

**ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU**

715 SOUTH KING STREET, SUITE 211 • HONOLULU, HAWAII 96813-3021
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
AND LEGAL COUNSEL

ADVISORY OPINION NO. 2015-2

I. SUMMARY

The Honolulu Ethics Commission approved a Stipulated Settlement Agreement with former city Councilmember Nestor Garcia, that requires him to pay \$8,100 to the city treasury as a civil fine for allegedly accepting prohibited gifts from lobbyists and for allegedly failing to disclose conflicts of interests resulting from the acceptance of the prohibited gifts when he voted on legislation that affected the interests of the lobbyist gift donors. Councilmember Garcia served on the City Council representing District 8 from January 2, 2003-January 2, 2013.

The Commission has not made any findings or conclusions that Councilmember Garcia, in fact, violated the City's Ethics Laws. This Advisory Opinion is being issued pursuant to the Commission's agreement with Councilmember Garcia to resolve the charges without further proceedings and Revised Ordinances of Honolulu ("ROH") Sec. 3-6.7(c).¹ All factual allegations are made based on staff's investigation of this matter.

II. PROCEDURAL BACKGROUND

On January 21, 2015, the Ethics Commission found probable cause that Councilmember Garcia violated city laws ROH Sec. 3-8.8(b)² and Revised Charter of Honolulu ("RCH") Sec. 11-103³) related to the acceptance of prohibited gifts and failures to disclose conflicts of interest;

¹ Sec. 3-6.7 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.

² ROH Sec. 3-8.8(b) provides in pertinent part:

During each one-year period beginning on July 1st and ending on June 30th, no councilmember shall solicit, accept, or receive, directly or indirectly, from any one source any gift or gifts valued singly or in the aggregate in excess of \$200.00.

³ RCH Sec. 11-103 provides:

Any elected or appointed officer or employee who possesses of 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

a Notice of Alleged Violations of the Standards of Conduct (“Notice”) was served on Councilmember Garcia.

On January 22, 2015, Councilmember Garcia met with Complainant and discussed the Notice. The parties reached an agreed settlement of the case.

On February 18, 2015, the Commission approved a stipulation to settle alleged violations of the standards of conduct whereby Councilmember Garcia admitted and acknowledged the alleged violations, and agreed to pay the city treasury \$8,100 in civil fines.

III. ALLEGED MISCONDUCT

A. Acceptance of Prohibited Gifts: RCH Sec. 11-102.1(a); ROH Sec. 3-8.8(b)

The city’s gift laws provide: City officers are prohibited from accepting gifts when it is reasonable to believe that the donor of the gift intended to reward or influence the city officer in the performance of his city duties. RCH Sec. 11-102.1(a)⁴; ROH Sec. 3-8.8(a)⁵. Further, city officers and employees are strictly prohibited from accepting gifts greater than \$200, singly or in the aggregate, from any one source in a fiscal year where the city officer has discretionary authority to affect the source’s interests. ROH Sec. 3-8.8(b).

There is a rebuttable presumption that *any* gift from a lobbyist, is intended to influence city policies and are thus prohibited because the very definition of lobbyist means, “any person who engages oneself for pay or other consideration for the purpose of influencing, directly or *indirectly*, and whether by such person or through any agent or employee or other person in *any*

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.

⁴ RCH Sec. 11-102.1(a) provides:

No elected or appointed officer or employee shall: 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 the performance of such person’s official duties.

⁵ ROH Sec. 3-8.8(a) provides:

No councilmember shall solicit, accept or receive, directly or indirectly, any gift, whether in the form of money, goods, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it can be reasonably inferred that the gift is intended to influence the councilmember in the performance of the councilmember’s official duties or is intended as a reward for any official action on the councilmember’s part.

manner *whatsoever*, the policy making process⁶ of the City and County of Honolulu.” ROH Sec. 3-13.2 (emphasis added).

Review of Lobbyists 1’s and 2’s⁷ subpoenaed business expense reports resulted in finding that Councilmember Garcia accepted \$1,764.40 worth⁸ of gifts of free meals and golf to discuss matters with Lobbyists 1 and 2 including: rail transit, transit oriented development, Kapolei growth, pending council issues, City Reapportionment Committee, Special Management Area Use Permits, and the City Land Trade.

