

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU



Advisory Opinion No. 83

This is in response to your disclosure that you qualify for a real estate salesman's license and your present position with the City is as a member of the uniform patrol division of the Honolulu Police Department.

We recommend that you pay your \$100.00 license fee and thereafter place your real estate salesman's license on an inactive status.

We understand the facts to be as follows:

- 1) At present you are a member of the uniform patrol, division of the Police Department of the City.
- 2) You recently took a real estate salesman's license examination, and you have been notified that you passed the examination and therefore qualify for a real estate salesman's license.
- 3) When you become an active real estate salesman, you may find criminal violation arising out of the use of the real property which you are actively trying to sell. Under such circumstance, the question is what would you do: File a criminal complaint for violation of state statute or City Ordinances, or forego the criminal complaint and consummate the sale so that you may realize your statutory commission as a real estate salesman?

Under the foregoing circumstances, the standards of conduct which may be breached are RCH Section 10-102.3 and RCH Section 10-104. RCH Section 10-102.3 provides that no officer or employee shall:

Engage in any business transaction or activity or have a financial interest, direct or indirect, which is *incompatible* with the proper discharge of his official duties or which may *tend to impair his independence of judgment* in the performance of his official duties
[Emphasis added]

At the outset the facts surrounding your case give rise to the classic triangle of a typical conflict of interest situation. *See* M 78-56, attached. In your case one square may be represented by your personal interest as a real estate salesman, while the second block may be represented by your official duties as a police officer, and the third block is represented by the real property. The conflict arises because you financial interest as real estate salesman and your official capacity as a police officer merge into the third block. Viewed in this light, you may be placed in an

incompatible situation or cause to make errors in judgment because you would have to make a choice between the salesman's fee you would receive arising out of the sale of the real property or to enforce the laws against the subject real property which is up for sale.

For example, the real estate broker for which you are working during your off duty hours may give you a list of properties which are up for sale. You also have a buyer who is interested in one of the properties that is up for sale. You take the prospective buyer to show him a real property that is on your list. In the course of showing the prospective buyer the subject property, you find that the present owner is in violation of a zoning ordinance for residential district because he has an additional dwelling in his basement. Under this circumstance, what would you do? Would you uphold the law as you sworn to do when you became a police officer and file a criminal complaint to prosecute the prospective seller or ignore the violation so that you can make a sale to each a commission in four figures.¹

Another example is where you may take a prospective buyer to a particular residential property situated somewhere on the North Shore of Oahu. In the process of showing the prospective buyer the residential property which is a subject of sale, you observe that the owner of the property is raising marijuana among some of the plantings he has on the rear of his lot. Once again, you are placed in a position to make a choice whether to enforce the law against the property owner who has committed a crime or because of the lucrative commission you may overlook the criminal activities of the property owner.

There also may be examples arising out of enforcement of traffic laws. For instance, you may be following a vehicle which may have gone through a red light at an intersection; and upon stopping the vehicle, you learn that the driver of the vehicle is a prospective client of yours who is interested in purchasing valuable commercial property for which you are in a position to receive commissions in five figures because of the value of the commercial property. Once again, do you issue the traffic citation to your prospective client who has violated a traffic law, or do you ignore the violation that was committed.

There may be other examples too numerous to relate herein. As such, this Commission believes that you should not be placed in a position to compromise your position between your duties as a police officer and pecuniary benefits you may derive out of your private activity as a real estate salesman.

Another standard of conduct which generally goes hand in hand with RCH Section 10-102.3 is RCH Section 10-104, which reads as follows:

¹ We state that your commission would be in four figures because we are well aware that the average cost of a single family dwelling is reported to range from \$75,000 and up. We further understand that the real estate commission ranges from 5 to 7% for each sale depending upon the sale price. In your case, a real estate salesman receives 1/2 of the commission while his broker retains the other half. When 5% is multiplied against \$75,000 the amount is \$3,750. This amount divided by 2 gives you a commission amounting to \$1,875 or as high as \$2,625 if the 7% fee commission is applied to the \$75,000.

No elected or appointed officer or employee shall use his official position to secure or grant special consideration, treatment, advantage, privilege or exemption to himself or any person beyond that which is available to every other person.

