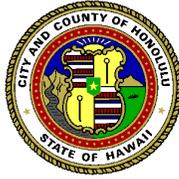


ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL
MAYOR



CHARLES W. TOTTO
EXECUTIVE DIRECTOR & LEGAL COUNSEL

February 11, 2016

TO: CHAIR VICTORIA MARKS, VICE CHAIR MICHAEL LILLY AND
MEMBERS OF THE ETHICS COMMISSION

FROM: CHARLES W. TOTTO, EXECUTIVE DIRECTOR AND LEGAL COUNSEL

SUBJECT: AGENDA ITEMS FOR THE FEBRUARY 17, 2016 MEETING, **OPEN SESSION**

I. CALL TO ORDER

II. NEW BUSINESS

A. For Action: Motion to Approve the Open Session Minutes of the January 20, 2016 Meeting.

B. Executive Director and Legal Counsel's Administrative Report. (Written) 2-17-16 Agenda Item II.B.2.b, OPEN-1; 2-17-16 Agenda Item II.B.2.c OPEN-2 (CONFIDENTIAL); 2-17-16 Agenda Item II.B.4, OPEN-3; and 2-17-16 Agenda Item II.B.8 OPEN-4 and OPEN-5.

1. Staff's Priorities for FY16 – FY17. (Unchanged from January 20, 2016 meeting.)

Here is a list of priorities at this time. Staff must remain flexible because much of our work is not within our control, such as the number and complexity of Requests for Advice (RFA) and Complaints Requiring Investigation (CRI) that are submitted to us. Also, this list may change as a result of EC member recommendations and directives.

- Highest Priority:
 - Develop and conduct all-employee ethics training program;
 - Timely responses to RFAs and CRIs;
 - Formulate and present Notices of Alleged Violations and contested hearings as required;

- Seek sufficient resources through FY17 budget to support necessary EC activities;
- Develop an operating plan with Commission; and
- Support Charter amendment to change salary process for EC's lawyers' salaries.
- Secondary Priority:
 - Report and implement improvements to pre-hearing and hearing processes;
 - Ensure timely filings of financial disclosures and lobbying reports in January 2016; and
 - Draft and advocate on important and necessary ethics legislation.

2. Reports from Staff Members.

a. Legal Clerk III Lisa Parker and Legal Clerk I Krissy Bigornia.

- The Clerks continued to shepherd filing of the 2015 financial disclosures for 600 city officers and employees (due Jan. 31). Although city employees rarely file late, invariably some board and commission members fail to timely file or to file complete forms, requiring the Clerks to contact those filers to complete forms.
- The Clerks obtained and electronically filed the annual reports and registrations from city lobbyists. A master list will be created and uploaded to the EC website and sent to the Administration and Council to identify registered lobbyists. The master list should be available by the end of the February.
- Kristine Bigornia drafted and reviewed the open and executive session minutes of the Jan. 20, 2016 Commission meeting; and finalized and transmitted these meeting materials to Dropbox and to you.
- Lisa Parker keeps the office running by purchasing and using a P-Card to pay for needed supplies; sorting and filing incoming pleadings and mail, finalizing letters and distributing pleadings from this office, working with the COR administrative services officer and administrative support agencies on fiscal and personnel matters such as tracking the amount of FY16 funding available to the Commission.
- Ms. Parker is on vacation through February and Ms. Bigornia is handling both her usual workload and much of Ms. Parker's.

- Ms. Bigornia focuses on maintaining the website, creating spreadsheets for statistical purposes and for data collation in complaint cases, and helping the attorneys create and improve training power points and videos.

b. Investigator Bill Shanafelt.

Investigator Shanafelt's recent activities are shown in the attached redacted case investigation spreadsheet. **2-17-16 Agenda Item II.B.2.b, OPEN-1.**

c. Associate Legal Counsel Laurie Wong.

The ALC's case and project status reports are attached as **2-17-16 Agenda Item II.B.2.c, OPEN-2 (CONFIDENTIAL)**. It is attached as a confidential document because it describes cases and projects that are confidential under ROH Sec. 3-6.12.

d. Executive Director and Legal Counsel, Chuck Totto.

