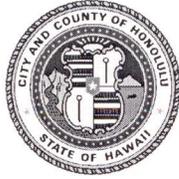


ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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Advisory Opinion No. 2012-4

I. Summary

Councilmember Nestor Garcia failed to disclose his conflicts of interest arising from his membership on the Kapolei Chamber of Commerce Board of Directors and later his employment as the executive director of the Kapolei Chamber of Commerce. The Chamber or its Board members testified before Council on 52 bills and resolutions in which they had an interest and on which Councilmember Garcia participated and voted. Under these facts, Councilmember Garcia was required to file a disclosure of conflict of interest for each legislative measure. He failed to do so. In addition, he misused his city email account to communicate regarding his personal business with the Chamber. Councilmember Garcia acknowledges these ethical violations and agrees to pay a civil fine of \$6,500.

II. Procedural Background

In March 2011, the Honolulu Ethics Commission (Commission) opened an investigation into whether Councilmember Nestor Garcia had conflicts of interest stemming from his employment with the Kapolei Chamber of Commerce (Chamber) and the fact that he had been a member of the Chamber's Board of Directors (Board). These concerns deepened because Councilmember Garcia had not filed conflict of interest disclosures for matters that came before him that affected the Chamber or the employers of the Chamber's Board members.

The Commission found probable cause of violations of Revised Charter of Honolulu (RCH) Sec. 11-103¹ and 11-104² at its August 8, 2011 meeting. A Notice of Alleged Violation of

¹ **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.

² **Section 11-104. Fair and Equal Treatment --**

Elected or appointed officers or employees shall not use their official positions to secure or grant special

the Standards of Conduct (Notice) was transmitted to Councilmember Garcia on September 22, 2011 and his Response was filed by his attorneys, William C. McCorriston and Kenneth J. Mansfield, on October 22, 2011. In his Response, Councilmember Garcia denied that he had violated the conflict disclosure law, RCH Sec. 11-103, and admitted that he had violated RCH Sec. 11-104 by misusing his city email account for non-city business.

The Commission staff and counsel for Councilmember Garcia agreed to settle the case whereby Councilmember Garcia admits he violated RCH Secs. 11-103 and 11-104. Also, he agreed to pay the city treasury \$6,500 as a civil fine and the Commission would dismiss the claims against him upon proof of payment. The Commission adopted the stipulation on June 15, 2012. The Commission renders this advisory opinion pursuant to Revised Ordinances of Honolulu (ROH) Sec. 3-6.7(c).³

III. Factual Background

A. Councilmember Garcia's private business activities and financial interests

Councilmember Nester Garcia began serving on the Council in January 2003. He has served two continuous terms with the second term to expire at the end of 2012. According to Councilmember Garcia, he became an advocate for rail mass transit in 2004.

In July 2007, Councilmember Garcia founded NRG Mediacom LLC to offer public relations consulting on media and government issues. He is the sole member of this business.

The Chamber was formed in 2007. In April 2008, Councilmember Garcia was invited to join and became a member of the Chamber's Board. At the November 2008 Board meeting, Councilmember Garcia was selected by the Board as the executive director for the Chamber. Councilmember Garcia resigned his seat on the Board, started his employment in January 2009 and continues in that position today.⁴ Councilmember Garcia is paid \$60,000 annually through NRG Mediacom, without employment benefits, for his services as the executive director. Board witnesses stated that the executive director position was needed to relieve one of the member's employees from the excessive amount of time she devoted to the Chamber and to allow for the Chamber to grow its membership. The salary for the position was determined based on salaries for executive directors for other chambers of commerce and similar entities.

consideration, treatment, advantage, privilege or exemption to themselves or any person beyond that which is available to every other person.

³ **Section 3-6.7. [Requests by third parties.] Complaints. --**

(c) Where no hearing is requested by the officer or employee, whose conduct is the subject of the complaint, 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.

