

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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PETER B. CARLISLE
MAYOR



CHARLES W. TOTTO
EXECUTIVE DIRECTOR & LEGAL COUNSEL

Advisory Opinion No. 2011-6

I. Summary

Because the City Council did not make a specific determination that the travel for the Mayor's wife was for a public purpose, the Commission reviews the matter based on the facts available to it. Based on the available facts, the Commission finds that the Mayor's wife is not a city officer or employee and her presence with the Mayor was not necessary to accomplish a city purpose. Therefore, city funds received as gifts to the city should not be used to pay for the travel expenses of the Mayor's wife in accompanying him on foreign travel in this instance. The Commission leaves as an open question whether city funds or gifts to the city may be used to pay for the expenses of a "protocol invitee" under other circumstances or where the Council has taken legislative action specifically allowing the use of public funds to pay for expenses of a "protocol invitee".

II. Facts

A. Resolution 11-142 to accept \$16,500 as a gift to the city.

On April 29, 2011, the Mayor requested a resolution from the Council asking it to accept \$16,500 as a gift to the city from the Taipei Economic and Cultural Office in Honolulu, the Chengdu and Qinhuangdao Municipal People's Government, and the Shenzhen Delicate Furniture Company (collectively referred to herein as the "Donors"). The money was to be used for the travel expenses of five delegates including airfare, ground transportation, accommodations and meals from June 4, 2011 to June 20, 2011. The purpose of the trip was to strengthen sister city ties, to discuss ways to further cooperate in economic development, to assist companies looking for business opportunities with Honolulu, to expand tourism to Honolulu and to formalize Honolulu's sister city relationship with Chengdu at a signing ceremony.

On May 9, 2011, OED informed the Commission staff that the five city delegates attending the China trip would be the Mayor, the Mayor's wife, two OED staff members and a councilmember. OED asked whether approximately \$3300 of the \$16,500 could be used to pay for Ms. Carlisle's travel expenses. Commission staff responded that the

benefit of the travel gifts would personally accrue to the Mayor and be unlawful under Section 3-8.7, Revised Ordinances of Honolulu (ROH).

On May 11, 2011, the Council heard Resolution 11-142. OED informed the Council that Ms. Carlisle would be traveling with the Mayor and that the gift was intended to pay for her travel as well as the expenses for the other city officers and employees. The Council approved Resolution 11-142, but made no specific findings regarding the need for Ms. Carlisle's presence on the trips or that expending the funds given to the city to pay for Ms. Carlisle's Travel would be for a public purpose.

On the same day, the Taipei Economic and Cultural Office sent a letter to Mayor Carlisle stating that Taiwan extends an invitation to the Mayor and First Lady to lead a delegation for a visit to Taiwan. The letter states that "it is well known that the First Lady Judith is involved in many community services and cultural events. Her presence in the meetings will certainly help promote Honolulu and enrich bilateral interactions."

On May 13, 2011, Commission staff received letters from Mr. Jeffrey Lau, President of the Chinese Chamber of Commerce of Hawaii on behalf of the Chengdu and Qinhuangdao Municipal People's governments. Mr. Lau stated that the governments invited both the Mayor and his wife to visit their cities. He further stated that in China it is customary to see the spouse of the elected officials accompany them on official business as they are seen as an extension of the elected official and their community.

B. The China trip from June 4, 2011 through June 20, 2011

Mayor and Ms. Carlisle and OED staff followed an itinerary prepared by OED staff. Out of the 16-day trip, 5 days were spent in transit, almost 3 days were used to visit rail transit officials and infrastructure, while preparation and execution of the sister city signing event took up 2 days, and the remaining 6 days appears to have been spent in courtesy meetings with local government officials, touring cultural sites and attending hosted lunches and dinners. At some of the functions, Ms. Carlisle made brief thank you remarks and was referred to as the First Lady of Honolulu.