- Increased the time spent working with Investigator Shanafelt on processing and closing complaint investigations;
- Research and interviews regarding proposed changes to the Ethics Commission Rules of Procedure;
- Research and interviews regarding proposed amendments to the Charter and working with the Charter Commission;
- Research and preparation of responsive open and executive session memoranda for the 2/11 and 2/17/16 EC meetings based on commissioner requests and input;
- Answering requests for advice;
- Setting work assignments and priorities;
- Reviewing Staff work product;
- Responding as needed re EC investigations;
- Coordinating with our Fiscal Officer to ensure sufficient funds are available for necessary expenses in the remainder of FY16.

3. General Statistics: Complaints and Requests for Advice as of the end of last month.

REQUEST FOR ADVICE & COMPLAINTS

	Total	Responses, Referral, Withdrawn or No Action	Under Review	Under Review – Net change from last report
July 1, 2013 - June 30, 2014	489	480	9	<i>Closed 0</i>
FY 14 TOTAL				
July 1, 2014 – June 30, 2015	398	367	31	<i>Closed 12</i>
FY 15 TOTAL				
July 1, 2015 – Jan. 31, 2016	213	173	0	<i>Closed 40</i>
FY16 TOTAL				

These statistics show the total number of Requests for Advice and Complaints Requiring Investigation for each fiscal year. They also show the outstanding requests and complaints at the end of the last month and the net reduction in cases during the last month. The vast majority of outstanding matters are complaints because they take much longer to investigate and respond to than do the requests for advice.

Please note that the last column shows the number of requests for advice and complaint investigations closed during the preceding month.

4. Additional Work Statistics.

- Attached is the year-to-date number of Requests for Advice and Complaints Requiring Investigation that have been received as they are accumulated over the fiscal year. It also shows the subject matter categories of the requests and complaints. **2-17-16 Agenda Item II.B.4, OPEN-3.**
- New Employee Ethics training through 1/31/16: **438**
- Website hits to website hits through 1/31/16: **3,362**

5. Current Fiscal Year Budget Issues.

- The EC has two current contracts not to exceed \$10,000 each for consultants.
- The EC is asking for an additional investigator/consultant contract. The total FY16 funding available for this contract is \$18,000. To assure that sufficient funds are allocated to the contract, other expenses will have to be minimized for the remainder of FY16.

6. Fiscal Year 2017 Budget.

The Managing Director (MD) and the Department of Budget and Fiscal Services (BFS) denied FY17 funds for all of our requests, but added \$7,800 to our consultant and investigative services accounts. Specifically, the MD denied: an investigator position or investigative services by contract (\$60,000); web based training ethics training funds (\$5040) for use in all-employee ethics training (making this duty an unfunded mandate); and salary equity for the lawyers (\$6,444).

This means that the EC will have the following resources for FY17:

- A total of \$56,800 for the following services: investigators, hearing officers, attorneys, surveillance, transcriptions, court reporters, service of process and expert witnesses. For comparison, in FY16 we will likely spend all allocated funds (449,000) for these expenses.
- No funds were allocated for all-employee ethics training. FY16 allocation was \$5,040. We will not be able to use the anticipated web-based ethics training program for all 9,300 City personnel without getting additional funding or moving funds from other accounts. Investigative, legal, transcription and other services are the only accounts which the EC has some level of discretion in expenses. If no funds are made available, we will go back to the “train the trainer” method of training that we used in FY13 and FY14.
- The EDLC’s salary will remain 4% lower than the salaries allocated for lawyers with comparable responsibilities and experience at the Department of Corporation Counsel and Prosecuting Attorney and the Office of Council Services.

The next step would be to ask the Council for increased funds in all three areas, but especially for mandatory ethics training. The Administration will transmit its version of the FY17 budget to the Council around the first or second week of March. After that we will be able to talk with the Council.

7. Ethics Training Program.

- As noted above, the all-employee ethics training will need additional funding to use the web based training process or we will have to return the “train the trainer” approach.
- I am working with the Council Chair’s office to set up a date in March for in-person ethics training for councilmembers and their staff.

8. Report on the Ethics Commission’s Proposed Charter Amendment Before the Charter Commission, and Other Proposals Affecting the Ethics Laws.

