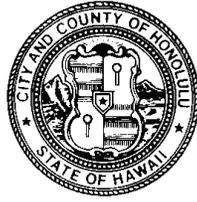


ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL
MAYOR



CHARLES W. TOTTO
EXECUTIVE DIRECTOR &
LEGAL COUNSEL

MINUTES
ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

Date and Place: January 6, 2014
Standard Financial Plaza
Conference Room, Suite 211

Present: Charles W. Gall, Esq., Chairperson
Rachael S. Wong, Dr.PH, Vice Chairperson
Michael A. Lilly, Esq., Commissioner
Katy Chen, Esq., Commissioner
Jeffrey Burroughs, Ph.D., Commissioner
Stephen Silva, Commissioner
Stanford Yuen, P.E., Commissioner
Charles W. Totto, Executive Director and Legal Counsel (EDLC)
Geoffrey Kam, Deputy, Department of Corporation Counsel (COR)
Nick Grube, Reported, Civil Beat
Mike Formby, Director, Department of Transportation Services (DTS)
Carolee Kubo, Director, Department of Human Resources (DHR)
Donna Leong, Corporation Counsel, COR
Diane Kawauchi, Deputy, COR
Sheryl Nicholson, First Deputy, COR
Cathy Maki, Administrative Services Officer, COR
Duane Pang, Deputy, COR
Laurie Santiago, United Public Workers (UPW)
Clifford Uwane, United Public Workers (UPW)
Jay Parasco, City Managing Director's Office
Catherine Cruz, Reporter, & Cameraman, KITV News
Gordon Y. L. Pang, Reporter, Star-Advertiser (Entered @ 11:46 am)
Kevin Mulligan, Hawaii Government Employees Association, HGEA
(Entered @ 11:46 am)
Richard Elsner, Interested Member of the Public (Entered @ 11:58 am)

Absent: Letha A. S. DeCaires, EC Investigator
Laurie A. Wong, Associate Legal Counsel (ALC)

Stenographer: Lisa P. Parker, Legal Clerk

I. CALL TO ORDER

The 476th meeting of the Ethics Commission (“Commission” or “EC”) was called to order at approximately 11:36 a.m. by Chair Gall. He asked the guests to introduce themselves.

The EC had before them the EDLC’s memo regarding January 6, 2014 EC meeting agenda items dated January 2, 2014.

II. FOR ACTION: REQUEST FOR A MOTION TO APPROVE THE MINUTES OF THE OPEN SESSION OF THE NOVEMBER 4, 2013 MEETING

Commissioner Chen asked that the November 18, 2013 meeting minutes be revised to clarify the speakers. Chair Gall asked that the minutes be more summarized. Chair Gall instructed that staff needs to revise the meeting minutes and resubmit them for approval.

III. OLD BUSINESS

The EC confirmed the dates and times of the February 19 and March 17, 2014 meetings at 11:30 am.

IV. NEW BUSINESS

For Discussion: Administrative News

Vice Chair Wong moved that “Administration News” be added to the agenda. Commissioner Silva seconded the Motion. The Motion was passed unanimously.

The EDLC reported that for the period July 1, 2009 through December 31, 2013, the Commission received a total of 536 complaints. Of these, 355 were investigated and closed, while 33 are still open cases. For the 355 that were investigated and closed, violations were found in 64 cases (18%), resulting in discipline being imposed in 26 (7%) of the cases. Corrective action, other than discipline, was taken by the effected agency in 141 cases (41%).

The EDLC commented that the EC website hits for FY 2014 to date were 2,559 with 798 hits on the Caldwell Transition Committee Advisory Opinion No. 2013-3.

The EDLC reported that the staff has trained approximately 3,000 employees to date for FY 2014. Staff will also include HPD in the all employee mandatory training to supplement HPD’s values-based ethics training which does not encompass the city’s standards of conduct. As such, HPD’s 2500 personnel will also be required to complete the mandatory all employee training by June 30, 2014. Staff and HPD are working together to accomplish the training.