C. Cultural expectations that the Mayor's wife accompany him on the trip.

Ann Chung, the director of OED, stated that in international protocol for some Asian countries, the mayor's wife is considered an extension of the mayor. According to Ms. Chung, the mayor's wife is considered part of the leadership team of the city; and having her attend an economic and cultural exchange such as the creation of a sister city relationship is considered a show of interest and respect to the host government for a continuing relationship between the governments. This is considered important by OED because of the developing economic relations between Hawaii and China. Ms. Carlisle's attendance was specifically requested by the governments of Taiwan and Mainland China. The invitation for Ms. Carlisle did not originate with the Mayor or his staff, but with the foreign governments.

Ms. Chung also stated that, had Ms. Carlisle not traveled with the Mayor, excuses would have been made by the city administration and the host government personnel would have been disappointed, but there would be no ramifications to the relations between Honolulu and the foreign governments. Honolulu does not reciprocate with gifts of travel to officials of other governments because it is not considered a priority use for the city's public funds.

The Council has not received similar requests from governments along with travel gifts, although Councilmember Chang was invited to attend the sister city travel to China at the foreign government's expense as the representative of the Council. He is unmarried and had no one accompany him. The Council did not express an opinion whether Ms. Carlisle's trips would properly be funded by taxpayer funds and deferred the issue to the Mayor.¹

D. The Mayor considers his wife's travel to China a "public purpose" which could have been paid for with taxpayer dollars from his discretionary fund.

The Mayor has a discretionary account funded with about \$25,000 annually. The account may be "expended by the mayor for such public purposes as the mayor may deem proper." RCH Sec. 5-105. The fund is monitored by the Department of Budget and Fiscal Services, and the fiscal officer in charge noted that, as far as he knows, the fund has never been used for a mayor's spouse's travel. OED staff was asked whether the Mayor considered having his wife travel with him in a protocol position to be a public purpose for which the discretionary account could be used. The response: "For the portions of the travel not covered by these gifts, the Mayor has determined for himself that no city funds would be used for his wife. No determination was made whether the expenses of the Mayor's wife could appropriately be paid from Mayor's Contingency Fund in RCH Sec. 5-105."²

At the Commission's request, the Mayor submitted an additional explanation:³

As is stated in Ann Chung's email response of July 26, 2011, no determination was made of the propriety of expenditure from the Mayor's Contingency Fund for the travel expenses of my wife not covered by the offers of travel and lodging for travel to Nagaoka, Japan and to Taiwan and Mainland China. I had already made the decision that travel expenses not covered by the offers would be paid by me, not by the city.

You have now asked me whether I consider the travel expenses of my wife to Nagaoka, Japan and to Taiwan and Mainland China to be expenses for a public purpose; yes, I do consider the travel and the expenses

¹ Email from Council Chair Ernest Y Martin to C. Tutto dated August 23, 2011.

² Email from Ann Chung to C. Tutto dated July 26, 2011

³ Email dated August 25, 2011 from Mayor Peter Carlisle to Charles Tutto, Executive Director and Legal Counsel, Honolulu Ethics Commission

incurred to be for a public purpose as described in RCH Sec. 5-105. I understand too that Ms. Chung confirmed with you that for both offers of travel to Japan and to Taiwan and Mainland China, OED confirmed with the donors that the offer was specifically to include the First Lady of the City and we accepted the offer that included my wife as a matter of respect for the foreign donor and as a matter of international diplomacy. As a resident of Hawaii I am sure you are aware that in Japan and China the presence of the wife of a dignitary at an event is a sign of respect and honors the host. At many Chinese and Japanese functions here in Honolulu Judy's presence is specifically requested.

I reiterate however, irrespective of whether my wife's travel was for a public purpose and the expenses were for a public purpose, my unilateral decision was that I would pay out-of-pocket for my wife's travel expenses not covered by the offer for travel and lodging. Some might find it difficult to believe that I would not accept money that could be paid by the City & County of Honolulu. You may not be aware that I have voluntarily taken a 15% salary reduction this year due to budget difficulties of the City caused by the current economic climate. I hope this helps prove there are times when I feel it is appropriate for me to share the City's and taxpayer's current financial burden.