As a general rule, when an employee is in a situation which is incompatible with his official position or in a situation which impairs his judgment in carrying out his official duties, he generally is in a situation where he may be applying two separate standards upon two individuals in similar circumstances arising out of his activity as an employee of the private employer and as an employee of the City. It follows because if there is no incompatibility or error in judgment, you need not secure or grant special consideration, treatment, advantage, privilege or exemption to any person beyond that which is available to every other person.

Perhaps you have never considered your private employment as viewed by this Commission. However, this Commission believes that to permit such private employment to continue may undermine the confidence of the public in your department and thereby adversely affect the operations of your department from the standpoint of your department's duty to enforce all laws in this State and City equally upon every resident of this City.

Furthermore, when one is engaged in selling, it generally involves an element of "puffing." "Puffing" is known in salesmanship as stressing the good points of the product on sale and minimizing the bad points. In so doing, the purchaser may rely on such "puffing" and purchase the product. Subsequently, he finds that the product does not come up to expectations as "puffed." When the buyer is disappointed with the product, he generally will question the honesty, creditability and integrity of the salesperson. This attitude of the purchaser generally includes the principals with whom the salesperson may be employed or associated. As such, when your honesty, creditability and integrity are under suspicion, they may affect your performance as well as the performance of the Police Department because the public generally believe that police officers are honest and can be relied on for their integrity. The lowering of the high esteem the public has of the Police Department, we believe, should not be jeopardized.

In summary, we conclude that your outside employment as a real estate salesman may result in violations of RCH Sections 10-102.3 and 10-104 because you may be placed in situations which are incompatible with the proper discharge of your official duties or which may tend to impair your independence of judgment as a police officer. Therefore, we recommend that you inactivate your real estate salesman's license.

Dated: Honolulu, Hawaii, September 28, 1978.

ETHICS COMMISSION
Rev. William Smith, Chairman

Attach. (M 78-56)

M 78-56

JUNE 8, 1978

MEMORANDUM

TO: CHAIRMAN AND MEMBERS OF THE ETHICS
COMMISSION

FROM: YOSHIAKI NAKAMOTO, DEPUTY CORPORATION
COUNSEL

SUBJECT: CLARIFICATION OF REVISED CHARTER OF HONOLULU 1973 SECTION 10-103,
RELATING TO DISCLOSURE OF CONFLICT OF INTEREST

This is in response to your oral request of May 2, 1978 for clarification of Revised Charter of Honolulu 1973 [RCH] Section 10-103, especially the phrase "might reasonably tend to create," and based on such clarification, the application of said Section 10-103 in connection with Councilman Akahane's involvement in his personal residence, his interest in an apartment in the Sakura condominium and his interest in an apartment in the Marco Polo condominium.

In the process of explaining and discussing the application of the various provisions relative to the standards of conduct contained in the RCH or in the Revised Ordinances of Honolulu 1969 [RO], there appears to be a confusion because those standards of conduct are used synonymously with the phrase conflict of interest. Actually, there are no conflict of interest provisions in the RCH or the RO. There are, in fact, "standards of conduct" which should be observed by the officers and employees of the City. There are only two standards of conduct in which the words "conflict with the public interest" (*see* first sentence of RCH Section 10-103) or the word "conflict" (*see* RO Section 7-13.4(e)) are used.

In addition, apparently, there are differences of opinion as to the definition of conflict of interest as it is used in RCH Section 10-103 relating to disclosures. That section states that:

Section 10-103. Disclosure of Interest — Any elected or appointed officer or employee who possesses or who acquires such interests as might reasonably tend to create a conflict with the public interest shall make full disclosure in writing to his appointing authority or to the council, in the case of a member of the council, and to the ethics commission, at any time such conflict becomes apparent. Such disclosure statements shall be made a matter of public record and be filed with the city clerk. Any member of the council, who knows he has a personal or private interest, direct or indirect, in any proposal before the council, shall disclose such interest in writing to the council. Such disclosure shall be made a matter of public record prior to the taking of any vote on such proposal.

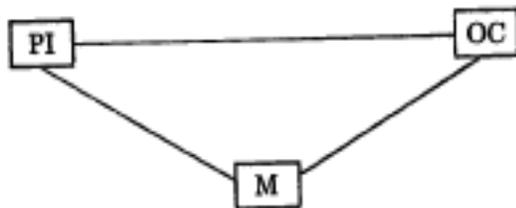
Hence, a related question which arises in connection with the differences of opinion regarding the definition of conflict of interest is under what situations an officer or employee of the City shall file a disclosure with his appointing authority or, if an elected official, with the Council.