⁴ We understand that for tax purposes the Chamber does not consider Councilmember Garcia to be an employee of the Chamber. However, for purposes of our analysis under the ethics laws, there is no relevant distinction between Councilmember Garcia and the Chamber having an employee-employer or a consultant-client relationship. Therefore, we use the terms interchangeably.

His duties include monitoring issues of interest to the Board that should be addressed by Board testimony or letters, arranging quarterly meetings and other events, increasing Chamber membership and suggesting possible candidates for Board seats. Councilmember Garcia states he has generally worked 8 to 10 hours per week for the Chamber.⁵ He has never had a written contract for his position with the Chamber.

During the same time frame Councilmember Garcia (through NRG Mediacom) contracted with Dura Constructors to provide weekly safety meetings and consult on safety prevention and workplace injuries, for which he receives about \$35,000 per year for 8 to 10 hours of work per week. These are the only two clients NRG Mediacom had from January 2009 to date.

B. Councilmember Garcia did not file conflict of interest disclosures for 52 bills and resolutions related to rail transit and other matters of interest to the Chamber or its Board members.

1. Rail transit bills and resolutions

On March 24, 2011, KITV News reported that one of NRG Mediacom's clients was the Chamber, and that the Chamber had been a staunch supporter of rail transit before the Council. The KITV News report observed that Councilmember Garcia had not filed disclosures of conflict of interest arising from his work for the Chamber regarding the Council bills and resolutions dealing with rail transit. The Commission also received a complaint from the public regarding the alleged failure to file conflict disclosures. The Commission staff's ensuing investigation focused on whether Councilmember Garcia failed to comply with RCH Sec. 11-103, which requires Councilmembers to publicly and fully disclose in writing a conflict of interest when it first becomes apparent and before voting on the measure that creates the conflict.

In his July 26, 2011 interview, Councilmember Garcia stated that he did not know until recently that the Chamber had taken a position in support of rail transit. But he clarified that he had always assumed that the Chamber was in favor of rail transit because it was an important component to developing and supporting businesses in the Kapolei area. As early as April 2008, members of the Board testified in support of Bill 80 (2006) to select the steel on steel rail option as the technology to be used. Also, the Chamber and some of its Board members advocated for the proposed rail mass transit system to promote the interests of the Chamber's membership to develop the Second City and West Oahu. Councilmember Garcia voted to support steel on steel. Attachment A hereto lists the bills and resolutions related to rail transit that Councilmember Garcia voted on. The measures in Attachment A have different levels of importance to the development of rail transit on Oahu, but each is integral to the project. During the relevant period, April 2008 until March 24, 2011, Councilmember Garcia voted on 38 resolutions and bills regarding rail transit without filing written conflict disclosures.

2. Bills and resolutions for other matters of interest to the Chamber or its Board members

⁵ Interview of Councilmember Garcia by Commission staff on July 26, 2011.

In addition, during the April 2008 to March 24, 2011 time frame, Councilmember Garcia also voted on 14 measures not related to rail where Board members testified. Again, no disclosures of interest were filed. For example, Councilmember Garcia voted on three bills -- 46, 47 and 48 (2008) -- to rezone land in West Oahu from restricted agricultural to residential and business after Board members testified in support. The measures are identified on Attachment B.

3. Councilmember Garcia's conflict of interest disclosure and financial disclosure practices

Councilmember Garcia and his staff stated that his general approach to analyzing whether a conflict of interest existed was based on a rule of thumb: if there was no direct financial benefit to him personally, there was no conflict of interest. Regarding the Chamber, they believed that, because it advocated on public policy issues and they thought none of its members directly benefited from the advocacy, the Chamber's position could not create a conflict with the public interest. In his interview and in responses to questions from staff, Councilmember Garcia explained that he did not file conflict of interest disclosures regarding rail transit measures because there was no tangible benefit to him from the rail project. The project was good for business generally, not just for Kapolei or the Chamber and its members, and, in his opinion, the individual measures had no direct connection to his clients. Also, he believed there was no reward or city-bestowed financial benefit from rail transit to him.

