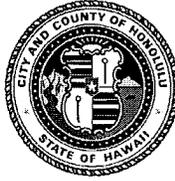


ETHICS COMMISSION  
**CITY AND COUNTY OF HONOLULU**

715 SOUTH KING STREET, SUITE 211, HONOLULU, HAWAII 96813-3091  
Phone: (808) 768-7786 · Fax: (808) 768-7768 · EMAIL: ethics@honolulu.gov  
Internet: www.honolulu.gov/ethics

KIRK CALDWELL  
MAYOR



CHARLES W. TOTTO  
EXECUTIVE DIRECTOR & LEGAL COUNSEL

**ADVISORY OPINION NO. 2013-3**

**I. SUMMARY**

This case stems from complaints concerning the possible influence of \$381,000 of private donations over Mayor Kirk Caldwell and his new administration. The Mayoral Transition Committee (“Committee”), a 501(c)(4) entity formed in December 2012, paid for costs associated with the transition from the Carlisle to the Caldwell administrations (\$51,000), the Mayor’s official inaugural ceremony (\$11,000), as well as the unofficial luau in Mayor Caldwell’s honor (\$145,000).

The Commission finds that Committee funds used to support legitimate government purposes - - the transition between administrations and the official inaugural ceremony – should be considered gifts to the city. As a result, the Committee and the Office of the Mayor were required to follow the Council Gift Policy, but did not do so.

However, the Mayor’s Inaugural Luau (“Luau”) was not a city government function. As such, the Committee funds used to pay for the Luau expenses resulted in a personal gift to city officials who attended. The funds subsidized the cost of the Luau to the benefit of the attendees who either attended free of charge or paid \$25 per ticket. Also, the Mayor received the additional benefit of the goodwill generated by the Luau festivities in his honor.

A city officer or employee may not accept a personal gift if a reasonable person could conclude that the gift is intended to influence or reward the officer or employee in discharging his or her official city duties. Under the facts of this case, the Commission finds that the contributions made by some of the Committee donors constituted prohibited gifts under the ethics laws. In determining that the gifts were prohibited, the Commission notes that:

- (a) At least 25 of the Committee’s Donors (the “25 Donors”) had matters pending with the city, including open contracts with city agencies, personal employment or appointments as city officials, or use registered city lobbyists to represent them. Together these 25 Donors provided \$127,000 or about 33% of all funds donated to the Committee. The one-third contribution for the Luau from the 25 Donors was \$42,000.

- (b) The Mayor has the highest and broadest level of fiscal power and discretionary authority possessed by any city official, giving him the latitude to favor or disfavor the interests of the 25 Donors, if he were so disposed; and
- (c) The public may reasonably perceive that the Mayor is the ultimate beneficiary of the donations to the Committee and that some contributors are able to effectively donate far in excess of gift law and campaign contribution limits, all of which undermines the public confidence and trust in the Office of the Mayor.

This case underscores serious concerns about the integrity of city government when large donations are made for a mayor's benefit from those who have much to gain or lose from their business relationships with the city administration. Government officials are restricted in receiving gifts because of the reasonable concern that gifts to an official may lead to the appearance or reality of preferential treatment by the official to the donor. Preferential treatment is inconsistent with the official's ethical duty to treat all members of the public fairly and equally.

The Commission, however, finds no gift law violation by the Mayor because he neither knew nor should have known that acceptance of the Luau tickets or the intangible benefit of the Luau in his honor would violate city gift laws. At the time of the contributions to pay for the transition, official inauguration and Luau costs, there were no ethical guidelines or legislation in place establishing limits on contributions to inaugural or transitional committees.

Contributions for either legitimate government transition expenses or unofficial inaugural celebrations require safeguards to protect the integrity of government officials who benefit from the financial support for transitional and inaugural purposes. The Commission describes safeguards to be taken by the groups collecting funds to support legitimate government purposes or personal gifts to city officers or employees to minimize the risk of unlawful gifts in similar circumstances. These protections include:

- (a) Public disclosure of the amounts and source of each donation and the reasons for and amounts expended for each purpose or project;
- (b) Prohibit asking any current or prospective city officer or employee to solicit or make contributions; and
- (c) Require each contributor to affirm he or she is not a registered city lobbyist and have no pending or predictable future business, proposals or transactions before the city in which the incoming administration is likely to be involved.

## **II. FACTUAL BACKGROUND**

### **A. Formation and Purpose of the Mayoral Transition Committee**

On November 6, 2012, Kirk Caldwell ("Mayor") won the Honolulu election for Mayor. On

December 4, 2012, Lex Smith, Esq., formed the Mayoral Transition Committee (“Committee”), and applied to the Internal Revenue Service for recognition as a domestic non-profit 501(c)(4)<sup>1</sup> corporation. The Committee was established for a number of purposes, including raising money to fund activities related to the transition into office of the Caldwell administration, such as office expenses, compensation for certain transition personnel and functions, consulting fees, organizing job applications, and organizing and conducting interviews of applicants for appointed positions in the city.<sup>2</sup>

The Committee defrayed expenses incurred in commemorating and celebrating the inauguration of Mayor Caldwell by holding an official inaugural celebration immediately after he was sworn in on January 2, 2013, as well as a luau about 5 weeks later. Such expenses included office expenses, salaries and consulting fees incurred in connection with organizing the celebration, as well as expenses incurred in securing the site for the celebration, security, entertainment, food and beverages as well as other similar costs. Bylaws of Mayoral Transition Committee at 1.1.