The EDLC reported that on December 20, 2013, he attended the EC's budget meeting with the Managing Director (MD), Department of Budget and Fiscal Services (BFS) staff, and COR. The MD approved the EC's request for funds to reallocate the Investigator II position to a IV and also approved the EC's request to create and fill the Assistant EDLC position pending approval from BFS and the Department of Human Resources (DHR). The MD denied the EC's request to hire a new ALC. The MD deferred approving additional funds for expanding office space pending further discussions with the Department of Community Services.

EDLC asked whether there would be additional budget meetings. Ms. Leong replied that she was not aware of additional meetings and that the MD has taken all the proposals under advisement.

Vice Chair Wong requested the EDLC to describe the proposed expansion of the office. The EDLC replied that the expansion would include another office and expansion of the common space to accommodate a new Legal Clerk I.

The EDLC reported that he responded to COR's request for justification of an Investigator IV position by determining the complexity of cases. The statistics show that the ratio of complex to standard investigations will be about 65% to 35% in the current fiscal year.

Chair Gall asked what standard was used to determine the complexity of cases. The EDLC replied that he reviewed factors as described in his report attachment OPEN-2 including: number of witnesses, number of legal issues, number of subjects, and difficulty in obtaining evidence.

The EDLC reported that staff released an "Ethics Alert" to all agency personnel officers explaining the restrictions under the one-year cooling off period before former city officers and employees may conduct work with or before city agencies. Staff is planning to make a short presentation to all administrative services officers to discuss ethics issues.

A. For Discussion and Appropriate Action: Responses from Departments of Corporation Counsel, Human Resources and Transportation Services to Commission Staff Requests.

The EDLC summarized EC's outstanding issues with several departments. In regard to DHR, the EDLC reported that Ms. Kubo continues to insist that DHR personnel review the electronic files and decide what is "relevant" to EC investigations based on an unsupported legal basis and contrary to years of past practice. The EDLC referenced a memo from Deputy Pang, dated January 3, 2014, regarding employee privacy issues and thanked him for the additional information.

Chair Gall commented that there seems to be a communication problem in that Ms. Kubo used the term "probable cause" in her memo last month as a lay person, not as a legal term of art.

Putting the differences in terminology aside, it seems that her standard is consistent with the EC's standard. Ms. Kubo confirmed Chair Gall's statement and also stated that she was trying to help the EC avoid breaking the law.

Chair Gall asked her what her concerns were in regard to time specifications. Ms. Kubo asked that the EC provide a specific time period in order to protect employee's privacy.

Commissioner Lilly asked her about the arbitration claims she referred to during the last meeting where she alleged that the city lost an arbitration due to privacy issues. Ms. Kubo responded that she was not aware of any city cases. Commissioner Lilly asked her if she has seen any arbitrations that were overturned due to a privacy issue. She responded that she has seen advisories for other cases because she has been involved in arbitrations that privacy rights need to be balanced with proper justification for the request. Commissioner Lilly asked her who determines probable cause. Chair Gall responded that the EC determines probable cause and asked the EDLC for confirmation. The EDLC confirmed.

Ms. Leong clarified that Ms. Kubo means that the internet policy requires "proper justification" to the Directors of DHR and DIT and MD in order for access to be granted. Ms. Kubo mistakenly used the term "probable cause." Ms. Kubo needs sufficient factual information including date/time parameters. Commissioner Chen asked the EDLC if there are still outstanding requests for information that had not been provided. The EDLC stated that he believed that the requests had been approved, but we have not received the files yet.

Commissioner Lilly asked what is "proper justification"? Mr. Pang responded that "proper justification" establishing a complaint under the Ethics Commission rules of procedure such as, describing pertinent facts and circumstances, name of employees or officers involved and the nature of the act and if the EC staff determines that the facts support a violation of the standard of conduct - that information provided to the DHR director should be sufficient.

Commissioner Lilly asked what information does the EC need to provide because complaints contain sensitive information such as the identity of the complainant. For example, we believe there is sufficient justification based on a complaint we received that employee X during this time period may have engaged in political activity on city time and we want that person's emails for that period. Ms. Leong clarified that the DHR Director does not need the identity of the complainant. She then stated that the example that Mr. Lilly articulated was generally proper justification, but will be determined on a case by case basis.

Chair Gall asked for confirmation that if the EC's standard to trigger an investigation is met, then that would provide sufficient justification to request information. Ms. Leong agreed. Commissioner Lilly requested and Ms. Leong agreed that the standard would be confirmed in writing with the EDLC.