In connection with the question in the paragraph above, the practice of filing the disclosure based on an "appearance" of a conflict of interest further adds to the confusion. We stress that an officer or employee is not required to file a disclosure under RCH Section 10-103 simply because there is an "appearance" of a conflict of interest. Such filing is purely voluntary on the part of the officer or employee. Thus, before we can begin to apply the provisions of said Section 10-103 relative to disclosure, we would have to define "conflict of interest."

Following is one of the simplest and clearest definitions of conflict of interest which we have found to date:

A 'conflict of interest' may be defined as any circumstance in which the *personal interest* of a public official *in a matter before him* in his *official capacity* may prevent or appear to prevent him from making an unbiased decision with respect to the matter. [73:758 Mich. L. Rev. 758] [Emphasis added]

Note the Key words and phrases we have emphasized by underscoring and they are: 1) personal interest, 2) in a matter before him, and 3) official capacity. To further clarify the definition of a conflict of interest, we submit the following illustration:



To simplify the illustration in the situations described hereinafter, we would use the following symbols to indicate their respective blocks in the illustration:

1. Personal interest — (PI)
2. In a matter before him — (M)
3. Official Capacity — (OC)

The significance of the illustration is to show that there must be a definite link between the three blocks before there is a conflict of interest. If one of the links is missing, then there is no conflict of interest. However, if the officer or employee acquires or possesses an interest which might tend to "create" a conflict with the public interest, he is required file a disclosure. The application of the phrase "might reasonably tend to create" is illustrated as Situation C under Paragraph III in the attachment, and the link is represented by a dotted link rather than by a solid link.

In addition, the attachment covers five situations, including that of Councilman Akahane's, in which we have applied the provisions of said Section 10-103, and the difference between the provisions of said Section 10-103 as compared to other standards of conduct contained in the RCH or the RO by utilizing the illustration above, together with our comments on a particular situation.

We trust the foregoing definition of conflict of interest, together with the attached illustrations and comments, clarifies when a City official is required to file a disclosure of a conflict of interest and the difference between violation of a standard of conduct and the necessity of filing a disclosure.

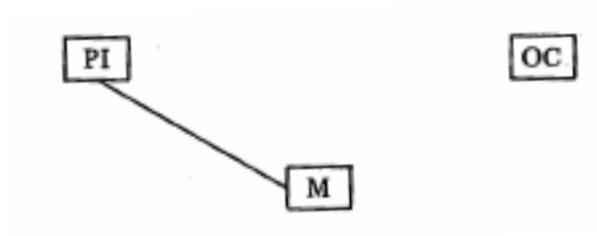
/s/ YOSHIAKI NAKAMOTO
Deputy Corporation Counsel

APPROVED:
/s/BARRY CHUNG
Corporation Counsel
YN:1n
Attach.

ATTACHMENT TO M 78-56

I. Situation A.

Councilman X utilizes the services of Developer H for the sale and purchase of his personal residence, the services of close associate of the developer for the purchase of condominium located in Nuuanu and the services of the same associate for the purchase of a condominium in the vicinity of the Ala Wai Canal.



Note that the basic links that are missing are Councilman X's official action on the real estate transactions with the developer because such official action as represented by Council's action was completed on the land development applications for his personal residence and the condominiums. Note also that the illustration is applicable to all three transactions, e.g., personal residence, Nuuanu area condominium and the Ala Wai area condominium.

Conclusion: Councilman X was not required to file a disclosure under Situation A.

II. Situation B.

Developer has had several General Plan, Detailed Land Use Map and zoning ordinances adopted by the Council. Councilman X did vote on the developer's foregoing land use amendments before the Council.



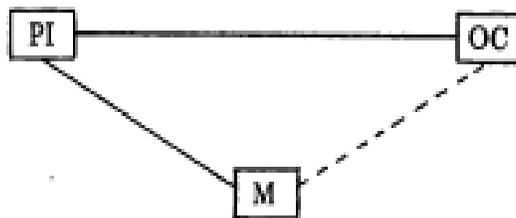
Note that the basic links that are missing are the personal interests of Councilman X in the land use application before the Council.

