

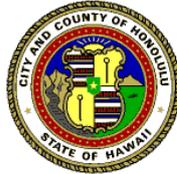
ETHICS COMMISSION

CITY AND COUNTY OF HONOLULU

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Advisory Opinion No. 2001-2

I. Summary

This opinion reviews the conflicts of interest that may arise when a city officer ("A"), discharges his/her official duties in matters where A's spouse ("Spouse") and/or Spouse's business ("Spouse's Business") advises clients who may be affected by A's discretionary actions. In certain situations, the financial and personal interests of A in Spouse's Business would conflict with the discharge of A's duties. Whether a conflict with A's public responsibilities will occur largely depends upon the roles played by A and Spouse's Business. Therefore, the Commission discusses examples of the types of conflicts of interest that could arise and the proper methods to avoid violating the standards of conduct. The Commission found no ethical violations regarding A's potential conflicts of interest.

A is required by § 11-103, Revised Charter of Honolulu (RCH), to immediately inform his/her appointing authority and the Ethics Commission (Commission) when a conflict between A's public duties and private interests become apparent. Therefore, the Commission recommends, among other things, that the required notice be made whenever Spouse's Business advises or represents any client regarding a matter against or before a city agency and where it is reasonably foreseeable that the matter may require discretionary action or other similar involvement by A or the agency in which A works ("Agency"). At that point, the Commission will be able to assist A in complying with the ethics laws.

II. Introduction

On [date], the Commission received a request for advice, asking for an opinion whether A would be in a conflict of interest given his/her position in the Agency. The basis of the concern was that, in his/her official capacity, A would be in possession of or have access to confidential information directly relevant to the position of the city in certain matters. Spouse advises some clients on issues and matters, the resolution of which may be affected by the official actions or participation of A. Also, A has substantial responsibilities within the Agency and has discretionary authority over carrying out those responsibilities.

The Commission is required by § 3-6.3(b), Revised Ordinances of Honolulu (ROH), to render an advisory opinion in circumstances where there is an alleged conflict of interest or other unethical conduct.

Pursuant to ROH § 3-6.7(c), the Commission transmitted a copy of the request to A on [date] and A responded on [date], denying any conflicts of interest. A did not request a hearing.

{Discussion of preliminary matters.}

Under these circumstances, the Commission is obligated to decide the matter on the information available to it, subject to the Commission's discretion to gather more information. ROH § 3-6.7(c). Having allowed A ample opportunity to appear before the Commission and answer the Commission's written questions, the Commission makes the following findings, conclusions and recommendations.

III. Question presented

The issue is whether conflicts of interest exist between A's duties as a city officer and his/her financial and personal interests in Spouse's Business when the business provides services to clients on matters in which A or the Agency may become involved.

IV. Facts

A. A's relevant financial interests

A has been a city officer with significant discretion in the Agency for the period [date]. Spouse owns the controlling interest of Spouse's Business. Spouse's income for [date] from this business was substantial. A has another financial interest that may be affected by his/her official actions.

B. A's duties

1. General duties

{ Discussion of A's general powers, duties and functions under the relevant law. }

2. Specific duties related to union matters

In order to broaden and confirm the Commission's understanding of the duties and role of those in A's position relevant to the question in this case, Commission staff interviewed three former city officers and several current employees.

{ Discussion of A's specific duties and responsibilities relevant to potential conflicts of interest. }

V. Relevant law

A. RCH § 11-103 - disclosure of conflicts of interest

This section requires that an officer:

. . . who possesses or acquires such interests as might reasonably tend to create a conflict with the public interest shall make full disclosure in writing to such person's appointing authority . . . and to the ethics commission, at any time such conflict becomes apparent.

This law places an affirmative duty on an officer or employee to present a full disclosure to his/her appointing authority and the Ethics Commission when the potential conflict becomes evident. The public rightfully expects an officer or employee to inform the appointing authority and the Commission of each conflict of interest that occurs and to take appropriate action to avoid or resolve the conflict, thereby protecting the integrity of government.

B. RCH § 11-102(c) -- interests incompatible with duties or that may tend to impair independent judgment.

RCH § 11-102 reads in pertinent part:

No elected or appointed officer or employee shall:

(c) Engage in any business transaction or activity or have a financial interest, direct or indirect, which is incompatible with the proper discharge of such person's official duties or which may tend to impair the independence of judgment in the performance of such person's official duties.