As early as September 2003, Councilmember Garcia disclosed that he was employed by City Bank before he voted on the appointment of Richard Lim to the Planning Commission. Mr Lim was Councilmember Garcia's immediate supervisor and the President and Chief Executive Officer of City Bank. Similarly, in January 2010, Councilmember Garcia filed his disclosure stating his Chamber employment when Theresia McMurdo, who was then a Board member, was appointed to the Board of Water Supply. For these two matters, he knew that his employment relationship with the affected parties required disclosure.

Councilmember Garcia filed 33 disclosures of conflict of interest during the April 2008 to March 24, 2011 period. 10 of these included conflicts of interest arising from Council measures affecting his wife's employer, Catholic Charities. He even revealed *de minimis* or remote concerns such as a gift to the city for a scoreboard from one of his employers (Dura Constructors), a "distant cousin" running for mayor in a special election and an old state House colleague running for a Council seat.

In November 2008, the Board appears to have instructed Councilmember Garcia to disclose his conflicts of interest between his Councilmember duties and his employment once he became the Chamber's executive director. "There was also discussion regarding potential conflicts due to Garcia's capacity as a Honolulu City Councilmember. Clarification was made that Garcia will need to disclose such conflicts of interest." Chamber meeting minutes of November 2008. At least one Board member stated that he recalled that Councilmember Garcia may have had conflicts of interest between his Chamber business activities and his Council duties. Councilmember Garcia stated he did not recall being informed of the instruction. No

disclosures were filed about the Chamber, except for the one discussed above related to Ms. McMurdo.

Further, Councilmember Garcia attended ethics training three times before March 2011. In each session, one of the main topics covered was identifying conflicts of interest, especially those that arise from financial interests or business activities. If he had any question as to reporting conflicts of interest, he was instructed to call the Commission staff.

Councilmember Garcia disclosed his Board membership and employment in his annual financial disclosure statements for 2008 and 2010 under the “Fiduciary Positions” category, but did not report his Chamber employment for 2009.

C. Councilmember Garcia’s use of city resources for his private business activities

Focusing on the use of city resources for his personal benefit, from 2008 to date, Councilmember Garcia sent 19 and received 63 emails on his city account that were related to Chamber matters. A list of the emails is in Attachment C.

II. Issues and short answers

- A. Did Councilmember Garcia unlawfully fail to file disclosures of conflicts of interest in violation of RCH Sec. 11-103 for each measure on which he voted that was related to rail transit and other matters of significance to the Chamber or its Board members?

Yes. Both as a Board member and the Chamber’s executive director, Councilmember Garcia knew or should have known that the Chamber had supported rail transit. In fact, he assumed that the Chamber supported rail transit and he voted on rail bills and resolutions where the Chamber had offered testimony. Councilmember Garcia also voted on other measures of significance to the Chamber or its Board members. Because he was a member of the Board and then the executive director of the Chamber, he had a conflict of interest between his Councilmember duties and his outside business activities and financial interests that he failed to disclose.

- B. Did Councilmember Garcia misuse his city email account and other city resources in violation of RCH Sec. 11-104 for the purposes of communicating with the Chamber and others on matters unrelated to city projects or purposes?

Yes, the city email account was used for the personal benefit of Councilmember Garcia and the Chamber and was not related to city business.

III. Analysis

A. RCH Sec. 11-103 required Councilmember Garcia to disclose his directorship of and employment with the Chamber for each legislative matter of significance to the Chamber or its Board members.

1. A councilmember's duty under the conflict of interest disclosure laws.

The city ethics laws provide for two types of disclosures showing conflicts of interest to be made available to the public. First, ROH Sec. 3-8.4 requires city officers to file annual financial disclosures. Financial disclosures show an official's and his or her dependent's income, debts and business interests over the prior calendar year. But, it is impractical, if not impossible, for any city official to list all the potential conflicts of interest that might result from his or her personal or financial interests. For instance, a city official may not be able to anticipate that a business client will come before him or her in the course of carrying out his or her city duties.