On January 15, 2016, the Charter Commission (CC) formed a Permitted Interaction Group (PIG) regarding a number of proposed ethics amendments. In particular, I was asked by the PIG to obtain and report information regarding the selection of ethics commission members as done for the Oakland Public Ethics Commission. I was also asked to report on options for EC budget independence. My research

and responses are attached as **2-17-16 Agenda Item II.B.8, OPEN-4**. They are being considered by the PIG.

The PIG also asked for my opinion regarding Proposal #153, which would change the gift law prohibition by requiring specific intent on the part of the gift giver to influence or reward a City official through gifts before there could be a gift law violation. I attached a copy of my response. **2-17-16 Agenda Item II.B.8, OPEN-5**.

9. Quarterly Newsletter.

A very brief oral report will be made at the meeting.

C. For Discussion and Action: Modification of Personnel Evaluation Form for the Executive Director and Legal Counsel. (**2-11-16 Agenda Item II.A, OPEN-1**)

This agenda item is continued from the February 11, 2016 meeting.

Should you have any questions on these matters, please contact me.

02-17-16

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**Investigator's Report
Agenda Item II.B.2.b.,
Page 3**

CASE No.	Name	Date Received	Date Close/NOAV memo to Chuck	Chuck/Laurie Reviewed	Date Chuck Approved	Notified CW of Closure
			DA advised			
15-063	Misuse of Position	08/19/15	hold off	10/27/15	10/27/15	
16-078	Gifts	09/16/15	10/05/15	12/29/15		
16-096	Misuse of Position	09/29/15	10/12/15	12/29/15		
15-152	Favoritism	10/21/15	10/23/15	10/23/15	Can't talk	
16-131	Abuse of Position	11/19/15	01/21/16		02/02/16	2/4/2016
16-160	Favoritism	12/09/15	01/29/16		02/02/16	anonymous
15-091	Neg Favoritism	12/28/15				
16-171	Theft/Misuse of Position	01/26/16				
Interviews						
	16-078- 1 subject	02/09/16				
	16-096- 1 subject	02/09/16				

Updated: 2/9/16

** NO referrals as of this date.

02-17-16

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CONFIDENTIAL

**The ALC's Report
Agenda Item II.B.2.c.,
Page 3**

02-17-16

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Statistics

Agenda Item II.B.4.,

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Totals Fiscal Year 2016

Total Inquiries	Advice	Complaints	Oral	Written	Investigations	Closed	Violation	Corrected	Discipline
215	150	65	51	118	11	175	0	0	0
Percentages %	69 77%	30 23%	23 72%	54 88%	5 12%	81 40%	0 00%	0 00%	0 00%

Overall			Advice			Complaints		
Misuse of city position or resource		Totals	Misuse of city position or resource		Totals	Misuse of city position or resource		Totals
1.a	Political activity	4	1.a	Political activity	4	1.a	Political activity	0
1.b	Nepotism	4	1.b	Nepotism	1	1.b	Nepotism	3
1.c	Personal/Family benefit	23	1.c	Personal/Family benefit	7	1.c	Personal/Family benefit	16
1.d	Benefit/disadvantage of another	44	1.d	Benefit/disadvantage of another	20	1.d	Benefit/disadvantage of another	24
1.e	Represent private interests against city	1	1.e	Represent private interests against city	1	1.e	Represent private interests against city	0
1.f	Appear before city agency on behalf of private interest	3	1.f	Appear before city agency on behalf of private interest	3	1.f	Appear before city agency on behalf of private interest	0
1.g	Disclosure of confidential information	6	1.g	Disclosure of confidential information	3	1.g	Disclosure of confidential information	3
1.h	Outside compensation for city work	2	1.h	Outside compensation for city work	6	1.h	Outside compensation for city work	0
1.i	Future employment	6	1.i	Future employment	1	1.i	Future employment	1
1.j	Other	1	1.j	Other	1	1.j	Other	0
1.k	Dual position	1	1.k	Dual position	1	1.k	Dual position	0
Conflict of interest		Totals	Conflict of interest		Totals	Conflict of interest		Totals
2.a	Gift to city personnel	19	2.a	Gift to city personnel	15	2.a	Gift to city personnel	4
2.b	Gift to city	3	2.b	Gift to city	3	2.b	Gift to city	0
2.c	Financial interest	18	2.c	Financial interest	17	2.c	Financial interest	1
2.d	Personal interest	6	2.d	Personal interest	6	2.d	Personal interest	0
2.e	Office or employee contract w/ city	2	2.e	Office or employee contract w/ city	1	2.e	Office or employee contract w/ city	1
2.f	Other, including procurement	2	2.f	Other, including procurement	1	2.f	Other, including procurement	1
Misc.		Totals	Misc.		Totals	Misc.		Totals
3.a	Financial disclosure statement	15	3.a	Financial disclosure statement	15	3.a	Financial disclosure statement	0
3.b	Conflict of interest disclosure	2	3.b	Conflict of interest disclosure	2	3.b	Conflict of interest disclosure	0
3.c	Ethics Training	1	3.c	Ethics Training	1	3.c	Ethics Training	0
3.d	Commission procedure, operations, etc.	28	3.d	Commission procedure, operations, etc.	28	3.d	Commission procedure, operations, etc.	0
3.e	Disclosure of outside interest, CC8	5	3.e	Disclosure of outside interest, CC8	5	3.e	Disclosure of outside interest, CC8	0
3.f	Other	11	3.f	Other	10	3.f	Other	1
Lobbying/ lobbyists		Totals	Lobbying/ lobbyists		Totals	Lobbying/ lobbyists		Totals
4.a	Lobbying/lobbyists	6	4.a	Lobbying/lobbyists	6	4.a	Lobbying/lobbyists	0
No Jurisdiction		Totals	No Jurisdiction		Totals	No Jurisdiction		Totals
5.a	No Jurisdiction	19	5.a	No Jurisdiction	4	5.a	No Jurisdiction	15