Thus, the issue raised by RCH § 11-102(c) is whether A has a financial interest that is either (1) "incompatible" with the duties of his/her position or (2) "may tend to impair" his/her independent judgment in performing his/her duties.

A "financial interest" is defined as an interest held by an individual or his/her spouse. ROH § 3-8.1. Spouse has a financial interest in the income received and ownership of the business and, consequently, A has an interest in Spouse's income and ownership in that business. A also has an independent financial interest as the trustee for the profit sharing plan. If A is a member of the profit sharing plan, he/she would also have an additional independent financial interest in the corporation.

The Commission's prior cases do not carefully examine "incompatibility," but discuss the "may tend to impair" standard. For example, in Advisory Opinion No. 259, a city officer was to help select the winning proposal for an automated budget preparation process. One of the bidders was the officer's former partnership, which still owed him nearly \$19,000. The Commission found it would be a conflict of interest for the city officer to sit on the review committee and select the bidder until the partnership no longer owed the city officer any money.

In Advisory Opinions Nos. 116 through 119 and 157 and 158, the Commission noted that:

It is generally held that a public officer owes an undivided duty to the public whom he serves and is not permitted to place himself in a position which will subject him to conflicting duties or expose him to the temptation of acting in a manner other than in the best interests of the public.

In these cases, the Commission required a general planner, an investigator and engineers to inactivate their real estate licenses because each employee was in a position where he could benefit financially from information gained through his employment.

In Advisory Opinion No. 91, a land planner for the city, who had access to confidential information about future land development before the information was released to the public by his Agency, was married to a real estate broker. The city employee also directly owned an interest in his wife's firm. The Commission stated:

Under such circumstances your dilemma is whether to divulge such information to your spouse for your private eventual benefit, or to keep it from her based on the public trust which you have a duty to uphold as a City employee. Such a dilemma may affect the proper discharge of your official duties or may tend to impair your independence of judgment in the performance of your official duties.

. . . . the fact that you are in a Agency which primarily deals with land and future development of such land in the City and your spouse who deals in the sale and purchase of real estate, are facts which may be reasonably perceived by the public as placing you in a position which may be advantageous to your spouse and may be reflected in a higher economic return for you and your spouse by disclosure of any confidential information to her. (Footnote omitted.)

The Commission noted its "duty to allay any perception that you may be taking advantage of your position as a land planner for the city for the benefit of [the wife's company]." The Commission recommended that the city employee divest himself of the "private financial interest and relinquish any office or directorship in [his wife's company]."

In Advisory Opinion No. 276, a firm occasionally was "involved in work that requires a permit from the Agency." The president of the firm was the spouse of the director of the Agency in question. The Commission required that the director be recused from any matters coming before the Agency from the spouse's company since the director's independence of judgment may be impaired. See also, Advisory Opinion No. 280 (recusal of director from any matter involving property owned by a trust for which he was trustee).

The case in Advisory Opinion No. 285 involved the officer responsible for preparation and implementation of the city's operating and capital budgets. Through a trust, the officer owned a thirty percent interest in a company that owned land under a condominium. The condominium owner-occupants filed with the appropriate city agency for mandatory conversion of the leasehold land. The Commission noted that the agency reviewing the conversion request may seek additional funding from the officer's Agency. The Commission found that there was no conflict of interest in the partial ownership of land beneath the condominium. The Commission concluded:

Although you prepare a City budget for the Mayor, he has the last word on what is submitted. Ultimately, the budget must be adopted by the Council, and it may vary from that proposed by the Mayor. All of which means that your decision-making power in regard to the City's budget is limited. Furthermore, your financial interest in the company which will be negotiating with owner-occupants of the condominium is shared with a family member and is a minority interest. Thus, the issue of whether your independence of judgment would be impaired is not a significant one.