As a result, city law also requires the disclosure of transactional conflicts of interest under RCH Sec. 11-103. This obligates a city officer or employee to publicly disclose any personal or private interest that may reasonably affect how the officer or employee carries out his or her city duties.⁶ Without the disclosure provision, the public would be unaware of those personal or private interests that may cause a reasonable member of the public to question the independence and objectivity of the city official regarding matters over which he or she has discretionary authority.⁷ Councilmembers, unlike all other city officials, are permitted under the law to vote on matters where they have a conflict of interest,⁸ but the conflict must be fully disclosed in writing when first apparent and before the vote occurs on a bill or resolution. RCH Sec. 11-103; Advisory Opinion No. 2011-1; see also Council Rule No. 14.

2. A Councilmember's duty to disclose business activities or financial interests that may affect independent judgment.

Councilmembers are considered to be part time officers of the city and, therefore, can be expected to have non-city employment. Yet, their duty to the public is paramount should a conflict develop between a Councilmember's personal or private interests and their public duties.⁹ The revised Charter and ordinances detail the various types of conflicts of interest that may occur.

⁶ All city personnel, with the sole exception of Councilmembers, must recuse themselves from the decision making process in a matter where they have a conflict of interest. See, RCH Sec. 11-103 and Advisory Opinion No. 2008-1.

⁷ Disclosure and recusal from participation for a government decision maker with a conflict of interest is essential to preserve and advance the democratic process. Advisory Opinion Nos. 2011-1 and 2007-1; see, Witt v. Morrow, 70 Cal.App.3d 817 (1977).

⁸ Section 3-107. Organization of Council; Officers; Rules; Meetings; Employees –

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

⁹ **Section 11-101. Declaration of Policy --**

Elected and appointed officers and employees shall demonstrate by their example the highest standards of ethical conduct, 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.

RCH Sec. 11-102.1(c) prohibits a city officer or employee from “[e]ngag[ing] in any business transaction or activity or hav[ing] 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.” (Emphasis added.) Stated simply, a city official has a conflict of interest if a reasonable person knowing the pertinent facts would question whether the official is impartial in carrying out his or her city duties.¹⁰

At its core, RCH Sec. 11-102.1(c) prohibits city officers and employees from placing themselves in situations where their personal business or financial interests conflict, or may conflict, with their official responsibilities. See Advisory Opinion No. 2001-2. In analyzing whether a particular situation presents a prohibited conflict under RCH Sec. 11-102.1(c), proof that one's judgment in discharging his/her official duties is actually impaired is not required. The reasonable appearance of impairment through conflicting loyalties is sufficient to establish a violation. See, e.g., Advisory Opinion No. 2008-1 (city board member who has contract with petitioner's law firm has conflict of interest without showing he acted on conflict); Advisory Opinion No. 2001-06 (likelihood of real conflict of interest arising is sufficient to establish violation of RCH Sec. 11-102(c)); Advisory Opinion No. 158 (the possibility of real conflict of interest arising is sufficient to establish violation of RCH Sec. 11-102(c)).

ROH Sec. 3-8.1 defines “financial interest” to include one's employment, ownership in a business or being a director or officer in a profit or nonprofit business.¹¹ Therefore, Councilmember Garcia's directorship of and employment with the Chamber created a direct financial interest for him. Moreover, the \$60,000 income from the executive director job is substantial. He has no written contract with the Chamber and collectively its Board members are able to determine whether Councilmember Garcia will be retained or his pay altered. Also, Councilmember Garcia considered that he owed a fiduciary duty to the Chamber as stated in his financial disclosures.