According to Mr. Smith, the reason for setting up a nonprofit corporation was so that the Committee would not have to pay income taxes on the donations collected, and to avoid commingling donations with a personal bank account. Contributions to the Committee are not tax deductible.

Also, per Mr. Smith, no funds received by the Committee would directly or indirectly go to the Committee directors, the Mayor, or any family member or relative of the Mayor. Any money the Committee receives that is not spent on transition or inaugural expenses will be donated to 501(c)(3) organizations.

The Committee attempted to safeguard against appearances of impropriety arising from the contributions by:

- Prohibiting the Mayor from having any authority or involvement with the day to day operations of the Committee;
- Selecting Committee directors who were not city employees;
- Prohibiting funds received by the Committee from going directly or indirectly to the directors, the Mayor or any family member or relative of the Mayor;

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<sup>1</sup> To be tax exempt under Internal Revenue Code Sec. 501(c)(4), an organization must not be organized for profit and must be operated exclusively to promote social welfare. The earnings of a section 501(c)(4) organization may not inure to the benefit of any private shareholder or individual. To be operated exclusively to promote social welfare, an organization must operate primarily to further the common good and general welfare of the people of the community (such as by bringing about civic betterment and social improvements). 26 U.S.C. Sec. 501(c)(4). <http://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Social-Welfare-Organizations> (Feb. 7, 2013).

<sup>2</sup> Mr. Smith filed a Brief of Mayoral Transition Committee to the Honolulu Ethics Commission on September 23, 2013.

- Upon request, disclosing the names of the parties who contributed funds and those who received funds;
- Prohibiting city employees from soliciting donations and deciding who would be invited to contribute; and
- Prohibiting recognition of large donors in the invitation or program of the Luau.

#### **B. Committee's Solicitation for Donations**

The Committee solicited the majority of donations from donors to Kirk Caldwell's mayoral campaign via an email on December 11, 2012 that provides:

As part of Kirk's financial ohana, we are reaching out to you to help finance the cost of transition and the Inaugural Event...A non-profit organization has been formed and will be used as the entity through which donations will be collected and expenditures made. The name is "**Mayoral Transition Committee.**" This is a non-political entity and, accordingly there is no limit on the amount that may be contributed to it by any one individual or organization...We are hoping that each of you might consider contributing or raising **\$5,000 (or more)** to support the transition and Inauguration festivities. (Emphasis in original.)

City employees were intentionally not asked to donate to the Committee unless they also contributed to the Mayor's political campaign. Mr. Smith noted that "[c]ontributions were not solicited by anyone who is or was employed by the city, including, but not limited to the mayor. Neither the mayor nor any other city employee participated in the decision of who would be invited to contribute...No one was offered anything in exchange for their contribution other than the opportunity to attend the inaugural luau." L. Smith Statement released on February 13, 2013. "This Committee has no involvement in any expenditure of public money; involves no work time of any public employee; no fundraising was done by any public employee; and until the press demanded that it be made public, no public employee had any knowledge of who chose to give and who chose not to give." Email from L. Smith to C. Tutto re Mayoral Transition Committee (Apr. 24, 2013).

At the time of the Luau, Mayor Caldwell was unaware of who had been asked to contribute by the Committee, who had contributed or how much had been contributed by the donors. The Mayor had no role in the operations or oversight of the Committee.

#### **C. Sources of Committee's Accrued Donations**

As of May 24, 2013, the Committee had deposited \$380,869 in donations from 102 donors. Among the 102 donors to the Committee, there are 25 with significant business relationships with city

government:<sup>3</sup>

- 9 donors who pay lobbyists (registered with the Commission) to represent them;<sup>4</sup>
- 12 donors who have contracts with the city to provide services;
- 2 donors who are cabinet members;
- 3 donors who are in appointed positions with the city;
- 1 donor who is a lobbyist currently registered with the Commission; and
- 10 donors who made contributions (totaling \$71,000) to the Committee when campaign spending laws apparently would have prevented the contributions to the Caldwell campaign fund.

The 25<sup>5</sup> identified donors (collectively, the “25 Donors”) contributed \$127,325 to the Committee, or about 33% of the total contributions. The Commission has not investigated and has not determined whether any of the other 77 donors have had or will have matters before the city that the Mayor could affect in doing his job.

#### **D. Committee’s Expenditure of Donations**

As of May 24, 2013, the Committee expended \$50,656 for a cabinet retreat, office supplies, and retainer for a consultant (referred to as “Transitional Expenses”). It used \$10,649 for the official January 2, 2013 inaugural ceremony costs including donations to religious and cultural organizations, catering, public relations services, handheld radios and headsets (referred to as “Official Inaugural Expenses”). Finally, the Committee spent \$145,129 for the luau honoring the Mayor that occurred on February 9, 2013. These costs included venue, entertainment, catering, tents, cart rentals, bar service, plant rentals, 100 commemorative bowls with inscriptions, 195 bowls for VIPs, portable restrooms, trash service, insurance, sound system, centerpieces, photography, equipment, volunteer T-shirts, parking, programs, HPD special duty, equipment, and Emcee Honorarium (referred to as “Luau Expenses”). The total funds expended by the Committee for Transition Expenses, Official Inaugural Expenses and Luau Expenses were \$206,444.

The Committee intends to donate the remaining unexpended \$174,245 to one or more 501(c)(3) organization(s) of the Committee’s choosing. As of June 10, 2013, the Committee had not yet decided which organization(s) will receive the money.

#### **E. The Official Inaugural Ceremony**

On January 2, 2013, Mayor Caldwell was sworn in at the Mission Memorial Auditorium. A small reception of light refreshments and a blessing was held thereafter.