Commissioner Chen asked the EDLC if he was still concerned about the expediency of obtaining information. Commissioner Lilly added that it is important to get an expeditious response so that deleted emails will not be purged. The EDLC replied that other issues were higher priority and he does not believe expediency will be a problem.

Commissioner Silva asked Ms. Leong to resolve the contrary positions regarding employee privacy versus expectation of no privacy in the city's internet policy.

Ms. Leong explained that there is a balancing act between use of the city's property and respecting the employee's expectation of privacy which is balanced by giving gatekeepers of the information to proper justification to gain access to the information. There have been miscommunications between the EC staff and the Departments and she has tasked her staff to respond to the EC expeditiously.

Commissioner Chen requested confirmation that parties had a clear understanding of the standard now to prevent future miscommunications. The EDLC responded that the term of art to obtain information requested is "proper justification" which is in DIT's policy. The EDLC asked if, in the example described by Commissioner Lilly, DHR will review someone's email to only look for political activity emails and only provide the EC with those emails or will EC receive all the emails requested in the person's account for the specific time period. Commissioner Lilly stated that the EC should not be given emails that have been sifted through by someone else for ethics violations, and the EC needs to decide which emails violate the city's ethics laws. The EC should be able to find violations based on other emails that are used for a non-city purpose that are in plain view. Ms. Leong stated that the EC needs to provide a time and subject parameter, but it is impractical for an employee to sift through emails before giving it to the EC, but deferred the answer to Ms. Kubo.

Ms. Kubo stated that the EC needs to provide the subject of the investigation, and she will only provide the information that is related to the subject of the investigation to prevent the EC from, "witch hunting employees for any issues under the sun." Commissioner Chen asked if that meant someone else will review each email for content. Ms. Kubo agreed. Commissioner Lilly stated that the EC should review the emails to determine whether it comes under the EC's purview. Vice Chair Wong asked who determines what evidence is relevant. Chair Gall stated that the information received has to be within the scope of the complaint and that in civil litigation, the producing party makes the determination of relevance. Commissioner Lilly replied that production can sometimes come before a judge to determine relevance. The EDLC added that it is because there is an officer of the court who can determine if the information produced is responsive and relevant which is a different context here. The EDLC stated that there is a law that specifically allows the EC to find further violations based on additional evidence found during investigations.

Chair Gall asked the EDLC to provide legal authority for guidance, and asked Mr. Pang if he had researched that issue while drafting his memo to the EC. Mr. Pang stated that he

did not. Ms. Leong stated that COR would be willing to work cooperatively with EC staff to establish proper justification. Commissioner Yuen asked who makes the decision as to the expediency and priority of the response to the request. The EDLC replied that DIT Director Mark Wong told him that he would place a hold on the emails immediately after he is informed.

In regard to DTS, Mr. Formby apologized for being unable to come to the December EC meeting due to two press conferences that day. He further stated that he was unaware of any disconnect between his department and the EC until he read about it in Civil Beat after the December meeting. He stated that he replied to the EC's questions and no one informed him that the information he passed on to the EC was not sufficient. He would prefer to have a face to face meeting with the EDLC instead of emails. Mr. Formby stated that he only received one complaint about OTS which was an anonymous handwritten complaint in an unmarked envelope from the EC with no instruction. He met with the MD and thoroughly investigated the complaint. Mr. Formby showed the investigative report to the EC. He stated that DTS takes all complaints seriously and investigates them. Since he has taken office in January 2013, DTS has created a formal draft policy on how to handle complaints. Mr. Formby stated that he has only seen three versions of the same complaints. The EDLC disclosed the name and subject of the complaint in a public email which was published in a Civil Beat article. Mr. Formby stated that DTS does not do that and he would hope that the EC would also preserve the sanctity of confidential information. Mr. Formby stated that he is willing to meet with the EDLC to share with him their process and defers to COR whether EC has jurisdiction over OTS since they are not city employees. Mr. Formby stated that he doesn't know why this issue has become controversial. Since June 2013, when DTS first testified on Bill 32, he supported the DTS oversight over OTS employees in principle and now needs to determine the logistics.