We find that Councilmember Garcia had an obvious conflict of interest in the legislative issues that the Chamber or the Board's members testified on. A reasonable person looking at all the facts in this case could not help but conclude that Councilmember Garcia's Board membership and employment at the Chamber could affect his participation and vote on measures affecting the positions of the Chamber or its Board members. For example, it would be natural for Councilmember Garcia to have been sensitive to the fact that he has no contract with the Chamber and his job could be at risk. That may well factor into the position he took on the rail, rezoning and other issues. In addition, he was duty bound to consider the consequences of his

¹⁰ The Standards of Conduct for Employees of the Executive Branch, 5 C.F.R. Section 2635.501(a) states that to avoid the appearance of loss of impartiality in performing official duties, an employee should not participate in a matter, if the employee “. . . determines that a reasonable person with knowledge of the relevant facts would question [the employee's] impartiality in the matter.”

¹¹ **Section 3-8.1. Definitions --**

"Financial interest" means an interest held by an individual, the individual's spouse or minor children which is: (1) an ownership interest in a business; (2) a creditor interest in an insolvent business; (3) an employment, or prospective employment for which negotiations have begun; (4) an ownership interest in real or personal property; (5) a loan or debtor interest; or (6) a directorship or officership in a business.

Councilmember actions on the Chamber because he considered himself to have a fiduciary duty to the Chamber. Councilmember Garcia's membership on the Board in 2008 created a business activity and fiduciary duty that would reasonably tend to impair his independent judgment in participating on Council matters that affected a position taken by the chamber or its Board members. This duty continued when he became the Chamber's executive directive.

It is evident that Councilmember Garcia was under a legal duty to disclose his relationship with the Chamber and its Board members for each bill and resolution that came before the Council regarding issues that were important to the Chamber or to its Board members. This triggered his obligation to disclose the conflicts of interest created by his employment. Because he did not do so, he is responsible for at least 52 separate ethics violations for failure to disclose his conflicts of interest.¹²

B. Councilmember Garcia misconstrued what creates a business activity or financial conflict of interest.

Councilmember Garcia did not believe he had a conflict of interest where the Chamber or its Board members testified on bills or resolutions because no direct financial benefit accrued to the Chamber or to him as a result of the passage or failure of the measure. This reasoning is incorrect.

First, the trigger in RCH Sec. 11-102.1(c) is whether a councilmember's business activity or financial interest *may reasonably be affected* by the position taken on a bill or resolution. There does not need to be a direct financial benefit accrued to the councilmember. When a councilmember's *employer* takes a position before the Council, it creates the most elemental conflict of interest for the councilmember because a reasonable person would question the impartiality of the employee in voting on a matter of importance to the employer. This is why ROH Sec. 3-8.1(2) defines "financial interest" to include employment and business activities. Even if the employee believed he or she would not be influenced by the employment relationship, public confidence and trust in government would be eroded by such a standard.

Second, at the very least, the Chamber and its Board members *were* reasonably affected by changes in the law as to rail transit and rezoning. The Board determined that certain members should testify on bills and resolutions in support of rail transit and zoning changes, among other legislation. Successful advocacy by the Chamber or its Board members would result in the implementation of the Chamber's policies, to the advantage of the Chamber and its members. The Chamber's members would benefit as they find more business opportunities arising from the passage of these laws.

Third, Councilmember Garcia suggests that, because he had been a proponent of rail years before his association with the Chamber, there is no conflict of interest. This argument was dismissed by the Commission in Advisory Opinion No. 2007-1. In that case, Councilmember Todd Apo had contended that he had no conflict of interest on bills to close the Waimanalo

¹² For purposes of this opinion, we are not counting the number of times that Councilmember Garcia failed to disclose before each vote on the 52 measures, even though each failure to disclose before each vote is a separate violation of RCH Sec. 11-103.

Gulch Landfill because he took the same position on the measure as his employer took. The Commission stated: “The key to determining if a conflict of interest existed here is not whether [the Councilmember’s employer’s] position was directly aligned with the bills; it is whether the [employer] had an interest that may have been affected by each of the bills.” Similarly, in this case, the fact that Councilmember Garcia and the Chamber held similar opinions on legislation does not alter the fact that the Chamber’s interests would be affected by the outcome of the vote on the measures.