Gifts to the city to defray travel expenses for legitimate government activities are relatively common. Only the Council may accept the gifts on behalf of the city, but the gifts may be earmarked for specific purposes. See, RCH Sec. 13-113. The Council Gift Policy is stated in Resolution 05-349, CD1, FD1. The Commission provides ethical guidance on the gifts to the city in its Guidelines on Gifts to City Agencies. Because their travel was for a city government purpose, there are no ethics issues stemming from the acceptance and use of the travel gifts to pay expenses for the Mayor, OED staff or Councilmember Chang.

III. Question Presented

Do the ethics laws prohibit the use of \$3300 to pay for the travel expenses for Ms. Carlisle's attendance on the trip to Taiwan and Mainland China?

IV. Analysis

At the outset, the Commission notes that the Council did not accept the gift for Ms. Carlisle's travel with a specific finding that the gift would, once it was accepted as city funds, be expended for a public purpose or that Ms. Carlisle's travel on this trip was for a public purpose. Therefore, the Commission reviews this matter based on the available facts to determine whether the use of public funds for Ms. Carlisle's travel was proper. In order to lawfully receive and expend the \$3300 for Ms. Carlisle's travel costs, the travel gifts must be gifts to the city to be expended for a public purpose. The Commission advises that the \$3300 for Ms. Carlisle's travel was not a reasonable and

necessary expense required to support the Mayor in carrying out his official duties and, therefore, was not expended for a public purpose.

Once a gift is accepted by the Council, the gift becomes a public resource and may only be expended for government purposes. The Council's Gift Policy reads: "Gift means any voluntary contribution of money, securities, other personal property, or of real estate or any interest in real estate to the city for a public purpose, made gratuitously and without consideration, whether earmarked for a specific or not."⁴ (Emphasis added.) In Advisory Opinion No. 2010-2, the Commission began its analysis by observing that any expenditure of public funds must be for a legitimate government purpose, citing Article IV, Section 7, Hawaii Constitution, and RCH Sec. 11-104.⁵

The Commission's *Guidelines on Gifts to City Agencies*⁶ notes: "**The gift [to the city] must only be for reasonable and necessary expenses and not for the sole benefit of the affected officer or employee. The gift may only be for the reasonable and necessary expenses associated with the expressed purpose of the donation.** If an officer or employee benefits from a gift to the city that exceeds the reasonable and necessary expenses required to discharge his or her city duties (for example, using first class instead of coach air travel), the gift may violate the gift laws and/or may require reimbursement to the donor for the value of an excessive gift." (Underscoring added.)

Ms. Carlisle's presence at the Asian functions had merit in it reflected a level of respect to the host governments. But, her attendance was not necessary to achieve a city duty. As she is neither a city officer nor employee she has no duties of her own to fulfill. Even if she had some sort of protocol position as the Mayor's wife, as noted above, there would have been no consequences to the governmental relations if she had not been in the Mayor's party. Thus, following the *Guidelines on Gifts to City Agencies* results in finding that the travel gifts were not expended for a reasonable and necessary city purpose.

Other municipal jurisdictions have found that the presence of a high-ranking official's spouse as a protocol invitee is not a reasonable and necessary expense sufficient to meet the threshold of a "public purpose."

The City of New York Conflicts of Interest Board (Board) found that the Brooklyn Borough President (President) could not accept the gift of free travel for his wife from foreign governments because she was not an employee of New York City (NYC). Under NYC law, gifts of travel may be accepted by city officials as long as the

⁴ Resolution 05-349, CD1, FD1, Exhibit A, p.1.

⁵ **Section 11-104. Fair and Equal Treatment --**

Elected or appointed officers or employees shall not use their official positions to secure or grant special consideration, treatment, advantage, privilege or exemption to themselves or any person beyond that which is available to every other person.