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<sup>3</sup> The Commission relied on publicly available information to determine the business relationships between the Committee donors and city government activity.

<sup>4</sup> Some of the 25 Donors who pay lobbyists to represent them in business before the city also have contracts with the city. The Commission counts donors with more than one business or financial interest with the city only one time.

<sup>5</sup> The Commission has not examined every possible interest of the 102 donors. Therefore, 25 is a conservative number.

## F. The Luau

The Luau to celebrate Mayor Caldwell's election victory occurred on Saturday, February 9, 2013 from 5-8:30 pm at Moanalua Gardens. The Committee invited the public to attend and offered tickets for purchase at \$25 per person. Approximately 1,200 attended the Luau, 300 of which were *gratis*. VIP tables were sold for \$2,500-\$10,000. The VIP contributors received a table closer to the stage reserved in the name of the buyer, more convenient parking, table service for food, a pre-event reception, hosted beer and wine service and a commemorative bowl. The entire cost of the Luau was \$145,129. The cost per person attending the Luau was \$121, but the tickets were sold for \$25 or were free. No items were presented to the Mayor at the Luau.

## III. ANALYSIS

### A. **Committee Donations Spent on Transitional Expenses and Official Inaugural Expenses were not Prohibited Personal Gifts to City Officers or Employees Because These Donations were Expended for a Legitimate Public Purpose.**

Gifts to a city agency made to further the proper goals, functions or business of the agency are gifts made for a public purpose. Commission Guidelines on Gifts to City Agencies (Mar. 20, 2006). See also Advisory Opinion No. 2011-6 (Jan. 17, 2012) at Sec. IV. These gifts are made to help an agency carry out a legitimate government function, and may only be used for reasonable and necessary expenses associated with the expressed purpose of the donation.<sup>6</sup> *Id.* The benefit of the gift should redound to the city and not individuals personally. Advisory Opinion No. 204 (Jul. 12, 1990).

#### 1. Contributions used to Pay for Transitional Expenses are a Gift to the City.

Money used to ensure a smooth transition from one administration to another has long been held as money being used for a public purpose. This is because any disruption in the execution of the laws and affairs of the government could produce results detrimental to the safety and well-being of the community. See the Presidential Transition Act of 1963, 3 U.S.C. Sec. 102 note; Hawaii Revised Statutes (HRS) Sec. 30-1. Federal and State of Hawaii law authorizes government resources to provide numerous resources to the incoming executive including: office space, furnishings, equipment, supplies, and compensation of members of office staff, expenses for procurement of services of experts or consultants, travel expenses, communication services, printing, binding, postal revenue reimbursement, briefings, workshops, or other activities to acquaint key prospective appointees with the types of problems and challenges that most typically confront new political appointees when they make the transition from campaign and other prior activities to assuming the responsibility for governance after inauguration. Presidential Transition Act of 1963 Sec. 3(h)(3)(A); HRS Sec. 30-3.

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<sup>6</sup> The Commission has not reviewed whether the expenses were in fact reasonable and necessary, but for purposes of this analysis has assumed that they were.

In this case, the Committee funds used for Transitional Expenses were a gift to the city as they are being used for a public purpose to minimize disruption between the Carlisle and the Caldwell administrations. The Committee was created to fund activities related to the transition of the Caldwell administration including office expenses, compensation for certain transition personnel and functions, consulting fees, organizing job applications, and organizing and conducting interviews of applicants for appointed positions in the city.

2. Contributions used to Pay for Official Inaugural Expenses are a Gift to the City.

Under the Hawaii Constitution, Art. XVI, Sec. 4, the mayor must take an oath before entering duties of office. As such, a mayor's inaugural swearing-in ceremony is considered an official government ceremony because he is involved in the performance of his official duties during this ceremony. See e.g., General Government Division, U.S. General Accounting Office, GGD-87-10 Report to the Hon. W. Proxmire, U.S. Senate: Presidential Inaugurations - Legislation is Needed to Clarify Agencies' Support Roles 37 (Feb. 27, 1987) (U.S. Constitution, Article II, Sec. 1 prescribes the only legal requirement for the inauguration of a President: the oath of office.)

It is only through historically accepted custom and tradition, the oath has been accompanied by many unofficial events associated with today's inaugurals including balls, receptions, and galas. See Comptroller General of the United States, B-202278, 62 Comp. Gen. 323 (Apr. 18, 1983) ("An inaugural ball being akin to a banquet, dinner or reception, would not be regarded as an official civil ceremony... [E]ven though an inaugural ball may be attended by officials of the Federal Government, they are not in attendance in the performance of their official city duties, but rather as guests who happen to be officials...Moreover, unlike the inaugural parade, an inaugural ball is not generally available to the community...[it] is limited to invitees; admission by ticket only; and are basically private gatherings or parties whose proceeds go to the Presidential Inaugural Committee.") See also, U.S. Office of Government Ethics, DO-09-001: Presidential Inaugural Events (Jan. 15, 2009) and LA-12-10: Presidential Inaugural Events (Dec. 20, 2012) (advising federal employees may not accept offers of free attendance to attend Inauguration related events such as balls, receptions, dinners and fundraisers from a prohibited source or because of the employee's official position, but employees may attend any event or accept any other item that is available for free to the public or for which the employee pays market value.)

Since the Inaugural Ceremony is an official government activity, expenses to pay for the ceremony were expenses for a public purpose.

3. Transitional and Official Inaugural Ceremony Expenses Must be Presented to and Formally Accepted by City Council as a Gift to the City.