We reiterate that the test for a conflict of interest is whether a reasonable person knowing all the facts could find that the official’s private or personal interest may affect the objective and independent discharge of his or her city duties.

C. Councilmember Garcia misused city resources for his personal benefit and that of the Chamber in violation of RCH Sec. 11-104.

RCH Sec. 11-104 prohibits the use of city resources for the benefit of a city officer or employee or any other person.¹³ See *Commission Guidelines on Use of City Resources* (Guidelines), Section III at <http://www1.honolulu.gov/ethics/guidelinesonuseofcityresources.htm>. The Guidelines also describe the reasonable personal use exception:

The "*reasonable personal use*" exception allows personnel to use a city resource for personal convenience that is (1) for a brief time, (2) does not interfere with the productivity of the employee, (3) does not create an additional cost to the city, and (4) is not for business, financial or commercial purposes. For example, an employee may use her city telephone to call her husband to discuss who will pick up the children from school. Strictly speaking, this is use of a city resource for a non-city purpose. However, the use is permitted as a convenience to personnel because it is for a short call, not for the purpose of buying or selling anything and use of the phone does not require the city to expend additional funds. (Emphasis in original.)

In this case, although only 19 of the email messages originated from Councilmember Garcia, they were sent with the intent to further Chamber business, as part of his job as executive director. Therefore, Councilmember Garcia’s conduct did not conform to the fourth requirement for the reasonable personal use exception – not for business purposes. We conclude that he violated RCH Sec. 11-104.

IV. Imposition of a civil fine

A. Civil fine for failing to file conflict disclosures under RCH Sec. 11-103

¹³ **RCH Sec. 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.

The Commission evaluates the totality of the circumstances to determine whether a fine should be imposed for an ethics violation and the amount of the fine pursuant to ROH Sec. 3-8.5(d)(2).¹⁴ The criteria include, but are not limited to: the nature and seriousness of the violation, the duration of the violation, whether the violation was negligent or intentional, and prior notice that the conduct was prohibited.

As noted above, disclosures of conflict of interest are critical to understanding issues that may interfere with a government official's actions and, therefore, the democratic process. Failure to file conflict disclosures for 52 bills and resolutions over a 3-year period is egregious. The seriousness is further heightened in the case of rail transit measures as evidenced by the media reports and public conjecture about whether Councilmember Garcia's failure to disclose his conflicts would nullify votes supporting rail transit and cast doubt on the propriety and legality of the project. The legislation included essential steps to planning and developing the largest capital improvement project in Hawaii's history. Rail transit has been and continues to be one of the most controversial public issues in several decades. By not revealing his Board membership or employment with the Chamber for each rail transit measure, Councilmember Garcia expanded the public debate over whether the rail transit measures were decided objectively, independently and fairly by the Council.¹⁵

Further, he failed to disclose his business relationship and financial interest when another critical Chamber plank came before him -- i.e., rezoning the Kapolei area from agricultural use to residential and business use -- as well as other issues.

¹⁴ **Section 3-8.5. Violation Penalty --**

(d)(2) In determining whether to impose a civil fine and the amount of the civil fine, the ethics commission shall consider the totality of the circumstances, including, but not limited to:

- (A) The nature and seriousness of the violation;
- (B) The duration of the violation;
- (C) The effort taken by the officer or exempt employee to correct the violation;
- (D) The presence or absence of any intention to conceal, deceive or mislead;
- (E) Whether the violation was negligent or intentional;
- (F) Whether the officer or exempt employee demonstrated good faith by consulting the ethics commission staff or another government agency or an attorney;
- (G) Whether the officer or exempt employee had prior notice that his or her conduct was prohibited;
- (H) The amount, if any, of the financial or other loss to the city as a result of the violation;
- (I) The value of anything received or sought in the violation;
- (J) The costs incurred in enforcement, including reasonable investigative costs and attorneys' fees;
- (K) Whether the officer or exempt employee was truthful and cooperative in the investigation; and
- (L) Any other relevant circumstance.

