

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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Advisory Opinion No. 2007-1

I. Summary

Section 11-103, Revised Charter of Honolulu, which requires a full written disclosure of interest before a councilmember may vote on a matter that raises a conflict of interest, is interpreted broadly to ensure that the public is informed of private interests that may tend to conflict with a councilmember's public duties.

No conflict of interest occurred when a councilmember ("Councilmember") worked on matters for his private employer that did not come before the Council.

A conflict of interest arose for Councilmember out of a series of bills before the Council relating to a Public Facility. Although Councilmember filed his written disclosure, he should have done so at an earlier time, before the vote on the first bill that affected his employer's interest. The bills affected his employer's interest. Therefore, Councilmember was obligated to disclose the conflict of interest before voting on the bills.

The Commission does not have jurisdiction over complaints alleging lobbying without registration where the alleged lobbying occurred before the Commission was authorized to regulate lobbying.

II. Background

Before taking office on [date], Councilmember had a position with his employer ("Employer"). He also served as a representative of an affiliate of Employer ("Affiliated Company"). He remained in those positions during the times relevant to this matter.

On [date], the Honolulu Ethics Commission received a complaint from a group of people. Specifically, the complainants contend that Councilmember violated the standards of conduct by:

1. a. Stating that he would look into their concerns regarding the closure of a Marine Facility, but not doing so;
 - b. Using the information received from the complainants as to the Marine Facility to bolster Affiliated Company's position before a state agency;
 - c. Failing to disclose his position with Employer to the complainants; and
 - d. Appearing before the state agency on behalf of Affiliated Company concerning the closure of the Marine Facility.
2. Complainants claim that Councilmember, before he was elected, failed to register as a lobbyist for Employer or Affiliated Company.
 3. Complainants allege that Councilmember failed to make a full written disclosure of interest as required by law before voting on Bill X regarding the use of a Public Facility.

The Commission transmitted a Notice of Possible Violation of the Standards of Conduct to Councilmember on May 2, 2007 regarding only the third allegation, above. Councilmember responded on May 20, 2007, but did not request a hearing. Therefore, the Commission may render its opinion based on the information before it, pursuant to Section 3-6.7(c), Revised Ordinances of Honolulu ("ROH").¹

III. Discussion

A. Concerns arising from Councilmember's representation of Affiliated Company regarding the Marine Facility

Complainants suggest that Councilmember violated the ethics laws by not disclosing to complainants his employment, failing to investigate complainants' concerns about the Marine Facility, misusing information received from the complainants about the Marine Facility and appearing before the state agency on behalf of Affiliated Company.

A representative of complainants and Councilmember discussed the Marine Facility issue over the telephone on a few occasions. The Marine Facility issue did not come before the Council. In addition, the representative states that, although he did not know exactly in what capacity Councilmember worked for Employer, he knew he was employed by or represented Employer prior to their telephone discussions. Councilmember assumed that, in his discussions

¹ Sec. 3-6.7 Requests by third parties.

(c) Where no hearing is requested by the officer or employee involved, the commission shall render its opinion on the basis of the information available; provided, that the commission may request for additional information when deemed necessary.

with complainants' representative about the Marine Facility, he was doing so in his private capacity as an officer of Employer, not in his position as a councilmember. Finally, neither complainants' representative nor Councilmember believes any of the information exchanged between them was confidential.

The key issues here are: (1) whether Councilmember had a conflict of interest and (2) if a conflict existed, whether he was required by the ethics laws to disclose his employment or his representation of Affiliated Company as a result of the conflict.

The position of councilmember is considered to be part-time and a councilmember is expected to have other sources of income besides his or her city salary. Advisory Opinion No. 197 (June 9, 1989) (noting that the Honolulu Salary Commission had reached this conclusion). Non-city employment sometimes results in a councilmember taking positions on public issues in his or her private employment. Under certain circumstances, a conflict of interest may be created between a councilmember's private employment and his public duties.

Generally, if a city officer or employee has a conflict of interest, he or she may not participate in the decision making process affecting the matter creating the conflict. However, despite this general rule, councilmembers may vote on any issue, even where the councilmember has a conflict of interest, as long as a full written disclosure of the conflict has been made public before he or she votes on the matter raising the conflict. Sections 3-107.1 and 11-103, Revised Charter of Honolulu ("RCH").²

RCH Section 11-102 and ROH Section 3-8.2 describe the types of personal interests that can create conflicts of interest prohibited under the ethics laws (*e.g.*, financial interests,

²Section 3-107.1 states in relevant part:

All councilmembers shall have the right to vote in the council at all times.

Section 11-103. 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 such person's 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 or she 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.

business activities, gifts, confidential information, etc.). Specifically, RCH Section 11-102(c)³ prohibits a councilmember from having a business activity or financial interest that is incompatible with his or her city duties or may tend to impair the judgment of the councilmember in carrying out his or her duties.

The dispositive fact here is that no issues regarding the Marine Facility have come before the Council while Councilmember has been a member. Thus, he was never called upon to exercise his official judgment or discharge any official duties with respect to the Marine Facility. As such, his private work for Affiliated Company could not have affected the exercise of his duties or judgment as a councilmember with respect to the Marine Facility. In other words, there was never a potential conflict of interest for Councilmember to disclose. If the Marine Facility issue had reached Councilmember in his elected capacity, his representation of Affiliated Company would have created a financial conflict of interest and, in turn, he would have had to fully disclose the conflict in writing before voting on the matter. Similarly, Councilmember's representation of Affiliated Company before the state agency would not create a conflict of interest for which he would have to file a disclosure because the issue did not come before the Council.