Only the City Council may accept gifts on behalf of the City. See RCH Sec. 3-113; Resolution 05-349, CD1, FD1. Since the Office of the Mayor would likely have to bear transition costs if the funds were not privately donated, it is the executive agency responsible for handling the gift pursuant

to Resolution 05-349, CD1, FD1 (Council Gift Policy). The Office of the Mayor must ensure that the Committee declares the gift and attaches receipts of expenditures to vendors. See also Advisory Opinion No. 2010-4 (Nov. 22, 2010) (gift for a legitimate government function in which the donor pays the vendor directly requires the executive agency to provide receipts with the declaration). Neither the Mayor's Office nor the Committee submitted the Transitional and Official Inaugural Expenses to Council for review and approval as required by the Council Gift Policy.

**B. Certain Committee Donations Spent on Luau Expenses were Prohibited Personal Gifts to the Mayor, but the Mayor did not Violate the Gift Laws Because the Mayor neither Knew nor Should Have Known that Receiving the Gifts Would be a Violation.**

1. The Purpose of Laws Restricting Personal Gifts Made to Government Officials.

Gifts to government officials, like gifts to the rest of us, instill a sense of obligation toward the donor. Gift restrictions under the law are intended to minimize the effects of this "rule of reciprocity."<sup>7</sup> In a social setting, reciprocity helps create and cement relationships in an environment where the recipient has no duty to treat everyone fairly.<sup>8</sup> Gift laws are triggered when the donor reasonably appears to be trying to influence the official by creating a relationship through gifts of events, meals, tickets and the like. Gifts to an official may subtly or directly influence the recipient in carrying out his or her official duties. This is because gifts from certain donors such as lobbyists, contractors and others who have an interest the official can affect may appear to be given with the intent to influence or reward official action, curry favor, or gain access to the official. This dynamic is often referred to as "pay-to-play."

The public concern is that the greater the value or frequency of personal gifts, the greater the perceived obligation to the donor by the candidate or official. Ultimately, the gift may lead to the reasonable public perception (and sometimes the reality) that the specific interest of the donor will outweigh that of the public. This real or perceived relationship between the official and the gift giver undermines the democratic process because the public reasonably believes that the official will return the favor with preferential treatment to the donor.<sup>9</sup>

As a result, ethics agencies regulate the sources and value of gifts that government officials may solicit or receive. Under the city gift laws, a violation may occur even if there is no *quid pro quo*

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<sup>7</sup> Sarah Welling, *Reviving the Federal Crime of Gratuities*, 55 *Ariz. L. Rev.* 417 (2013) at pp. 423, 431- 436 (describing social science research explaining the rule of reciprocity).

<sup>8</sup> Robert Wechsler, *Local Government Ethics Programs 2.0* (2013), pp. 181-183, at <http://www.cityethics.org/ethics%20book>.

<sup>9</sup> Commission's Guidelines on Gifts. See generally, Richard Rifkin, "Gift Giving in the Public Sector," pp. 240-241, in *Ethical Standards in the Public Sector* (1999), American Bar Association.

between the donor and the recipient. A gift is prohibited if it is reasonable to conclude that the gift is offered to influence or reward the officer or employee in carrying out his or her city duties.

2. Contributions to the Committee from the 25 Donors that were Spent on Luau Expenses Constituted Prohibited Personal Gifts to the Mayor.

Certain contributions to the Committee expended on the Luau are, for ethics law analysis purposes, personal gifts, not gifts to the city. As discussed above, both the federal and state constitutions recognize the oath of office as the only legal requirement for an inauguration. As such, an adjunct inaugural celebration like the Luau is not an official government ceremony. Since city money can only be used for legitimate government purposes, city funds may not be used for an unofficial inaugural celebration because it does not constitute a legitimate government purpose. Therefore, funding for unofficial inaugural ceremonies must come from private sources.

A free or below-cost ticket to attend an unofficial inaugural ceremony is therefore a personal gift to the attendee. In addition, the Commission has recognized that there is a value to an elected official's enhanced goodwill and reputation in the community. Advisory Opinion No. 2010-2 (Mar. 3, 2010) at Sec. V(I) ("By using the fund to treat voters, community leaders, his family and his business associates to meals, Councilmember Tam enhanced his goodwill with these groups at the taxpayers' expense. This likely increased his stature in the community and inured to his political benefit.")

Personal gifts to city officers and employees are regulated by RCH Sec. 11-102.1(a), ROH Secs. 3-8.7 and 3-8.8. The city's gift laws have two major restrictions. First, the gift<sup>10</sup> cap prohibits receiving gifts valued in excess of \$200 per year from a source whose interests the recipient may affect in carrying out his or her city duties.<sup>11</sup>

Second, even if a gift fails to reach the \$200 value threshold, it is still prohibited if a reasonable person would conclude that the gift is intended to influence or reward the recipient in the performance of their official city duties.<sup>12</sup> The donor must have an interest -- such as a pending or likely future

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<sup>10</sup> "Gift" means any gift whether in the form of money, goods, service, loan, travel, entertainment, hospitality, thing, or promise or in any other form. ROH Sec. 3-8.7(a).

<sup>11</sup> **Sec. 3-8.7 Gifts to mayor, prosecuting attorney, and appointed officer or employee--Prohibition under certain circumstances.**

(c) During each one-year period beginning on July 1st and ending on June 30th, neither the mayor, the prosecuting attorney, nor any appointed officer or employee shall solicit, accept, or receive, directly or indirectly, from any one source any gift or gifts, not exempted by subsection (d), valued singly or in the aggregate in excess of \$200.00.