¹⁵ Of public concern is whether Councilmember Garcia's failure to file the required disclosures would void his vote and, as a result, change the vote count on a rail transit bill or resolution from the measure passing to failing in Council. See, Hui Malama Aina O Ko'olau v. Pacarro, 4 Haw. App. 304 (1983). Only one measure, Resolution 09-306, was passed by a 5 to 4 vote with Councilmember Garcia in the majority. The nullification of Councilmember Garcia's vote for failing to disclose his conflict of interest would have resulted in a 4 to 4 vote. But in 2010 the subject matter of Resolution 09-306 was reauthorized by Resolution 10-305 by a vote of 7 ayes. Therefore, the fact that Councilmember Garcia's votes would have been nullified for failure to file disclosures did not have the practical affect of negating the passage of any bills or resolutions.

Councilmember Garcia's conflict disclosure history was erratic. In 2003, Commission staff advised Councilmember Garcia's staff that the Councilmember was required to disclose that the President and Chief Executive Officer of the bank at which Councilman Garcia was then employed was up for Council confirmation to a city board. The advice was followed then and again by Councilmember Garcia when one of the Chamber Board members was appointed to a city board. At least for these two matters, he knew that his employment relationship required disclosure.

However, the Commission's advice regarding his employment was not followed for the 52 measures the Chamber and its Board members supported. In fact, Councilmember Garcia disclosed his wife's employment for 10 measures involving her employer, but failed to do the same where the Chamber or its Board members testified.

In addition to being advised by the Ethics Commission staff to disclose his conflicts of interests, it appears that even the Chamber's Board instructed Councilmember Garcia to disclose his conflicts of interest once he became the executive director. The meeting minutes of November 2008 state: "Clarification was made that Garcia will need to disclose such conflicts of interest," referring to his conflict of interest between his Councilmember duties and his financial interest in employment with the Chamber. Yet, no disclosures were filed on the 52 bills and resolutions.

Councilmember Garcia attended ethics training on three occasions. At each session, the mandate to disclose conflicts of interest arising from business activities and financial interests were discussed.

This is a case where the nature of the conflict was obvious – his employer or the Board members who controlled his employment took positions on important issues before the Council. There is no valid excuse for his misconduct. We note, however, that Councilmember Garcia disclosed his employment relationship with the Chamber in most of his annual financial disclosures. Because of that fact, we do not conclude that he intended to mislead or conceal his business relationship with the Chamber.

To his credit, Councilmember Garcia has been fully cooperative in the investigation. He immediately corrected his conduct by filing conflict disclosures regarding the Chamber's interests once informed to do so by Commission staff. He has also acknowledged and taken responsibility for his misconduct.

The purpose of the ethics laws is to maintain and foster the highest ethical standards in city officials so that the public may justifiably rely on the integrity of government. RCH Sec. 11-101. Conflicts of interest cause reasonable members of the public to doubt an official's integrity, and the integrity of the official's agency. See, Advisory Opinion No. 2012-2. Conflicts of interest that are not disclosed by the official except through investigation multiplies that public skepticism. The civic harm generated by Councilmember Garcia's misconduct will not only be the loss trust in him, but also in the Council.

Based on the foregoing analysis we find the civil fine of \$6,500 stipulated between the Commission staff and Councilmember Garcia to be reasonable.

B. No civil fine for use of city email account under RCH Sec. 11-104

Under the facts in this case, we do not consider Councilmember Garcia’s misuse of his city email account to warrant a civil fine. He originated only 19 email messages over a two-year period. He did not contest that claim as stated in the Notice, he stopped improperly using his city email account, and there was no measurable financial impact on the city from the misuse.