Conclusion: Councilman X was not required to file a disclosure under Situation B.

III. Situation C.

The Revised Charter Commission added an additional dimension to the classic definition of conflict of interest. That is, the phrase "acquires or possesses . . . as might reasonably tend to

create a conflict with the public interest." (Emphasis added). See the first sentence of RCH Section 10-103. For this additional dimension, let us assume the following facts: Councilman X, while a private citizen, has a financial investment in the developer's land development hui. In the meantime, Councilman X is elected as a councilman from Y District. Also, during the interval between the date of investment and prior to taking his oath of office, developer's land use application is before the Department of Land Utilization. Subsequently, Councilman X takes the oath of office. Upon taking the oath of office, Councilman X should have filed a disclosure of conflict of interest because of the underscored phrase. The following result is reflected when the triangle is applied to this situation:



Note in this situation, the dotted link symbolizes a potential conflict of interest. We construe the underscored phrase as a potential conflict of interest because of the words "might" and "tend to." Under such situation, Councilman X should have filed a disclosure of conflict of interest. However, Councilman X did state that he sold his interest in the developer's land development hui before he took his oath of office. Therefore, no necessity to file a disclosure.

There were cases before the Ethics Commission in which the Commission applied the foregoing triangle with dotted link between OC and M. These cases were: 1) police officers who were to be employed by private transportation companies as chauffeurs or bus operators; 2) firemen were employed by private companies to train and assist other employees of the private companies relative to the testing fire extinguishing systems in highrise buildings; and 3) Board of Water Supply case in which several employees were hired by consultants who were awarded contracts by Board of Water Supply to provide engineering services.

As a general rule, when an officer or employee files a disclosure based on the dotted link triangle, a review of the provisions of RCH Section 10-102.3 becomes necessary depending upon whether the officer or employee made a disclosure before or after accepting private employment. That section provides that:

3. Engage in any business transaction or activity or have a financial interest, direct or indirect, which is incompatible with the proper discharge of his official duties or which may tend to impair his independence of judgment in the performance of his official duties.

In the case of the police officers, the Commission did not consider whether they violated the provisions of said Section 10-102.3 because they filed a disclosure before they actually accepted employment with the private transportation companies. As to the firemen, some of them had

been employed by the private companies, but the Commission did not consider whether they violated the provisions of said Section 10 102.3 because they filed a disclosure shortly after they were employed by the private companies. Because of the brevity of the private employment the Commission gave the firemen the benefit of the doubt that they did not violate said Section 10-102.3. However, as to the Board of Water Supply employees, they failed to file a disclosure and were employed by several private consultants for various projects. Based on the foregoing, the Commission did consider whether the Board of Water Supply employees violated said Section 10-102.3.

Two additional elements that require consideration by Ethics Commission when a disclosure is filed by an officer or employee based on the dotted link triangle are: 1) remoteness and 2) whether disclosure gives rise to the application of the provision of RCH Section 10-102.3.

The following hypothetical case is an example where remoteness" is a factor in determining whether a disclosure should be filed:

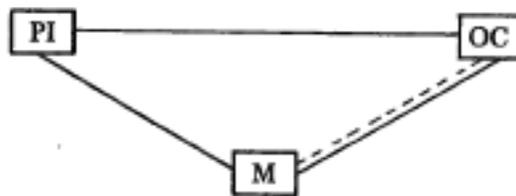
The First Deputy Corporation Counsel [First Deputy] purchases a vacant residential property comprising 10,000 square feet, which was located in an R-6 zoned district (5,000 square feet). This purchase gave the First Deputy an opportunity to subdivide his property and sell the additional lot. He takes advantage of this opportunity and files an application for a subdivision of this property. Experience has shown that the Director of Land Utilization [Director] very seldom requests an opinion from the Department of the Corporation Counsel regarding the interpretation or construction of any subdivision statutes, ordinances or rules and regulations when they are applied to a specific application for a subdivision. If an opinion is requested by the Director, the established procedure in the Department of the Corporation Counsel is that: 1) it is assigned to a deputy who advises the department requesting the opinion, and 2) after the opinion is drafted, then it is reviewed by the division head. Then it is reviewed by the First Deputy and forwarded to the Corporation Counsel for final approval (official action) by affixing his signature thereto. On the other hand, if the Director requests an opinion regarding the application of the subdivision filed by the First Deputy, the procedure would be to bypass the First Deputy for his review and is sent directly to the Corporation Counsel for official action by the division head. However, if the Corporation Counsel was incapacitated at the time official action was required on the opinion affecting the First Deputy's real property, the First Deputy, as Acting Corporation Counsel, will be taking official action on that opinion. But the coincidence of the Corporation Counsel being incapacitated and the opinion to come before the First Deputy at the time the Corporation Counsel is incapacitated is remote. Therefore, the First Deputy is not required to file a disclosure because there would be no dotted link triangle applicable to his situation. However, if the First Deputy is prudent, he would file a disclosure because of "an appearance of a conflict of interest," although he is not required to do so based on the application of said Section 10-103 as illustrated herein. Also, it would save him any embarrassment if the news media publicized the fact that he had an application for a subdivision filed with the Department of Land Utilization and no disclosure had been filed. If the coincidence as mentioned hereinbefore should occur, he would have met the mandate of said Section 10-103 because he had filed a disclosure.