<sup>12</sup> **Section 11-102. Conflicts of Interest--1.o** elected or appointed officer or employee shall:

(a) Solicit or accept any gift, directly or indirectly, whether in the form of money, loan, gratuity, favor, service, thing or promise, or in any other form, under circumstances in which it can reasonably be inferred that the gift is intended to influence the officer or employee in

contract, license application, bill or other factual connection -- that has been before, is pending or is reasonably predictable to come before the receiving official in the course of discharging his or her duties. Advisory Opinion No. 2002-3 (Sep. 6, 2002). Federal law also follows this approach by defining as “prohibited sources” those who have an interest that may be affected by the official action of the recipient. 5 CFR Sec. 2635.203(d).

The factors described below show that contributions made to the Committee by the 25 Donors and from the Committee to benefit the Luau were prohibited under the gift laws as a reasonable person could conclude that they were intended to influence or reward the Mayor. The discussion subsumes the nine factors stated in the Commission’s Revised Guidelines on Gifts (Apr. 21, 2004).<sup>13</sup>

a. The 25 Donors have Significant Interests in Official City Action that May be Affected by the Mayor.

We examine the 25 Donors who have interests that may be affected by the Mayor in the course of carrying out his duties.<sup>14</sup> They are:

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the performance of such person's official duties. Nothing herein shall preclude the solicitation or acceptance of lawful contributions for election campaigns.

**Sec. 3-8.7 Gifts to mayor, prosecuting attorney, and appointed officer or employee--Prohibition under certain circumstances.**

(b) Neither the mayor, the prosecuting attorney, nor any appointed officer or employee shall solicit, accept, or receive, directly or indirectly, any gift under circumstances in which it can be reasonably inferred that the gift is intended:

- (1) To influence the solicitor or recipient in the performance of an official duty; or
- (2) As a reward for any official action on the solicitor's or recipient's part.

<sup>13</sup> The factors include:

- 1) The official duties of the recipient, especially whether they include official action directly affecting the donor;
- 2) The business relationship between the recipient and the donor;
- 3) The existence of past, present, or predictable future applications or contracts between the donor and the city;
  - a) Whether the recipient's department presently has before it an application affecting the donor; and
  - b) Whether the contract was made or permit granted through an open, public process;
- 4) Whether the gift will aid the recipient in performing his or her city duties, and, therefore benefits the city, or whether the recipient gains a personal benefit;
- 5) Whether receipt of the gift impugns the integrity of the recipient's department or agency;
- 6) What benefit the donor may gain from giving the gift;
- 7) The value of the gift; and
- 8) The custom and practice in the community with regard to the giving of gifts.

<sup>14</sup> For purposes of gift law violations, the Commission has analyzed individual donors to an organization as the source of the personal gift as opposed to limiting the review to only the organization. Doing so allows for a more meaningful evaluation of the connection between the donor’s interest that the recipient city official may affect in carrying out the official’s duties. See Advisory Opinion No. 2003-2 (Jun. 20, 2003) (analyzing the conflict between interests of members of the Hawaii Hotels Association as donors to annual Liquor Commission Conference and duties of a city officials); Advisory Opinion No. 2004-1 (Mar. 5, 2004) (analyzing the conflict between interests of members of an industry

- 9 donors who pay lobbyists who have registered this year with the Commission to represent them;
- 12 donors who have contracts with the city to provide services;
- 2 donors who are cabinet members;
- 3 donors who are in appointed positions with the city; and
- 1 donor who is a current registered lobbyist with the Commission.

The 25 Donors have significant financial interests or business activities with the city. They contributed \$127,000 to the Committee or about 33% of the total donations to the Committee. Their share of the Luau Expenses was \$42,000 for what the Congress considers a political event.<sup>15</sup>

According to the Committee, its solicitations were focused on mayoral campaign donors. The Committee informed donors, “This is a non-political entity and, accordingly there is no limit on the amount that may be contributed to it by any one individual or organization. . . We are hoping that each of you might consider contributing or raising **\$5,000 (or more)** to support the transition and Inauguration festivities.” (Underscoring added.) Here, three of the 25 Donors had already reached the maximum donation of \$4,000 to the Mayor for the 2012 election period from November 5, 2008 through November 6, 2012.<sup>16</sup> These same Donors also gave \$10,000 each to the Committee.

In addition to capping the contribution amount during an election cycle, Hawaii campaign spending laws prohibit anyone who contracts with the city from contributing to a candidate at any time between the execution of the contract through the completion of the contract if payment for the performance of the contract is to be made in whole or in part from funds appropriated by the Council in this case. HRS Sec. 11-355(a)(1) and (2). There are 10 Donors who would have been prohibited as contractors to the city from contributing to the Mayor under the campaign laws. These same Donors contributed to the Committee in the total amount of \$71,000. Such donations are lawful because the campaign contribution cap does not apply here.

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association and duties of a city official).

<sup>15</sup> Congress recognizes that donations for inaugural events are not tax deductible and are identified as a political activity. 26 U.S.C. Sec. 501(c)(4); 26 U.S.C. Sec. 276 (a)(3). “No deduction otherwise allowable under this chapter shall be allowed for any amount paid or incurred for admission to an inaugural ball, inaugural gala, inaugural parade, or inaugural concert, or to any similar event which is identified with a political party or political candidate.”

