisfied with the outcome.

Chair Marks clarified when a Respondent requests a hearing, it should be confidential. She asked if the Commission is able to state that an investigation has been done and resulted in a Notice of Violation.

COR Deputy Yost stated in the Office of Information Practices (OIP) opinion for disclosure of records, the investigative file can be disclosed by redacting all those involved.

The ALC stated in open session, because we are not violating anyone's reasonable expectation of privacy, we can discuss. COR Deputy Yost confirmed.

Vice Chair Lilly stated that there are two different statutes. Chair Marks and COR Deputy Yost agreed, advising that OIP be contacted about the open records law.

Chair Marks carried over this item to the next meeting.

6. Education Opportunities – Commissioners and Staff

- a. *Ethics in Hawai`i* Conference (State and Honolulu Ethics Commissions, Hawai`i, Kauai, and Maui Boards of Ethics, September 5, 2019) – Report

The EDLC stated that she would like to open the floor to Commissioners and staff who attended the event to share their thoughts. She continued that the consensus she heard was that everyone wants to have it again, annually if possible.

Comments received by Commissioners and staff included that it was illuminating because of the differences between the counties and State; hold a half-day conference with narrow topics; in consideration of resources, hold the event biennially (every other year); establish a Hawai`i Ethics Commission Association.

- b. *Ethics in Hawai`i Under Siege?* (Common Cause, September 5, 2019) – Report

The EDLC stated that Ms. Ma did not open the session with the Ethics Commission’s objections to having former staff on the panel, as she had promised.

Ms. Ma stated that she forgot and apologized for not following through.

- c. SCCE 18<sup>th</sup> Annual Compliance & Ethics Institute 2019 (September 15–18, 2019) – Report

The EDLC attended and stated that this is still one of the best conferences she has attended. Her early-bird registration included pre- and post-conference sessions. This year’s conference included more government-focused sessions, including one pre-conference session featuring the City of Atlanta Ethics Office and a plenary session featuring Michael E. Horowitz, Inspector General, U.S. Department of Justice. Government agencies attending included the Federal Bureau of Investigation, retirement systems, county water authorities, boards of ethics and government accountability, among others.

- d. COGEL 41<sup>st</sup> Annual Conference (December 15-18, 2019), Chicago Marriott Downtown, Chicago, IL – Update

The EDLC announced three registrations; one pending.

III. Executive Session Determination

- A. For Discussion and Action: Whether the Ethics Commission Should Exercise Its Discretion to Consider the Evaluation of the Executive Director and Legal Counsel Where Consideration of Matters Affecting Privacy Will Be Involved, in an Executive Meeting Closed to the Public Pursuant to Section 92-5(a)(2)

**\*\*\*AGENDA ITEM TAKEN OUT OF ORDER\*\*\***

**\*\*\*AGENDA ITEM DISCUSSED IN OPEN SESSION\*\*\***

Chair Marks asked the Commission about the EDLC's evaluation; the EDLC requested an executive session.

**At 1:16 p.m., Commissioner Amano motioned to enter executive session from open session. Commissioner Monk seconded. The motion carried unanimously.**

Chair Marks offered to take testimony prior to going in to executive session.

Ms. Iwasa testified:

- A concern is the INV's work pie chart showing over 50 percent of time is spent in administration; the Commission agreed.
- Suggested posting the meeting agenda and materials by linking Twitter to Facebook.
- Under the Charter, suggested that it is best for the Ethics Commission to be removed from the Department of the Corporation Counsel; met with Councilmember Waters on submitting a resolution.
- For Executive Session, encouraged the Commission to follow the Honolulu Police Commission's lead on having more open session items, including the evaluation of the Police Chief. She understands the EDLC's desire for privacy, but would like the Commission to consider open session in the future.

Chair Marks stated that historically, the EDLC's evaluation has always been in executive session.

IV. Executive Session (The following agenda items will be reviewed in executive session pursuant to Section 92-5(a)(2), Hawaii Revised Statutes (HRS), to consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved; or Section 92-5(a)(4), HRS, to consult with the Commission's attorney on questions and issues pertaining to the Commission's powers, duties, privileges, immunities and liabilities.)

Before entering Executive Session, the ALC and COR Deputy Yost requested Chair Marks to discuss Agenda Items IV.B. and IV.C. in Open Session, and to enter Executive Session if there are specific questions to attorneys regarding legal recommendations or analysis. Chair Marks granted the request.

A. For Discussion: Executive Director and Legal Counsel Annual Evaluation (FY19)

B. For Discussion and Action: Request for Formal Advisory Opinion – Should the Gift Guidelines Be Amended to Prohibit City Officers and Employees from Accepting Gifts from Persons Doing Business with Their City Agency, Regardless of the Value

of the Gift (i.e., Reconsider Current Exceptions that Allow Acceptance of Tokens of Aloha and Gifts of Relatively Small Value from Persons Doing Business with A City Agency)?