An example of the second element is the three cases related before involving the police officers, firemen and the Board of Water Supply employees.

IV. Situation D.

In said Section 10-103, a member of the Council is required to file a disclosure under two factual situations. The first is as set forth in Situation C and the other is when the subject matter is before the Council for its action and a councilman has a private or personal interest in the subject matter. (See third sentence of RCH Section 10-103).

Based on the same facts as in Situation C, the following result is reflected when the triangle is applied to this situation.



Note that in this situation, an additional solid link is added alongside the dotted link to indicate that when the developer's land use application is before the Council, it completes the triangle.

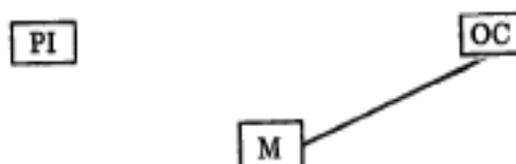
Conclusion: Councilman X is required to file another disclosure.

V. Situation E.

This situation results in a violation of one of the standards of conduct in Article X of the Revised Charter but there are many taxpayers as well as officers and employees of the City or State who have misconceptions that a disclosure is required.

The facts relate to the recent news article about a State employee who supervises the private auto rental concession at the Honolulu International Airport and who accepted a car as a gift from one of the concessionaires. Upon acceptance of that car, the public employee has violated the standards of conduct as prescribed in RCH Section 10-102.1 relating to acceptance or solicitation of gifts under circumstances in which it can reasonably be inferred that the gift is intended to influence him in the performance of his official duties. Under the facts of this case, just the acceptance of the gift would be a violation of Section 10-102 because of the phrase "reasonably be inferred." In short, the value of the car alone is sufficient proof to "infer" that the public employee had violated Section 10-102.1.

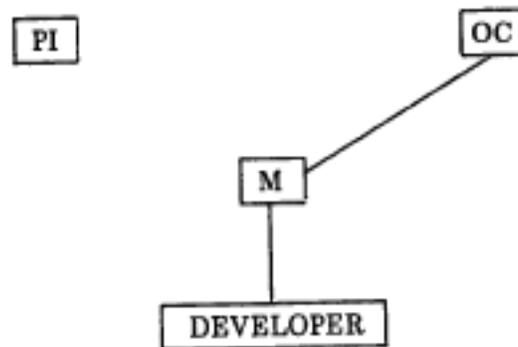
The following result is reflected when the triangle is applied to this situation:



Note that in this situation, the basic links are missing because he has no private interest in the X auto rental agency. As such, the public employee need not file a disclosure. However, as stated above, he did violate the provision of Section 10-102.1 by accepting the car.

VI. Situation F.

Under the facts of this case, a public interest nonprofit private corporation charged that Councilman Y failed to disclose political contributions made by Developer S when Councilman Y voted on Developer S's condominium project to be erected in the vicinity of Thomas Square. The following result is reflected when the triangle is applied to this situation:



Note in this situation, the basic links are missing between PI to OC and between M to PI because Councilman Y did not have private personal interest in M. The additional block representing developer shows that the developer derived the benefit of Council's action and not Councilman Y. Therefore, Councilman Y was not required to file a disclosure.