<sup>16</sup> HRS Sec. 11-357 (a)(2) provides: No person shall make contributions to a candidate seeking nomination or election to a four-year nonstatewide office or to a candidate committee in an aggregate amount greater than \$4,000 during an election period.

HRS Sec. 11-302 provides: An “election period” is defined as “The four year time period between the day after the general election through the day of the next general election, if a candidate is seeking nomination or election to a four year office.”

The average gift for the Transition, Official Inaugural and Luau Expenses from the 25 Donors was \$5080, while the average from the other 77 donors was only \$3286 – a difference of 55%. This tends to show the relative importance of donating for the 25 Donors with city contracts, employment or pending matters.

b. The Mayor has Exceptionally Broad Fiscal Power and Discretionary Authority.

The public concern over gifts to an official should be commensurate with the level of fiscal power and discretionary authority held by that official. The greater power and authority, the more autonomy and ability the official has to make or participate in decisions that have serious consequences for the city and for the gift giver.

The mayor is the chief executive officer of the city and is empowered to exercise direct supervision over all executive agencies and their directors. He or she sets city government's policies and priorities that are implemented by the executive departments. The position has control over appointment and removal of department heads (except for the Prosecuting Attorney, Fire Chief and Police Chief), deputy directors (with the noted exceptions), board and commission members and all other exempt employees. Under his or her auspices, the administration proposes bills and he or she wields veto power over legislation. The mayor has substantial control over the annual operating and capital budgets, totaling in excess of \$1 billion. The mayor has a voice, but no vote, in the proceedings of all boards and commissions. See RCH Sec. 5-103. In sum, the mayor has broad discretion to act in a manner to directly or indirectly promote the success of a person or company that has or would like to have business with or a license from the city, or is regulated by or is trying to influence the direction of the city.

Because of their financial and business relationships with the city, the Mayor is able to affect the interest of the 25 Donors in carrying out his job duties. The Mayor sets policies and priorities for the city administration that can help or hinder a particular industry's economic prospects. He can expect that the 12 lobbyists will regularly meet with him and/or his cabinet to influence policy and priority decision making. Nine of the 25 Donors use city registered lobbyists and 12 have open city contracts. The Mayor hired or appointed to cabinet or other high-level city positions five of the 25 Donors.

c. The Acceptance of Large Individual or Aggregate Contributions Tends to Diminish the Reasonable Public Perception of the Integrity of the Mayor's Office.

The value of or benefit resulting from a gift is a common factor in analyzing whether a gift is prohibited because the value of or benefit from a gift is directly related to public perception of influence. In other words, the higher the value of or benefit from a gift, the greater the public concern over the impact of the gift on the recipient.

The cost to put on the Luau was about \$121 per attendee. (\$145,000 cost divided by 1200 attendees equals \$120.83 per attendee.) Because the 25 Donors supplied 33% of the total contributions to the Committee, the value that could be reasonably attributed to the 25 Donors is 33% of \$121, or

about \$40 per ticket. Assuming that the Mayor's wife attended the Luau free of charge, the total value of the personal gift from the 25 Donors collectively to the Mayor is \$80. If we pro rate the value of the tickets (\$80) based on each of the 25 Donors, the value would be only about \$3.50 to the Mayor.

Although the individual gift value is small, it does not reflect the full weight of the contributions on the Luau. The contributions helped subsidize the festivity which was priced well-below cost. The Luau itself inured to the Mayor's general and political goodwill in the community.

The Commission has recognized that the per person gift value fails to account for the public perception of large individual or aggregate contributions from donors who have an interest in building and maintaining relationships with city decision makers. In Advisory Opinion No. 2003-2 (Jun. 20, 2003), the Commission evaluated the value of a gift from members of the hotel and beverage industries to the Liquor Commission ("LQC") members and staff for an annual conference. The Commission noted that, even though the individual gifts received by the LQC members and staff were minimal, the individual and aggregate contributions made were significant in light of the cost of the conference. The Commission also found "that the donations received by the LQC in support of the Conference raises an appearance of a conflict of interest and it could be inferred that these donations were intended to influence the LQC as an agency, its commissioners and/or its employees in the discharge of their duties, or that they violated RCH §11-102(a)."

In a similar situation to the case at hand, the Philadelphia Board of Ethics found an appearance of impropriety associated with using donations to an inaugural and transitional committee as a way for donors and recipients to circumvent the regulations imposed by campaign spending laws.

We are concerned that solicitations of thousands of dollars arguably on behalf of the man who is about to be Mayor, from donors, many of which have likely already reached the maximum donation permitted to that same Mayor-elect's campaign would present a possible public perception that some donors were attempting to purchase influence with the new Mayor. It could reasonably appear to the public that the Mayor is the ultimate beneficiary of the donations and that large political contributors are able to effectively donate far in excess of the doubled contribution limits. The appearance that the City's contribution limits are somehow being avoided, albeit lawfully, may tend to weaken public confidence in City government creating the appearance that large donors may have more influence with the new Administration. (Emphasis added.)

Opinion No. 2007-005 (Dec. 5, 2007) at 8-9.

In summary, the fact that the 25 Donors contributions paid for one-third or \$42,000 of the expenses for the Luau supports a reasonable public perception that the Mayor was the ultimate beneficiary of the donations and that the 25 Donors were able to effectively donate in excess of the gift or campaign contribution limits.

The Mayor has broad discretion and far reaching authority over city policy and priorities that could shape the success of anyone doing business with the city. All of the 25 Donors have a financial interest that could benefit by currying favor with the Mayor. Some of the 25 Donors were appointed as cabinet members by the Mayor. Others have contracts with the city. One Donor is a registered

lobbyist, whose job is to influence city policy. Several other Donors hire registered lobbyists to represent them to influence policy change. The well-funded inaugural celebration benefited the Mayor's reputation and status in the community.