In Advisory Opinion No. 108, the Commission examined a potential conflict of interest for a mayoral aide who screened for and recommended appointees for boards

and commissions to the mayor. The aide's husband was an applicant for a position as an executive director to a board the members of which the aide would screen and make recommendations. The decision whether or not to appoint was the mayor's. The Commission first determined that the aide had a "financial interest" in her husband's potential employment with the board. In discussing the prohibition against a financial interest that was incompatible with the aide's duties or may tend to impair her independent judgment, the Commission stated:

. . . the aide has acquired an interest which may be incompatible with official duties because the aide's spouse was . . . one of the applicant's for executive director. The aide could screen and recommend to the Mayor appointees to the board who are sympathetic towards the spouse's appointment as executive director. If the aide screened and recommended appointees to the board with the spouse uppermost in mind, allegations could be made that judgment was impaired and the aide was improperly discharging official duties.

The Commission recommended that the aide be recused from screening or recommending candidates for the board that was in the process of hiring an executive director.

The state Ethics Commission (EC) dealt with the financial interest of a spouse and a state employee's duties in Opinion No. 2000-1. In that case a head of an office within a Agency had substantial discretionary duties and was married to an employee of a company that had multiple contracts with the office. The state employee was responsible for overseeing those contracts. Although the state recognized that the spouses' respective employment created a conflict of interest, the state EC noted that the circumstances were unique and determined that the state ethics code should not be interpreted to preclude either employee from employment. The state EC also determined that safeguards could be implemented to help mitigate the conflict of interest.

The state EC found that the state employee headed an office that ". . . administered certain programs within a large industry . . . [and] was responsible for planning, directing, and executing the programs, and served as the [Agency's] key advisor and authority on the programs. . . The employee was involved in setting and administering policies, procurement and contracting, overseeing contracts, conducting investigations, and handling grievances."

Next the state EC reviewed its conflict of interest law. The state ethics code does not have a counterpart to RCH § 11-102(c) or the "may tend to impair" independent judgment standard. Instead, the HRS § 84-14 prohibits official action affecting a

business in which the employee has a substantial financial interest. This statute is essentially the same as ROH § 3-8.2(a).

The state employee's duties and responsibilities required him to use discretionary authority and to take official action directly affecting the business employing his wife. However, the state EC concluded it was "problematic" to have the office head recuse himself from all matters affecting his wife's employer because disqualification would prevent him from carrying out a large segment of his duties. Furthermore, there were duties that he could not delegate to staff without overloading their work. To remove the conflict would require the office head or his wife to terminate employment.

The state EC found that the case presented special circumstances and stated that "the Commission did not believe that the conflict of interest prohibition was intended to be so restrictive as to preclude the employee from continuing to serve as the head of the Office or require his spouse to terminate her employment with the Business." To avoid the conflict of interest as much as possible, the state EC recommended that the office head disqualify himself from matters directly affecting his wife's employer. Where the office head could not do this:

. . . his supervisor must review and approve his official action, to the extent possible or practicable. . . . The Commission believed that an independent review and approval of official action taken by the employee directly affecting the [wife's employer] regarding policy and other matters would help to safeguard against preferential treatment, actual or perceived, being given to the [wife's employer].

Although none of the foregoing cases presents the same facts as this case, some useful conclusions may be drawn. One purpose of the ethics laws is to prevent conflicts of interest because city officers and employees should not serve two masters. Therefore, the Commission has regularly required city officers and employees to forego activities that are likely to place them in a position where conflicts will arise. These limitations are imposed without a finding that the officers or employees would allow themselves to be swayed by the personal or financial interest because such an analysis is inherently subjective and unreliable. Instead, the objective standard used is whether a reasonable person, given all the facts, would conclude that the officer's independent judgment may tend to be impaired. See, In the Matter of the Water Use Permit Applications, 94 Haw. 97, 122, 9 P.3d 409, 434 (2000) (quoting State v. Ross, 89 Haw. 371, 380, 974 P.2d 11, 20 (1998)); Federal Office of Government Ethics Opinion No. 95x1 at 1, dated February 13, 1995; Federal Office of Government Ethics Opinion No. 85x10 at 4, dated July 15, 1985; Federal Office of Government Ethics Opinion No. 85x11 at 2, dated October 23, 1985. Finally, should a conflict arise, the officer has a duty to report it and remove himself or herself from the matter raising the conflict. This can be done by recusal or by divesting the financial interest.