02-17-16

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The EDLC's Research

Agenda Item II.B.8.,

Page 6

Totto, Charles W.

From: Totto, Charles W.
Sent: Wednesday, January 27, 2016 2:08 PM
To: 'kevin.mulligan8@gmail.com'
Cc: Parker, Lisa P
Subject: Charter Comm review of Ethics Comm

Tracking:	Recipient	Read
	'kevin.mulligan8@gmail.com'	
	Parker, Lisa P	Read: 1/27/2016 2:20 PM

Hi Kevin,

On behalf of the Permitted Interaction Group for ethics review, you had asked me to be a resource for the Charter Commission (CC). The two issues you were most interested in were the process for appointing ethics agency members and the budget independence for the Ethics Commission (EC). This is a summary of the information I've reviewed to date.

Before going on, however, I want to give you the overall comment regarding these issues stated by the EC at its January 20, 2016 Meeting. In summary, the EC is supportive of Charter amendments that would enhance or increase the EC's independence, including budget independence. The EC does not take a position on the method of appointment of EC members and thinks that the issue is best decided by other policy makers.

1. EC member selection

On 1/25/16, I spoke at length with my counterpart at the Oakland Public Ethics Commission (PEC), Whitney Barazoto. In a 2014 Charter amendment, the PEC obtained both an updated process for selecting PEC members and a minimum budget.

PEC member appointment process.

The amendment further reduced the mayor's role in selection of the PEC members. Now, the mayor, city auditor and city attorney each appoint one member.

- The mayor's appointment is to be a person who has represented "a local civic organization with a demonstrated history of involvement in local governance issues."
- The city attorney's appointment is to be one who has "a background in public policy or public law, preferably with experience in governmental ethics."
- The city auditor's appointment is to be one who has "a background in auditing compliance with ethics laws or protection of whistleblowers."
- Note – Before the 2014 Oakland Charter amendment, the mayor appointed 3 members, the 3 members then selected a group from which the mayor would appoint the 4 other members. The Council could provide names to the mayor and had confirmation power.

There are additional criteria such as not having a financial relationship with the appointing person.

The appointments made by the 3 above may be rejected within 45 days of notice by City Council resolution.

Once the 3 appointed members are on board the PEC, they select the remaining 4 members after a public recruitment process. Each of the 4 additional members “shall reflect the interests of the greater Oakland neighborhood, nonprofit and business communities.” Oakland Charter (2014) Sec. 603(d)(1) and (2) and (e).