RCH Section 11-102(b)⁴ restricts the use of confidential information by a city officer or employee for the benefit of anyone. Although complainants gave information to Councilmember, neither complainants nor Councilmember claim that the information was confidential. Therefore, a conflict could not have arisen and no disclosure was needed.

B. Failure to file lobbyist registration and annual report

Before Councilmember took office on [date], he lobbied on behalf of the Employer. According to the Office of the City Clerk, he did not register as a lobbyist in [year] as required by ROH Sec. 4-1.3(a)⁵ or file an annual report pursuant to ROH Sec. 4-1.3(c).⁶

The Commission did not have jurisdiction over lobbying matters until the enactment of Ordinance No. 05-033 at the end of 2005. As a result, the Commission may not opine on Councilmember's failure to file the required information before that date.

³ Section 11-102. Conflicts of Interest --

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.

⁴ Section 11-102. Conflicts of Interest --

No elected or appointed officer or employee shall:

- (b) Disclose confidential information gained by reason of such person's office or position or use such information for the personal gain or benefit of anyone.

⁵ Now ROH Section 3-6.13.3(a).

⁶ Now ROH Section 3-6.13.3(c).

C. Duty to disclose the conflict of interest regarding the Public Facility and Councilmember's employment

As noted above, each city councilmember, officer and employee is required to file a full written disclosure whenever he or she has an interest that “might reasonably tend to create a conflict with the public interest . . .” RCH Section 11-103. Councilmembers are permitted to vote on the matter that creates the conflict, but only once the written disclosure has been made a matter of public record. If a councilmember fails to follow this process, his or her vote is void on any legislation for which he or she has not filed the disclosure. *See*, RCH Sec. 11-103; *Hui Malama Aina O Koolau v. Pacarro*, 4 Haw. App. 304, 666 P2d 177 (1983).

The Commission must determine whether Councilmember knew or should have known that his private employment might reasonably tend to create a conflict with his city duties to review and vote on bills affecting the Public Facility. For the purpose of evaluating whether a conflict of interest existed, it is fair to attribute Employer's positions regarding the Public Facility to Councilmember because of his specific work duties for Employer.

In [year], the general manager of Employer and the president of Affiliated Company submitted public comments to a state agency opposing the expansion of the Public Facility. On [date], Employer formally opposed a government plan regarding the Public Facility. It is evident that, as of the date when Councilmember took office, he would have known of Employer's positions relating to the use of the Public Facility.

Bill X [year] and Bill X Committee Draft 1 (“CD1”)⁷ were intended to significantly restrict the use of the Public Facility. Bill X Committee Draft 2 (“CD2”), if passed, would have closed the Public Facility.

The first vote on Bill X was on [date] and the first vote on Bill X CD1 was four months later. Councilmember voted in favor of both bills. Councilmember did not file his written disclosure of interest until eight months after his vote on Bill X and four months after his vote on Bill X CD1. Upon filing his disclosure on Bill X CD2, he voted in favor of Bill X CD2.

A councilmember has a duty to evaluate and vote on bills that come before the Council. Councilmember suggests that he did not need to disclose a conflict of interest before voting on Bill X or Bill X CD1 because no conflict existed between his employment and his duty to review and vote on these bills. He states that Bills X and X CD1 did not concern the closure of the Public Facility. Therefore, he did not file a disclosure interest before voting on Bill X or its CD1. In contrast, according to Councilmember, Bill X CD2 specifically called for closure of the Public Facility and that triggered a conflict. Therefore, he filed his disclosure before voting on Bill X CD2. Finally, he notes that many similar issues could arguably affect the Public Facility and that he has not taken such an extensive approach to filing disclosures.

⁷ Footnote deleted for public version of this opinion.

RCH Section 11-103 is worded broadly: disclosure is required whenever a city officer or employee has an interest that “**might reasonably tend** to conflict with the public interest.” (Emphasis added.) In addition, the Commission has expansively interpreted the conflict of interest laws in the past. 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.” (Emphasis in original.) Advisory Opinion No. 131 (February 14, 1984). *See also*, Advisory Opinion No. 2001-2 (June 22, 2001) (“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.”) Furthermore, to narrowly read RCH Section 11-103 would undermine the policy of informing the public when a councilmembers’ private interests could affect legislation.

In this case, each of the bills had a fundamental issue in common – use of the Public Facility. The key to determining if a conflict of interest existed here is not whether Employer’s position was directly aligned with the bills; it is whether Employer had an interest that may have been affected by each of the bills. Employer’s interest had been publicly stated before the introduction of the bills. A reasonable person could have viewed Councilmember’s employment as potentially affecting his decision making on the bill. Therefore, Councilmember was required to fully disclose his private employment in writing before he voted on any of the versions of Bill X.

IV. Recommendation

We note that Councilmember filed his disclosure when he thought it was required. His misconstruing the trigger for the conflict appears to be an honest mistake as to how broadly RCH Section 11-103 is interpreted. It was not the result of any attempt to hide his employment, which was disclosed in his public Disclosure of Financial Interest statement and appears to have been common knowledge. Moreover, Councilmember had filed full disclosures of his employment for other related matters before the Council.

Therefore, the Commission recommends that no disciplinary action be taken in this matter.

The Commission believes that this opinion should act as a reminder to all councilmembers, board and commission members, and officers and employees to file a full disclosure in writing whenever they have an interest that may tend to conflict with their duties to the public. Except for councilmembers who may vote after fully disclosing the conflict in writing, all city personnel with conflicts of interest must remove themselves from taking any part in the decision making process regarding the matter raising the conflict. The Commission and its staff stand ready to advise city personnel whether they have a conflict of interest.

Dated: July 18, 2007

/S/
LEX R. SMITH, Chair
Honolulu Ethics Commission