C. ROH 3-8.2(a) - participation in official action directly affecting substantial financial interest

ROH § 3-8.2(a) states:

No officer or employee of the city, . . . shall:

(a) Participate, as an agent or representative of a city agency, in any official action directly affecting a business or matter in which (1) such person has a substantial financial interest;

To violate this section, the officer (1) must be involved in an official act (2) that directly affects (3) a business or other matter (4) in which the officer has a substantial financial interest.

An "official act" ". . . means a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." ROH § 3-8.1. Therefore, a city officer meeting the four elements would not be able to participate in a formal or informal decision-making process without violating the law.

D. RCH § 11-101 - the appearance of a conflict of interest

Ethics issues not only involve actual conflicts of interest, but apparent ones as well. This is a long established principle of governance, as reflected in RCH § 11-101:

Elected and appointed officers and employees shall demonstrate by their example the highest standards of ethical conduct,⁽⁴⁾ to the end that the public may justifiably have trust and confidence in the integrity of government. They, as agents of public purpose, shall hold their offices or positions for the benefit of the public, shall recognize that the public interest is their primary concern, and shall faithfully discharge the duties of their offices regardless of personal considerations.

As a result, the law requires ". . . City personnel to avoid even the appearance of impropriety or conflict of interest." Advisory Opinion No. 183. See also, Advisory Opinion Nos. 6, 11, 13, 17, 19, 47, 54, 63, 64, 70, 92, 180 and 283.

Many of the cases discussing whether an interest is incompatible or may tend to impair the officer's independent judgment also examine the issue of the appearance of a conflict of interest, even if no actual conflict exists. The appearance of a conflict arises when one may reasonably perceive that the officer's public duty may be interfered with or compromised by a personal or financial interest.

In Advisory Opinion No. 53, a city employee had confidential information about subdivision and grading plans and reviews. The employee also engaged in real estate sales with his father. This gave rise to a suspicion that the employee might transmit subdivision or planning information to his father, even though he himself will not take direct advantage of the opportunity. As a result, the employee was requested to inactivate his real estate license. See also, Advisory Opinion Nos. 180 and 203.

The Commission has extended the policy against the appearance of a conflict of interest to personal relationships. Advisory Opinion No. 184. In the context of examining whether a personal friendship between a commissioner and a person appearing before the board, the Commission noted:

The Commission believes personal relationships could influence an officer or an employee. For example, if a close friend asks a favor, the request may be difficult to refuse. Absent a request, the mere existence of a relationship may influence the officer or employee. . . .

Given this friendship, other members of Commission Z may be hesitant to take official action that is adverse to [the friend's] interests. Other persons who have business before Commission Z may believe Commission Z favors [the friend]. And the public may lose confidence in government in which Commission Z is a part. Therefore, when members of Commission Z have personal friendships with persons who appear or have business before Commission Z, the commissioners create for themselves the appearance of conflicts of interest, for which they are accountable.

VI. Analysis

The foregoing cases require that an officer of the city be committed first and foremost to his or her public duties and must be diligent to take all reasonable steps to avoid both real and apparent conflicts of interest. Depending on the facts in a given situation, A could find him/herself in a conflict of interest. Furthermore, RCH § 11-103 requires that A inform his/her appointing authority and the Commission when it becomes apparent that A's financial or personal interests might reasonably conflict with the public interest in discharging his/her duties. The discussion below is intended to guide A and the appointing authority to ensure that A adheres to the substance and procedures required by the ethics laws.

A. Factors considered

The Commission considers several factors to be relevant in determining whether a conflict of interest exists and the dimensions of the conflict. First, we examine the relative size and importance of the financial interest to the officer. In this regard, Spouse's salary and the value of his/her ownership interest in Spouse's Business is

substantial. Furthermore, A has a financial interest that may be affected by his/her decisions and actions.

Second, we note the nature of the relationship between husband and wife. This relationship is the closest of personal ties, based upon trust, loyalty, support and communication. In the marital context, salaries and business ownership are not simply arm's length commercial transactions, but are inherent components of the marriage. Thus, being married makes the family's financial interests intensely personal and raises a deeper concern about conflicts of interest than does a common business transaction.

Another factor to examine is the link, if any, between the duties of the officer and the impact on the financial interest. This is a key element under ROH § 3-8.2(a), which requires that the official action in which A participates "directly affect" the financial interest. Similarly, this factor is relevant to RCH § 11-102(c) because a duty only remotely linked to a financial interest may be less likely to tend to impair independent judgment. This factor requires an examination of the specific duties involved in a given situation.