It is critical to examine the 25 Donors contributions in the aggregate, rather than looking only at the value of each of the 25 Donors' individual funding to each attendee. The facts and public policy against unlimited money that elected officials may receive through personal gifts or campaign contributions support the conclusion that the funds received from the 25 donors created at least an appearance of a conflict of interest.

3. The Mayor did not Violate the Gift Laws Because He Neither Knew Nor should have Known that the Contributions to the Committee From the 25 Donors were Prohibited Personal Gifts.

We find that a reasonable person in the Mayor's position, presented with the facts that he was aware of, would not know and with reasonable diligence should not have known that these gifts were gifts that violate the gift laws.

The Commission may only find an ethics violation ". . . if [the officer or employee] *knew or should have known* that his or her conduct would constitute a violation." Advisory Opinion No. 2004-7 (Jun. 22, 2004) (internal citations omitted) (Emphasis in original). In that case, the Commission concluded that city officials who participated in an editorial which resulted in what appeared to be their official endorsements of products did not violate the city's ethics laws because the factual circumstances were not enough to put a reasonably prudent person in the officials' position on notice that the magazine would use their official positions to give a special advantage to the stores and manufacturers featured. The Commission noted:

First, the request to participate in the Feature came from a Reporter, not the media company's advertising or marketing department. Second, the Official was told that the Feature would be an "editorial feature" rather than an "advertising feature." Third, none of the Participants were told that the Feature would include the vendors' names and the prices of the products. Fourth, the Participants received no personal benefits or compensation for their participation. Finally, the Official specifically required that a disclaimer be included in the Feature.

In the Mayor's case, solicitation and receipt of donations came through the Committee. The Mayor had no role in the day-to-day operations or oversight of the Committee. He was not aware who was solicited, who donated or the amount of donations for Transition, Inaugural or Luau expenses. The Committee followed the federal model of the Presidential Inaugural Committee which does not categorize donations as "gifts to the president." No city employees or officers solicited donations or worked for the Committee. The unofficial inaugural celebration is traditionally funded by private funds. This tradition had never been examined by the Commission. There was a lack of ethical guidance and no legislation in this matter. Therefore, we conclude that the Mayor neither knew nor should have known that his conduct of receiving funds from the 25 Donors through a Committee for the unofficial inaugural function would be a

violation of the city's ethics laws.

**C. Safeguards are needed to Minimize the Future Risk that Private Donations Expended for Transition and Inaugural Expenses Will Violate the City's Gift Laws.**

Despite concerns over special interest money flowing to the benefit of government officials, state and federal lawmakers and ethics boards recognize the necessity<sup>17</sup> for private donations to subsidize transitional and inaugural expenses due to a lack of public funding. As such, instead of prohibiting these types of donations, lawmakers and regulators in other jurisdictions have enacted mandatory safeguards for soliciting and receiving private donations for these expenses.

For example, there was significant federal concern about the appearance of impropriety caused by the undisclosed contributions of "soft money" to presidential candidates which prompted the Bipartisan Campaign Reform Act requiring reporting of donors to the Presidential Inaugural Committee.<sup>18</sup>

Similarly, the Presidential Transition Act of 1963 requires that transition committee funds be maintained in conformance with Internal Revenue Code 501(c)(4), and that within 30 days of the presidential inauguration, the committee maintaining the fund shall disclose information regarding the contributions such as the date of contribution, source, amount, and expenditure thereof. The Transition Act also limits private donations to \$5,000. 26 U.S.C. Sec. 501(c)(4). Presidential Transition Act of 1963, Sec. 5(a)(1).

States also have legislation to mitigate the appearances of conflicts of interest. Louisiana Revised Statutes Sec. 1125 requires that on or before the 60<sup>th</sup> day after the gubernatorial inauguration and by February 15<sup>th</sup> annually thereafter until all contributions have been expended, the governor shall file an all-inclusive report with the Board of Ethics which shall state the name, address, date, and amount of each contribution and expenditure. The report will be accompanied by an affidavit by the governor certifying that the information contained in the report is true and correct to the best of his knowledge, information, or belief. Louisiana also requires that the report and all financial records of the transition and inauguration be public records.

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<sup>17</sup> H.R.S. Sec. 30-6 provides, "The governor shall include in the budget transmitted to the legislature, for each fiscal year in which the governor's regular term of office will expire, a request for appropriation of \$100,000 for carrying out the purposes of this chapter [Gubernatorial Transition]." Neither the Revised Charter of Honolulu nor the Revised Ordinances of Honolulu contain any similar requirements for funding the Mayoral Transition. Further, there is no state or local laws that require funding for inaugural ceremonies and adjunct inaugural celebrations.

<sup>18</sup> 36 U.S.C. Sec. 501 *et seq.* 36 U.S.C. Sec. 510; 11 C.F.R. Sec. 104.21. Bipartisan Campaign Reform Act of 2001 (H.R. 2356 minority view) encouraged passage of 36 U.S.C. Sec. 510 due to special interest money flowing in the form of soft money. The act would require that all activities aimed at influencing federal elections be paid for only with fully disclosed and reasonably limited amounts of money known as hard money and to eliminate the unlimited largely undisclosed money known as soft money.