Ms. Barazoto’s comments:

- The PEC members have been selected by a similar method since 1998. The 2014 amendment further reduced the potential for politicization by changing the mayor’s appointment from 3 members to 1.
- 3 of the members are appointed by elected officials and the Council still has a chance to reject the appointments. This allows for accountability by elected officials. The political dimension is greatly reduced, or at least spread around.
- She believes the process is “fantastic” because it produces a balanced set of generally non-political, community-oriented members. It has also allowed for diversification away from older white males. She would not want to change the 2014 appointment law in any way.
- The current PEC make-up is about half lawyers and half with nonprofit backgrounds.
- Ms. Barazoto seems an intelligent attorney and has been the PEC director since 2012. Generally, the PEC is not quite as far along the regulatory curve as the EC because in 2014 it started to impose civil fines and pursue highly visible cases.
- This approach combines the traditional “mayor appoints and council confirms” approach with the more modern approaches of using civic groups for selection.
- The Oakland mayor, city auditor and city attorney are all elected offices, so for Honolulu the CC may want to consider the mayor, city auditor (not elected but relatively politically independent) and the prosecutor as those who each appoint a member.

2. Budget independence.

You mentioned that the PIG is interested in removing current administrative filters that inhibit or prevent the EC bringing its budget request directly to the Council. CC proposal #114 (League of Women Voters) would have the EC administratively attached to the City Auditor and give the EC’s Executive Director and Legal Counsel the authority that executive department heads have to make budget and personnel decisions. This is similar to the provisions for the City Auditor under RCH Sec. 3-501.4. Placement with the City Auditor would likely mean that the EC would be able to bring its requests more directly to the Council because the EC would be in the Legislative Branch and there is a substantially smaller bureaucracy in the Legislative Branch.

However, although this approach removes Administration interference, it still allows the Council to control the EC’s budget. Given recent history (EC misconduct findings or settlements with 5

councilmembers in the last few years) and the number of ethics complaints filed against councilmembers, the CC may want to consider setting a floor for the EC's funding.

Although the approach in most jurisdictions is still to have the legislative body set the ethics' agencies budgets, there are some notable exceptions:

- Oakland: The Charter provides that "The City shall appropriate a sufficient budget for the PEC to fulfill its functions and duties." The Charter also provides that the PEC has a minimum staff of 6 full-time employees and describes the general nature of the employees. Oakland Charter (2014) Sec. 603(g)(1) and (2).
- New Orleans: The Ethics Review Board, along with its inspector general, is assured an amount not less than .75% of the General Fund operating budget and its budget may not be vetoed by the mayor. Sec.9-401 of the Home Rule Charter.
- Philadelphia: Charter Sec. 2-300(4)(e) provides a budget of \$1,000,000 for the first two fiscal years after the effective date of the section. Then the Charter mandates appropriations "for all subsequent fiscal years, an amount adequate to enable the Board to perform its functions assigned by the charter." If the Council fails to make an adequate appropriation, the Board may file a legal action against the Council for mandamus (a court order requiring an action by the government) for the Council to set an adequate budget.
- San Diego: San Diego Mun. Code Sec. 26.0411 sets a minimum staff of 3 and guarantees that the ethics commission a reasonable budget. The agency now has 5 employees.
- Broward County, Fla. (Fort Lauderdale and Boca Raton): Uses a .25% fee on each contract the county enters into.
- California: The Ca. Fair Political Practices (which has jurisdiction over local and state government) has had a guaranteed budget since 1976 of \$1,000,000 adjusted for inflation. Ca. Govt. Code Sec. 83122.
- Oregon: The ethics commission assesses state agencies and municipalities based on full-time equivalent staffing.
- Alabama: The ethics agency is allocated .01% of the state's general fund. This can only be modified by a 2/3 vote of both houses.

Each of these options has plusses and minuses. An amendment that requires sufficient funding for the EC to carry out its duties under the Charter and ordinances has the benefit of not casting funding in concrete. (See, Oakland above.) In other words, if the EC is given another duty by law, there is room for the budget to grow. In 2012, the EC was given the duty to provide ethics training to all 9,300 city officers and employees every 2 years, but was not given any additional resources by which to fulfill the mandate. This approach also inherently allows the Council to weigh in on the resources the EC needs to carry out its duties. Others may prefer a concrete percentage of the general fund, and that would allow for a growth or shrinkage of the funding as the general fund increases or diminishes.