The EDLC asked Director Formby's position on the ethical oversight of OTS employees. Mr. Formby replied that he would share a September draft of ethics and conflicts policy, that the OTS board first adopted. He is working on revising the policy and is willing to work with the EDLC. He took the EC laws and incorporated it to the extent that he can fairly apply it to DTS' contractual management relationship with OTS. He is drafting internal rules on how to handle a complaint regarding OTS.

The EDLC asked Mr. Formby about the specifics of the investigation of the anonymous complaint the EC provided him. Mr. Formby replied that an investigation was conducted by DTS and another investigation was conducted by OTS. He then met with the OTS Director Roger Morton to discuss the outcome of the investigations and formulated recommendations. EDLC asked if Mr. Formby would be willing to share the recommendations. Mr. Formby stated that he needed to consult with COR since the EC has no jurisdiction over OTS employees. The EDLC asked Mr. Formby if the EC should be involved in any kind of regulation of ethics at OTS. Mr. Formby stated that he doesn't have an opinion and defers to COR because it is a legal question, but he feels that everyone supports ethical behavior in the city. EDLC asked Mr. Formby between 2010 and October 2013, how many ethics complaint were received and reviewed by DTS or OTS regarding OTS. Mr. Formby responded that he only had knowledge of

complaints from January 2013 to date. He is only aware of one complaint he had mentioned before that came in three different forms. Commissioner Lilly commented that if the EC did have jurisdiction over OTS employees, then it would be beneficial to DTS because the EC would investigate case for them. Mr. Formby agreed, but again deferred to COR as the legal issue of the EC's jurisdiction.

Chair Gall advised that the rest of the discussion between the EDLC and Mr. Formby be conducted in a separate meeting outside the presence of the Commission members. The EDLC asked Mr. Formby for the January 2, 2013 DTS policy on handling ethics complaint. Mr. Formby clarified that there was no formal policy in effect at that time. Since then he has been working on an internal policy with agreement by Mr. Morton so that OTS will turn over all ethics complaints regarding OTS to DTS. The EDLC asked if Mr. Formby would have any problem sharing the draft policy with the EC. Mr. Formby replied that he would not have any problem.

- B. For Action: Request for a Motion to Confirm the Proposed FY2014 Salary for the ALC and to Approve the Requested Fiscal Year 2014 Salary for the EDLC.

Chair Gall asked Ms. Leong if the EC could use the \$10,000 salary savings from the investigator position to support the EDLC and ALC salaries for attorneys with comparable experience. EDLC stated that he was waiting for a response from DHR and COR on this matter. **Chair Gall suggested deferring the agenda item until a response is received.**

- C. For Discussion: Corporation Counsel's Response to the Commission's Amended Request Re Scope of Representation of COR in Ethics Matters, Dated September 6, 2013.

Ms. Leong stated that often times ethics issues arise in the context of other laws, and it is important to understand the context in which the ethics laws are analyzed to avoid violating other laws. COR is responsible for fully advising clients of all laws that affect them. COR has the ability to advise clients based on the EC's advisory opinions which are accessible to the deputies. Novel issues which have no precedent will be brought to the EC. Vice Chair Wong was concerned about a duplication of efforts, and mixed messages to employees. Ms. Leong stated that COR is supporting the EC staff with the heavy workload. She repeated that in regard to high stakes and novel issues COR will advise clients to contact the EC. Vice Chair Wong stated that it appeared that the cleanest way to support the EC would be to provide the EC with more resources as opposed to giving ethics advice. Ms. Leong stated that as per MD Shinn, stated at the last meeting, there are budget constraints.

Commissioner Lilly voiced concern that if COR's attorney-client privileged advice is contrary to the EC's advice, the employee who follows COR's advice could violate the ethics laws. Ms. Leong replied that the attorney client privilege is to encourage the client to come to

the attorney for advice. Similarly, complaints and requests for advice the EC receives are confidential to also encourage people to seek advice.

She is also aware that in the state or city level, the Ethics Commission counsel provided incorrect advice to a city officer or employee. The circuit court found the employee violated the ethics law, but the circuit court mitigated the consequences because the violator sought advice from the Ethics Commission director in good faith. Therefore, advice from the EDLC does not insulate the person making the inquiry, but could mitigate the consequences of violations of the ethics laws, just as the COR advice would mitigate the consequences.