Fourth, it is important to consider the extent of the officer's discretion in carrying out the responsibilities of the position. The more discretion allowed the officer, the more likely a conflict of interest may occur. As discussed, A has varying degrees of discretionary authority over matters relevant to Spouse's Business' clients.

B. Potential Conflicts of interest

Based on the ethics laws, the cases described earlier and the analysis of the four factors above, the Commission concludes that violations of the conflict of interest laws are reasonably foreseeable where Spouse's Business advises a client in matters involving the discretionary duties of A or the Agency. Any discretion in presenting information or participating in the decision making process on the part of A for those issues where Spouse's Business provides services to an affected client would create a likelihood that A's independent judgment may tend to be impaired in violation of RCH § 11-102(c) or that A would violate the participation prohibition in ROH § 3-8.2(a). Even if A has no discretionary authority regarding a matter involving Spouse's Business' client, A's involvement in the matter would constitute an appearance of a conflict of interest in violation of RCH § 11-101. Similarly, at least an apparent conflict of interest would exist even in circumstances where the client and the city have no disagreements or issues with one another.

We find that other cases with similar facts have received similar treatment. See, e.g., Federal Office of Government Ethics Opinion No. 96x10, dated April 25, 1996

(employee should recuse himself from participating in matters that could directly and predictably affect securities owned and controlled by spouse); Federal Office of Government Ethics Opinion No. 95x1 dated February 13, 1995 (agency head who is spouse of partner in law firm that represents clients before agency should recuse herself from participating in any matter in which spouse's firm represents a party before the agency); Office of the Attorney General of Arizona Opinion dated December 4, 1979, 1979 Ariz. AG LEXIS 30 (school board member whose spouse represents teachers concerning salaries, benefits and grievances is disqualified from participating in personnel matters before the board because "spouse is in a direct adversary position with . . . school board").

Below, we discuss the types of conflicts of interest that arose as a result of our investigation and are illustrative of potential conflicts of interest.

1. [] matters

Examples of [] matters giving rise to conflicts of interest should Spouse's Business provide services to a client in a matter involving A's duties would include []. The public would reasonably be concerned under such circumstances that A's financial and personal interests may tend to impair his/her independent judgement.

The same would hold true for matters involving []⁽²⁾ and other matters where Spouse or Spouse's Business has represented or is advising a client. Once again, should Spouse's Business be involved in any manner in [] cases involving the city, A should recuse him/herself from any involvement.

2. [] matters

Former officers and current employees of the city informed the Commission that the role of those in A's position in certain matters that would raise potential conflicts of interest for A.

A should avoid any participation in the discussion or decision making for these matters. Once again, a reasonable person could conclude that A's financial and personal interests may tend to impair his/her judgment in violation of RCH 11-102(c).

3. Confidential information

In this context, confidential information is information which is not readily available to the public. Because of his/her position, A will have access to or knowledge of confidential information as to certain issues. Depending on the facts, this type of confidential information may be of strategic relevance to Spouse's Business' clients.

RCH § 11-102(b) prohibits a city officer from disclosure of ". . . confidential information gained by reason of such person's office or position or use [of] such information for the personal gain or benefit of anyone." (No one has complained to the Commission that A has disclosed confidential information.) To the extent that Spouse's Business represents clients in matters to which A's confidential information is relevant, A may reasonably be perceived as having an apparent conflict of interest between his/her responsibilities as a city officer and his/her financial and personal interests. The conflict still exists even if A would never reveal the confidential information.

In prior cases the Commission has recommended that officers and employees divest themselves of the interest in order to remove the appearance of a conflict. However, in those cases the apparent conflict either was related to a specific incident or was cured by something less intrusive than losing employment. On balance, A should be afforded the opportunity to follow the process described regarding conflicts of interest.

4. [] matters

{ A discussion of these matters. }

5. Guidelines for handling potential conflicts of interest

In order to aid A in avoiding the conflicts of interest, we provide guidelines. First, the Commission does not believe that a blanket prohibition is warranted at this time against A's discharging his/her duties regarding all matters that may result in a conflict of interest. A case-by-case review is a less intrusive means by which A may avoid breaches of the ethics code. As a result, the Commission focuses on the involvement of Spouse's Business and A or the Agency in the same issue. If they are both involved, A will have to remove him/herself from all discussion, participation and decision making in the matter. Thus, the number and nature of the conflicts of interest will largely depend upon the respective roles played by A and Spouse's Business. To some extent this is within the control of A and Spouse.