I'm sure there is a lot of food for thought here, so I'll await your review and further discussion.

Chuck

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Honolulu Ethics Commission

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THANK YOU.

02-17-16

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**The EDLC's Research
(Continue...)**

**Agenda Item II.B.8.,
Page 6**

Totto, Charles W.

From: Totto, Charles W.
Sent: Thursday, January 28, 2016 5:30 PM
To: 'kevin.mulligan8@gmail.com'
Cc: Parker, Lisa P
Subject: CC Proposal #153 re gifts
Attachments: Testimony of Ethics Commission on Charter Proposal #153, Friday, January 15, 2016, 3:30 p.m., Agenda Item III.

Tracking:	Recipient	Read
	'kevin.mulligan8@gmail.com'	
	Parker, Lisa P	Read: 1/29/2016 1:35 PM

Hi Kevin,

Got your voicemail.

I've attached my testimony to this proposal from Jan. 15. Please let me know if you'd like more analysis.

A couple of additional points: First, none of the ethics laws in the Charter or the ordinance require "intent" to violate the law.

Second, giving a gift to a city official with the intent to influence them in carrying out their city duties would result in bribery under the Hawaii Penal Code. HRS Sec. 710-1040 states "(1) A person commits the offense of bribery if: (a) The person confers, . . . any pecuniary benefit upon a public servant **with the intent to influence** the public servant's vote, opinion, judgment, exercise of discretion or other action in the public servant's official capacity;" (Emphasis mine.) The change suggested in Prop. 153 would make the gift law the same as the bribery law and the Prosecuting Attorney would pursue the case.

Prop 153 is a good example of the difference between criminal law and ethics law. The penalty for a crime is loss of freedom and so there is a higher standard of proof – the official has to act "with intent" to break the law. The penalty for an ethics violation is loss of money through a civil fine or suspension or loss of employment through discharge. For ethics violations the standard of proof is whether the official "knew or reasonably should have known" that the conduct violated the ethics laws.

Finally, the practical effect is that Prop 153 would remove the gift prohibition in the ethics law. The EC has several formal Advisory Opinions and has trained the city work force for years that intent is not needed to violate the gift law. Under 153, the EC would have to find evidence of intent, such as an admission by the gift giver that he/she intended to influence the official. Take for example the Romy Cachola case – none of the lobbyists would have testified they intended to influence his vote or opinion even though they gave him dozens of gifts amounting to thousands of dollars in dinners and golf outings. Under Prop 153 gifts like Cachola's would be the new norm.

Hope this helps.

Chuck

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THANK YOU.

Totto, Charles W.

From: Totto, Charles W.
Sent: Friday, January 15, 2016 11:17 AM
To: Charter Commission
Cc: 'Michael Lilly (Michael@NLJLAW.COM)'; Parker, Lisa P
Subject: Testimony of Ethics Commission on Charter Proposal #153, Friday, January 15, 2016, 3:30 p.m., Agenda Item III.

Tracking:	Recipient	Read
	Charter Commission	Read: 1/15/2016 11:26 AM
	'Michael Lilly (Michael@NLJLAW.COM)'	
	Parker, Lisa P	Read: 1/15/2016 11:28 AM

Good Afternoon Chair Rae and Members of the Commission:

My name is Chuck Totto and I am the Executive Director and Legal Counsel for the Honolulu Ethics Commission. My purpose in addressing Proposal 15 is to be a resource for the Charter Commission regarding the City's current ethics laws and policies. The Ethics Commission has not or taken a position on the proposal.

The commentary to the proposal states that "This language is overly broad and when it is used in conjunction with the definition of a lobbyist can and has been used by the Ethics Commission to determine that ANY gift from a lobbyist, regardless of value, is a violation of law." However, the Ethics Commission has not rendered an opinion that any gift from a lobbyist, regardless of value, to a City officer or employee creates a violation of RCH Sec. 11-102.1(a). Whether a gift to a City official valued at less than \$200 results in a violation depends on the facts and circumstances of the case.

The proposed law change would require that the Ethics Commission prove that the gift giver intended to influence the City official in carrying out his/her duties. This is the standard of proof required for a criminal bribery conviction. The intent standard is not used in proving City ethics law violations.

Thank you.

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THANK YOU.