Commissioner Chen stated that she was concerned that employees would be confused; also, the attorney-client relationship requires the attorney to put the client's best interest above all others; finally, ethics issues are not straightforward; how will COR determine what is novel or a complex issue. Ms. Leong stated that her duty is to the city and county of Honolulu, not to the employee asking for advice and she will do what is in the best interest of the people as that is her "guiding light." Ms. Leong stated that she would use EC's advisory opinion to provide ethics advice. Commissioner Lilly suggested that Ms. Leong defer ethics advice to the EC staff because that is their area of expertise similar to private practice attorneys referring clients to another attorney who has that area of expertise. Ms. Leong stated that COR would work collaboratively with the EC staff and to the extent that COR could benefit from EC staff clarification she would encourage her staff to contact the EC staff.

Commissioner Silva asked what happens when an employee who is the subject of an investigation seeks legal advice from COR on the EC case. Will COR advise them or represent them? Ms. Leong stated that COR would not turn that employee away if COR can advise them as to the EC's process and how to comply with the standards of conduct.

Commissioner Burroughs told Ms. Leong that she has stated many times she would not discourage the employees from contacting the EC. He would prefer that she would have a policy to encourage the employee to come to the EC for advice and that the EC receive priority in the kind of recommendations that COR would make to their clients. Ms. Leong stated that if a complainant came to them, she would advise them to go to the EC. Commissioner Burroughs agreed that it made sense in that limited situation, but broadly speaking as people are asking for ethical advice that her policy should be to encourage the clients to come to the EC which is more beneficial to COR's clients.

The EDLC stated that he appreciated Ms. Leong's collaborative efforts to work with the EC. But, the EC has an ethics program that incorporates advisory opinions into training. How would the EC incorporate COR's attorney-client privileged novel advice into ethics training? Ms. Leong stated that she would not advise on novel issues. The EDLC asked if Ms. Leong or Ms. Shinn, the MD, made the final decision that COR would provide ethics advice. Ms. Leong replied that the Charter authorizes COR to provide advice and she is aware that this issue had

been discussed with the EDLC and other Corporation Counsels throughout the years. As such, she is just continuing the practice of COR to fully advise clients. The EDLC stated that a few months ago Ms. Shinn stated that she was going to have COR give ethics advice because it would be protected by the attorney-client privilege. He asked if Ms. Leong was aware of that statement. Ms. Leong confirmed that since EC staff counsels the EC, the advice they give to others would not be protected under the attorney-client privilege and that Ms. Shinn welcomes city officers and employees to come to COR on ethics laws. The EDLC again asked if Ms. Leong was aware if that was Ms. Shinn's reasoning for advocating that COR provide ethics advice. Ms. Leong advised the EDLC to ask Ms. Shinn.

Chair Gall stated that at this point there is a difference of opinion as to whether COR providing ethics advice is good policy. Chair Gall stated that he does not know what the EC is trying to achieve because there is no issue before the EC.

The EDLC requested to ask Ms. Leong a final question. The EDLC asked Ms. Leong if she considered Article XIV of the State Constitution in determining whether COR should provide ethics advice. Ms. Leong was not familiar with Article XIV of the State Constitution and so the EDLC read it to her, which provides that each county shall have an ethics commission which shall administer the ethics laws. She stated she absolutely took it into account by considering the Revised Charter of Honolulu which implements the Constitution. The EDLC responded that RCH defers to state laws and federal laws before granting COR authority to administer all city laws. Ms. Leong responded that COR does not believe that RCH and State Constitution are inconsistent and that she had fully addressed this issue in her October memorandum to the EC.

Vice Chair Wong offered that an EC subgroup, such as herself and perhaps the Chair could attend meetings with COR and EC staff in an effort to remove these items from the open session agenda. Ms. Leong stated that she would be open and happy to meet with EC staff as emails take a lot of time and meeting in person fosters better relationships. Vice Chair Wong noted that the EC trusts the EDLC and that he represents the EC.

VI. ADJOURNMENT

Commissioner Burroughs moved to adjourn the meeting and Commissioner Silva seconded. All were in favor.