Like the Committee in this case, some transition or inaugural committees take the initiative to mitigate the appearance of conflicts of interests. These safeguards are presented and confirmed by the jurisdiction's ethics agency. For example, the Colorado Independent Ethics Commission reviewed the governor's transitional committee protections. The Colorado Commission found that the process proposed by the committee created acceptable safeguards given the fact that transition expenses could not be publicly funded. Advisory Opinion No. 10-18 (Nov. 5, 2010) at 5-6. The Philadelphia Board recommended several ways for the committee and other nonprofit corporations to mitigate these appearance issues. Opinion No. 2007-005.

Like the Colorado and Philadelphia ethics agencies, this Commission makes recommendations to future inaugural and transition committees to preserve the integrity of the city officials and government. To avoid gift law violations, recipients, beneficiaries and committees should use the following safeguards:

- (1) Ensure that contributions to carry out a public purpose are donated to the city following the Council Gift Policy;
- (2) Prohibit committee directors from being current or prospective city government officers or employees;
- (3) Prohibit asking any current or prospective city officer or employee to solicit or give contributions to the committee;
- (4) Prohibit the retention or compensation by the committee of any current city officer or employee; except as stated in paragraph (5);
- (5) Organize volunteers, not paid consultants, to assist with identifying, vetting and recommending individuals to serve in senior positions within the incoming administration;
- (6) Require each contributor to affirm that the contributor is not a registered city lobbyist and has no business, proposals or transactions pending or likely to come before the city in which the incoming administration will be involved;
- (7) Prohibit those who may not contribute from donating funds through other people or entities;
- (8) Publicly disclose the source and amount of all contributions and the amount and purpose of all expenditures;
- (9) Prohibit the honoree of an inaugural party from having any authority over the day-to-day operations of the committee including expenditures made;
- (10) Identify those responsible for carrying out the purposes of the transition or inaugural funding;

- (11) Limit publicity about donations for the inaugural event(s) and the transition effort (e.g., invitations, program, flyers, and the like for inaugural events and other publicity for the transition team should not involve prominent recognition of the names of individual donors).

Adopting these and other safeguards should ensure that information about the donations and expenditures are publicly available, that the business or financial relationships between the new administration and the donors are eliminated, and that the overall concerns about influence and preferential treatment are minimized. The Commission will evaluate these and other safeguards taken as well as the particular facts on a case-by-case basis to determine if there are gift law violations.

#### **IV. PUBLICATION OF ADVISORY OPINION**

The Commission examines whether to publish an opinion without redaction pursuant to its Policy and Procedure for Release and Publication of Formal Advisory Opinions. We examine whether the concerns as to invading personal privacy under HRS Sec. 92F-13(1) outweigh the public's interest in disclosure of this advisory opinion. We review the five criteria from Hawaii Office of Information Practices (OIP) Opn Ltr. 10-3. Applying the five factors in Opn. Ltr.10-3 to this case we note:

- (1) Rank of the government employee. The Mayor is the highest ranking officer in city government with the broadest level of discretionary authority and fiscal power. His ability to set the administration's goals and to manage the actions of other city officials heightens the need for the public to be informed of his conduct and those who may intend to influence him by making gifts to the city or the Mayor personally.
- (2) The degree of wrongdoing. The Commission finds no ethics law violations, but there are important legal and public policy concerns arising from the facts in this case regarding gifts to the city and gifts for the Mayor's benefit that undermine the integrity of city government unless safeguards are established against similar occurrences in the future.
- (3) The availability of other means to obtain the information. The public would not be able to obtain the information about the Commission's opinion and the facts contained therein without publication of the full opinion. The factual analysis of the 25 Donors' interests in maintaining business relations with the city administration has not been provided by any other source since the issue arose in early 2013. There is no alternative way for the public to obtain the Commission's policy and legal analyses.
- (4) Whether the information sheds light on government activity. The information about the contributions through the Committee will focus public scrutiny on the Mayor's and the 25 Donors' conduct and the ethical expectations for government officials. Also, the Commission's opinion allows the public to

understand the Commission's role in investigating and advising on complex ethics issues.

- (5) Whether the information is related to job function or of a personal nature. The information disclosed focuses on the actual or potential benefits for donors by contributing funds to enhance the success of the Mayor in his work for the city.

There is a significantly lower expectation of privacy because most of the information regarding contributions and expenditures has already been voluntarily provided to the media by the Committee or are available publicly. Also, 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). As to the information about the 25 Donors, to the extent that contributions for transition and inaugural expenses have some privacy interest attached to them, the Committee's disclosure of the donors and their contributions would negate the privacy expectation. On balance, the five factors support disclosure of the full opinion.

## V. CONCLUSIONS

The Commission finds the following:<sup>19</sup>

- A. The proper disposition of gifts for a public purpose is through the Council Gift Policy.
- B. Under the facts of this case, the Mayor did not violate the gift laws because the circumstances were insufficient to put a reasonably prudent person in his position on notice that accepting the benefits of the donations from the 25 Donors for Inaugural Luau Expenses would be a gift law violation.
- C. The recommended safeguards should be used to reduce the risk of gift law violations for city officials when contributions are made to pay for transition, official inaugural or unofficial inaugural expenses.

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<sup>19</sup> Chair Charles W. Gall recused himself and did not participate in this matter.

D. This advisory opinion will be made public without redaction.

APPROVED AS TO FORM AND LEGALITY:

/s/Charles W. Totto                      10/7/13

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CHARLES W. TOTTO                      Dated  
Attorney for Complainant

APPROVED:

/s/Rachael S. Wong                      10/8/13

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RACHAEL S. WONG, Vice Chair                      Dated  
Honolulu Ethics Commission