**\*\*\*AGENDA ITEM DISCUSSED IN OPEN SESSION\*\*\***

The ALC stated the Gift Guidelines need to be revisited, explaining that they state that all City employees, except for law enforcement, can accept “Tokens of Aloha,” such as a box of maunapua, lei, or banana bread, and then the item is shared with staff. Recently, a City officer inquired about accepting a Token of Aloha, and was informally advised that it cannot be accepted because it is coming from someone who is doing business with your City agency. After the advice, the City officer reprimanded the officer’s subordinate about accepting a Token of Aloha. The issue is whether to follow the guidelines (okay to accept) or the advice (not okay because it was received from someone doing business with the city agency). The ALC asked the Commission if it would like to establish a zero-tolerance (no gifts) policy, including Tokens of Aloha.

Commissioner Kanda asked if there are restrictions on cost; the ALC answered that in practice, staff advises \$25, but the guidelines states \$50.

The EDLC stated that often the cost of a gift is unknown, such as a gift basket, which could cost from \$50 to \$200.

Chair Marks stated that a box of maunapua, pork hash, and half-moon cost her \$34, so \$25 might be low.

Commissioner Adler stated that he is ready for a zero-tolerance policy because it is slippery.

Commissioner Suemori expressed that she wants to agree, but there are people who genuinely appreciate city employees and their work.

The EDLC shared that she and ALC met with Department of Human Resources (DHR) Director Kubo and Managing Director Amemiya to discuss the gift guidelines and give notice of the Commission’s discussion. Director Kubo estimated that 75 percent of the City workforce does not interact with the public and that 25 percent are on the counter. There are no records of who receives what and when.

Ms. Iwasa shared that she gives the fire department home-baked goods on an annual basis because she appreciates them for having saved her husband’s life. She continued if the employees at the counter are receiving Tokens of the Aloha, would they know if the giver is doing business with the City.

Commissioner Monk stated clean and simple is very appealing, but to have a zero-tolerance policy would be culturally painful. He shared his experience while working in the

Federal government, when accepting a gift, it must be clear that the receiver accepts on behalf of the Embassy and will share with staff. With gift cards—anything with a monetary value—has to be excluded. Commissioner Monk continued that it needs to be promulgated from the top down.

Commissioner Kanda stated that it should be in the frequently asked questions of what is acceptable.

**Commissioner Amano made and Commissioner Adler seconded a motion to adopt a zero-tolerance rule.**

The ALC stated that she researched nine different jurisdictions, including the U.S Office of Government Ethics and Hawai‘i State Ethics Commission, and all had allowances for tokens of appreciation.

Commissioner Adler asked Chair Marks if it would be valuable to invite open testimony on this from a wider circle of participants.

Commissioner Amano disagreed, stating that it would not be a useful discussion because it is a slippery slope. She shared that when discussing gifts, former Ethics Commissioner Silva believed in zero-tolerance. At first, she did not understand, but currently thinks it is a good idea because we are government workers paid with taxpayers’ money.

The Commission continued its discussion, raising issues, including enforcement, issuing warning letters, whether lei and refreshments would be prohibited, among other topics.

Commissioner Amano asked for the definition of “gift.” The ALC answered that a lei is considered a “gift.” “*Gift* means any gift, whether in the form of money, goods, service, loan, travel, entertainment, hospitality, thing, or promise or in any other form.”

Commissioner Kanda suggested continuing this discussion at the next meeting.

Chair Marks stated that there is a motion and a second for zero-tolerance, and that further discussion will be tabled.

The EDLC reminded Chair Marks that the Commission wanted to provide guidance before the holiday season. Chair Marks announced the next meeting will be on Wednesday, November 13, 2019, and the first item on the agenda will be gifts.

**C. For Discussion: May the Ethics Commission:**

1. Create a Permitted Interaction Group (PIG) for Community Outreach and Media Response
2. Delegate One Commissioner to Speak on Behalf of the Ethics Commission
3. Respond to a Complainant Who Would Like to Discuss Their Case in Open Session

4. Notice on Its Agenda and Consider “Matters Affecting Privacy” in Executive Session

Agenda Item IV.C will be carried over to the November 13, 2019 meeting.

V. Strategic Planning

A. *Ethics Commission–2027 (Amended)*

1. For Discussion and Action: Delegation of Authority by Ethics Commission to Ethics Commission Investigator to Self-Initiate Investigations on Behalf of the Commission
2. For Discussion and Action: Community Outreach Plan (DRAFT) and Whether the Ethics Commission May Create a Permitted Interaction Group (PIG) for Community Outreach and Media Response

Agenda Item V will be carried over to the November 13, 2019 meeting.

VI. Adjournment

- A. For Discussion and Action: Next Reserved Meeting Date: November 13, 2019
- B. For Discussion and Action: Next Scheduled Meeting Date: December 18, 2019 (December Meeting Date Conflicts with COGEL Conference)

After discussion, the Commission decided to meet on November 13, 2019, and cancelled its December 18, 2019 meeting. The Commission’s first meeting in 2020 will be February 19, 2019.

The Commission posted its tentative Calendar Year 2020 meeting schedule.

**At 1:55 p.m., Commissioner Suemori made and Commissioner Monk seconded a motion to adjourn the Ethics Commission meeting. The motion carried unanimously.**