B. Failure to Disclose Conflicts of Interest: RCH Sec. 11-103

RCH Sec. 11-103 requires that a councilmember disclose a conflict of interest when it first becomes apparent, and no later than when the councilmember votes on the legislation. If there is no timely disclosure, the councilmember has violated RCH Sec. 11-103. Advisory Opinion No. 2011-1, Sec. V.A.

A review of legislation⁹ voted on by Councilmember Garcia between when the first gift was received in October 2008 through the end of his term on January 2, 2013, revealed that Councilmember Garcia failed to disclose conflicts of interest in 72 bills and resolutions which affected Lobbyist 1’s and 2’s interests including legislation affecting rail transit, Kapolei, and matters in which employees of Lobbyist 1 and 2 testified in support.

IV. IMPOSITION OF A CIVIL FINE

The Commission has jurisdiction for six years over any alleged violations, but cannot recover any fines for alleged violations that occur outside the four year fine period.¹⁰

⁶ “‘The policy making process’ means any action taken by an officer or employee of the City and County of Honolulu with respect to any bill, resolution or other measure in the city council, or with respect to any rule, regulation, standard, rate or other regulatory enactment of any city agency.” ROH Sec. 3-13.2.

⁷ Pursuant to Opn. Ltrs. Nos. 99-7, 98-5, and 96-2, State of Hawaii Office of Information Practices, the Commission declines to reveal the identity of the lobbyists in this case because it could cause a chilling effect on witness cooperation for future cases. HRS Sec. 92F-13(3).

⁸ The Complainant calculated the value of gifts by dividing the total expense by the number of attendees. This methodology has been accepted as reasonable and within the Commission’s discretion. *See Life Insurance Association of Massachusetts, Inc. v. State Ethics Commission*, 727 N.E.2d 819, 821 (Mass. 2000); *see also U.S. v. Woodward*, 149 F.3d 46, 53, FN3 (1st Cir. 1998).

⁹ Complainant only reviewed legislation one year after receipt of the *first* prohibited gift; thereafter, the Commission reviewed whether there were any required disclosures one year prior to receipt and/or following receipt of a prohibited gift based on the one year review periods required for conflict of interest review in RCH Sec. 11-102.2(a) and RCH Sec. 11-105.

¹⁰ ROH Sec. 3-6.3(c); ROH Sec. 3-8.5(d)(6).

Councilmember Garcia received gifts in the amount of \$484.87 during the relevant 4-year fine period (September 29, 2010-January 2, 2013), and failed to disclose conflicts on 42 bills and resolutions resulting from receipt of the prohibited gifts.

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).¹¹ One of the most aggravating circumstances of this case is that in June 2012, Councilmember Garcia agreed to pay the city \$6,500 in civil fines for failing to disclose conflicts of interest related to his employment at the Kapolei Chamber of Commerce and actions on 52 bills and resolutions affecting his employer's interests such as rail transit and rezoning. The Commission issued Advisory Opinion No. 2012-4 which fully details the investigation and result of that case.

His alleged prior misconduct for failing to disclose conflicts of interest compounds the nature and seriousness of the allegations in this case. The 42 disclosure violations in this case occurred during an approximate two and a half year period, and were related to receipt of \$484.87 in prohibited gifts within the same time frame.

To his credit, Councilmember Garcia has been cooperative and truthful in the investigation of this case. He immediately sought to resolve this matter after receiving the Notice and has also expressed remorse and has taken responsibility for his misconduct.

Although there were fewer disclosure violations in this case than in Advisory Opinion No. 2012-4, we find that the \$8,100 civil fine to be reasonable and appropriate given the amount of the gifts received and because of the prior case, the penalties have been increased here.

V. CONCLUSIONS

1. The civil fine against former Councilmember Garcia in the amount of \$8,100 is deemed reasonable under the circumstances.

¹¹ Section 3-8.5 (d)(2) provides in pertinent part: The Commission shall review the totality of the circumstance in order to determine the amount of civil fines. The Commission reviews factors, including, but is not limited to: 1) The nature and seriousness of the violation; 2) The duration of the violation; 3) The effort taken to correct the violation; 4) Intention to conceal, deceive or mislead; 5) Prior notice that his or her conduct was prohibited; 6) The amount, if any, of the financial or other loss to the city as a result of the violation, including enforcement costs; 7) The value of anything received or sought in the violation.