Second, the examples discussed above in items 1 through 4 are not exclusive and should not be considered as limiting the types of conflicts that could arise in the future.

Third, the Commission is concerned with the discretionary actions on the part of A and the Agency and not ministerial ones. Therefore, the key issues are those where A or the Agency participate, decide, recommend, approve, disapprove, or otherwise act

or refrain from acting in their discretion on any matter involving Spouse's Business' clients.

The fourth guideline suggests that the potential for conflicts of interest be broadly interpreted by A. For example, the fact that Spouse's Business may no longer be advising a client on a matter that involves A's participation, does not mean that no conflict exists. The financial and personal interests are triggered when A works on or is otherwise involved in a matter in which Spouse's Business has provided any service. Furthermore, this example shows that, in preparing for future conflicts of interest, we use broad terms such as "issue," "matter" and "involvement."

This leads us to the fifth guideline. A should request the advice of the Commission in interpreting the law or this opinion as soon as a conflict becomes apparent. Each set of facts may present different issues and require different recommendations.

Pursuant to RCH § 11-103, A is responsible to use reasonable diligence to determine whether Spouse's Business provides services in any matter that comes before A or the Agency.⁽³⁾ We remind A that he/she is required by the same law to report the conflict to the appointing authority and the Ethics Commission. Without A's due diligence and reporting, the public reasonably may not trust A to recuse him/herself from each matter involving his/her financial and personal interests.

VII. Recommendations to avoid conflicts of interest

The Commission is required to recommend appropriate actions to remedy potential or actual ethics violations to the officer involved and the appointing authority pursuant to ROH § 3-6.5(e). We do so based upon the facts, law and policies described herein.

We recommend the following:

1. A should immediately inform the appointing authority and the Commission in writing of each matter in which Spouse's Business advises, represents or otherwise provides services to a client for a matter before or against any city agency and for which the discretionary action or other similar involvement by the Agency may reasonably be expected. We have presented examples of these matters above. This disclosure and reporting is required under RCH § 11-103 because such matters might reasonably tend to create a conflict with the public interest.
2. The written disclosure should include a statement of A's personal or financial interest, his/her duties and responsibilities relevant to the disclosed conflict, when action on the matter is expected to occur and the manner, if any, in which A intends to resolve the conflict of interest.

3. Should A have any question about whether a situation might create a conflict with the public interest, he/she should err on the side of caution and disclose the matter to the appointing authority and the Commission. The Commission will be able to advise A as to whether a conflict may occur or exists and offer suggestions to resolve the conflict.

4. In any situation creating a conflict between the public interest in carrying out A's duties or responsibilities and his/her private financial and personal interests, A should immediately remove and physically absent him/herself from any participation in obtaining information, discussion or decision making. A should recuse him/herself from the issue and assign the matter to the appropriate person without any instruction that may influence the substance of the decision making.

5. A should remove him/herself from the other financial interest that could be affected by A's official decisions or actions. A should also submit a statement of completion for these tasks to the appointing authority and the Commission. Although this will not remove the potential for conflicts of interest between A's duties and Spouse's Business, it will reduce the extent of A's potentially conflicting financial interests.

Should this process not be followed or not resolve the conflicts, the Commission will recommend appropriate action based upon the facts and circumstances.

To facilitate the completion of this process, ROH § 3-6.5(e) requires that the appointing authority inform the Commission as to whatever action is deemed necessary. This section also requires the response by the appointing authority within fifteen days from receipt of the advisory opinion.

Dated: June 22, 2001

/S/

LOLINDA D. RAMOS, Chairperson
Ethics Commission

1. A similar requirement is stated in Article XIV, Hawai'i Constitution, and is applicable to each county.

2. Witnesses stated that while A was in a similar position he/she sometimes, but not always, removed him/herself from meetings where certain issues that could result in conflicts of interest were being discussed. However, the Commission has no record of written notice by A of any conflicts.

3. []