⁶ <http://www1.honolulu.gov/ethics/giftguidelines3-20.htm>

funds are expended for government purposes. (The NYC law has the same result as the Council Gift Policy, whereby gifts to perform city business may be accepted by the Council.) The travel gift for the President was lawful because it was considered part of his job to improve social and economic relations with the governments of Turkey and the Netherlands, the donors. However, as the President's wife was not a city employee, a travel gift could not be used to pay her way. The Board held that "paying for the company of one's spouse on a business trip abroad is plainly not an expense that can be paid for with the City funds." Final Findings of Fact, Conclusions of Law and Order, COIB Case No. 09-0181, July 21, 2011 at 3.

The President offered several theories to justify that his wife's travel supported his government business abroad. He noted that: he and his wife were guests of foreign mayors and other officials for several meals; the President's wife was requested to be part of the delegation by the foreign governments; the travel was for purpose of developing a sister city relationship and to strengthen socio-economic ties; they listened to speeches, received proclamations, visited hospitals, urban renewal zones and religious and cultural centers; the President was not a good traveler and never went anywhere without his wife and, so, needed her on the trips to enable him to perform his official duties; and his wife was known as the as the "First Lady of Brooklyn." The Boards rejected these arguments, found the wife's attendance was not required to conduct NYC business and that the travel gift personally benefited the President. *Id.* at 3.

Similarly, a Texas Attorney General Opinion (Letter Opinion No. LO-90-31) concluded that the government could not pay for the expenses of spouses of city councilmembers and other city employees to attend government related conventions. The attorney general noted that the spouses were not government employees and had no official responsibilities or duties to perform. Therefore, using government funds for the spouse's expenses would be unlawful.

The Commission recognizes that protocol invites are permitted under federal law as exception to the federal standards of conduct found in Title 5 of the Code of Federal Regulations Part 2635. Congress provides a legislative exception under 31 U.S.C. Sec. 1353(b) for acceptance of gifts from foreign governments. Title 5 of the United States Code section 7342(c)<1)(B)(ii) permits an employee and an employee's spouse to "accept gifts of travel or expenses for travel taking place entirely outside of the United States (such as transportation, food and lodging) of more than minimal value if such acceptance is appropriate, consistent with the interests of the United States..." Unlike the federal law, there is no city law that would provide a similar exception to the city's ethics laws for a city official's spouse to accept a gift for travel from a foreign government.

V. Conclusions and recommendations

We acknowledge that the Council Gift Policy has not previously been interpreted in circumstances similar to those presented here. Furthermore, it is reasonable for a city official to think that the Council Gift Policy might permit gifts to the city for the use by the mayor's spouse if that use is related to some city event. OED asked for an opinion

from the Commission staff before expending the money and staff advised that the travel gifts would be considered unlawful gifts to the Mayor.

In our opinion, if the Mayor retains the \$3,300 travel benefits, it would result in an unlawful use of city funds under RCH Sec. 11-04. We recommend that the Mayor reimburse the city for the actual expense of his wife's travel or alternatively have the City Council make a specific determination that all or a portion of the funds for Ms. Carlisle's travel was for a public purpose.

The Commission makes its determination based on the facts presented in this case and upon interpretation of the current law. Under other circumstances, there may be a reason to depart from our opinion today or to create an exception to the gift law for "protocol invitees." Also, the Council may take legislative action in this area by passing an ordinance permitting such a use of city funds or by specifically identifying and justifying the use of city funds in a gift resolution.

Finally we commend the Mayor for bringing the issue to our attention, as prior administrations had not consulted the Commission on this issue. Asking for advice, as the Mayor did, before taking action allows all issues to be fairly reviewed and responded to, while supporting the efficient administration of government and avoiding the loss of public trust resulting from ethical misconduct.

APPROVED AS TO FORM
AND LEGALITY:

/s/Charles W. Tutto
CHARLES W. TOTTO
Executive Director and Legal Counsel

/s/Charles W. Gall
Honolulu Ethics Commission

Dated: Honolulu, Hawaii, 1/17/12