V. Identification of Councilmember Garcia in this opinion

Under ROH Sec. 3-6.3(k),¹⁶ the Commission may disclose the identity of an ethics law violator if doing so is in accordance with the state open records law, Chapter 92F, Hawaii Revised Statutes (HRS). The Commission must weigh the public’s interest in knowing the conduct of its government officials and the Commission’s work to enforce the ethics law against the privacy interests of the government official. A government record, such as a formal advisory opinion, may not be disclosed if disclosure would constitute a “clearly unwarranted invasion of personal privacy.” HRS Sec. 92F-13(1). Yet, disclosure of a government record does not constitute a “clearly unwarranted invasion of personal privacy” if the public interest in disclosure outweighs the privacy interest of the individual. Public interest in disclosure includes official information that sheds light on the conduct of government officials (Councilmember Garcia) and on an agency’s (the Commission) performance of its statutory duties.

Office of Information Practices Opinion Letter No. 10-03 recommends evaluating several factors to determine whether the employee’s privacy interest in maintaining confidentiality is outweighed by the public interest in identifying the violator. The five essential criteria are discussed below:

1. The rank of the government employee: Councilmember Garcia was the Chair of the Council and the head of the legislative branch of city government and, therefore, at the pinnacle of city government. Furthermore, the Hawaii Supreme Court has noted that government officials with significant discretionary or fiscal power, as opposed to officials without such power, may reasonably expect that their private information may be revealed to the public. *Nakano v. Matayoshi*, 68 Haw. 141 (1985) (financial statements of high-level government official may be publicly disclosed even though other officials’ statements are protected from disclosure).

¹⁶ **Section 3-6.3. Powers, duties and functions.**

(k) The commission may disclose the name of any officer or employee who has been determined by the commission, following investigation and a hearing or opportunity for a hearing, to have violated any of the provisions of Article 8 of this chapter or of Article XI of the revised charter in accordance with HRS Chapter 92F.

2. The degree of wrongdoing and strength of evidence against the employee: The facts are not contested and the violations are egregious, high in number and occurred over a 3-year period.
3. The availability of other means to obtain the information: There is no other means for the public to find out if Councilmember Garcia violated RCH Secs. 11-103 and 11-104.
4. Whether the information sought sheds light on government activity: Identifying Councilmember Garcia would show how he misinterpreted his duty under the conflict disclosure law and that he failed to timely file his conflict disclosures.
5. Whether the information is related to a government job function, or is of a personal nature: The information in this case is related to Councilmember Garcia's duties as a Councilmember.

We find that each factor weighs in favor of disclosure of Councilmember Garcia's identity in this advisory opinion.

VI. Conclusions and recommendations

- A. The civil fine against Councilmember Garcia in the amount of \$6,500 is deemed reasonable under the circumstances. The claims stated in the Notice will be dismissed upon proof of payment to the city treasury of \$6,500 by June 20, 2012.
- B. The advisory opinion will disclose Councilmember Garcia's identity and misconduct. Under the Commission's Opinion Policy, Councilmember Garcia will be given notice and a copy of the opinion 10 days before the opinion is published.
- C. The Commission will submit a copy of this opinion to the Council, and the Council may decide if discipline is warranted under the facts. Pursuant to ROH Sec. 3-6.5(e),¹⁷ the Council is required to determine and report the action taken, if any, and the reasons for the action to the Commission within 15 days after receiving the opinion.

Dated: June 15, 2012

¹⁷ **Section 3-6.5. Requirements applicable to the rendering of advisory opinions. --**

(e) After an opinion has been rendered, the commission shall notify the appointing authority of the officer or employee involved or the council in the case of elected officials, of its decision and shall recommend appropriate disciplinary action against officers and employees found to have violated standards of conduct established by the revised charter or by ordinance. The appointing authority or the council shall take whatever action is deemed necessary, and report the action taken and the reasons for the action to the commission within 15 days after receiving the decision and recommendation of the commission.


By: ^{for} CHARLES W. GALL, Chairperson
Honolulu Ethics Commission

APPROVED AS TO FORM
AND LEGALITY:



CHARLES W. TOTTO, Executive Director and Legal Counsel
Honolulu Ethics Commission