

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

Date and Place: April 20, 2016
Standard Financial Plaza
Conference Room, Suite 211

Present: Hon. Victoria Marks (ret.), Chair
Michael Lilly, Esq., Vice Chair
Stephen Silva, Commissioner
Stanford Yuen, P.E., Commissioner
Hon. Riki Amano (ret.), Commissioner
Hon. Allene Suemori (ret.), Commissioner
Charles W. Tutto, Executive Director and Legal Counsel (EDLC)
Geoffrey Kam, Deputy Corporation Counsel,
Department of the Corporation Counsel
Peter B. Carlisle, Counsel for EDLC
Nick Grube, Civil Beat
Cory Lum, Civil Beat

Absent: William Shanafelt, Investigator III

Stenographer: Lisa P. Parker, Legal Clerk III
Kristine Bigornia, Legal Clerk I

MINUTES OF THE APRIL 20, 2016 OPEN SESSION MEETING

I. CALL TO ORDER

The Ethics Commission members received a copy of the April 15, 2016 Memorandum regarding the Agenda items for the April 20, 2016 meeting. Chair Marks called the meeting to order at 11:32 a.m.

II. NEW BUSINESS

- A. For Action: Motion to Approve the Open Session Minutes of the March 9 and March 16, 2016 Meetings.

Chair Marks asked the Commission if there were any additions, corrections or deletions and, since there were none, asked for a motion to approve the minutes. Commissioner Yuen so moved, Commissioner Silva seconded, all were in favor and the motion passed unanimously.

- B. Executive Director and Legal Counsel's Administrative Report. (Written)

1. Work Reports from Staff Members.

The EDLC responded to Commissioner Yuen's question that over the last several meetings there was a request to make sure that certain topics were covered by a written report so that the Commission could ask clarifying questions. Commissioner Yuen was satisfied with the EDLC's response.

2. General Statistics Complaints and Requests for Advice as of the end of Last Month.

Chair Marks asked the EDLC if he had statistics regarding his report on Request for Advice & Complaints, and if there was an easier way to compare the 2014 and 2015 statistics at the present point in time. The EDLC responded that we could manually count each year, but that it would be easier to get a gross number count. It takes significant time to count and compare three (3) different years and breaking down the count of complaints and requests for advice. The EDLC also stated that staff is still working with DIT for help.

3. Pending Complaints Requiring Investigation and Request for Advice.

Chair Marks asked if there were any questions, and since there were none, stated that the EDLC informed the Commission that he does not provide names of people until after a probable cause hearing, since it was confidential, and the EDLC confirmed. Chair Marks continued that the first time she ever saw a person's name was in the attached report, given by the EDLC and that the ALC never mentioned any names. The EDLC responded that the ALC did indicate a name by using an initial and...Chair Marks interjected "XYZ", and the EDLC confirmed. Chair Marks asked the EDLC if he changed his policy by spelling-out names. The EDLC responded that the name was used so the Commission would be able to see what cases were a significant portion of the workload. The EDLC felt that the ALC had marked some "XYZ" cases as having been referred to another agency. It is more accurate to state another agency has requested information.

Commissioner Suemori asked why the "XYZ" matters were complaints if it's only asking for information from another agency, and the EDLC explained that the complaint was received by the Ethics Commission and the information was requested by another agency. Commissioner Suemori then asked if every request by another agency would be an open complaint, and the EDLC confirmed.

Commissioner Suemori asked about several entries that appear to be identical, but listed as individual complaints. Commissioner Suemori asked for more clarification regarding the individual complaints and why they couldn't be combined into one complaint, and Vice Chair Lilly and the EDLC responded that each complaint were different issues, however, agreed that the complaints could be consolidated if the facts were the same and if certain criteria were met. The EDLC continued that in one of the cases in particular, the complaint was of different nature, so those complaints were kept separately, in order for the complaints to reflect what was being done and extent of the workload. The EDLC further stated in detail more reasons for having separate complaints, and Vice Chair Lilly responded that the log was designed so that complaints are logged-in sequentially, as they come in, and reconfirmed that complaints could also be combined or consolidated later.

Chair Marks asked why there were fifteen (15) complaints unassigned, and that they were unassigned as long as sixteen (16) months and three (3) weeks. The EDLC explained that if a case was not assigned it would mean it would be his responsibility and that no investigation had been initiated yet. He also stated often the older cases presented weak facts or not a serious violation relative to other cases. Chair Marks asked if the EDLC had other cases assigned to him, and the EDLC confirmed.

Commissioner Suemori asked if the EDLC when he would be able to work on the sixteen (16) month old case, and the EDLC responded that there is no strict policy, but at the end of two (2) years and if staff was not able to do conduct an investigation or refer the case, the complainant would be informed that staff just didn't have the resources to investigate the matter.

Commissioner Yuen stated that sometimes the complaint would be withdrawn, and the EDLC further explained in more detail about matters in which complainants withdrew their cases. Commissioner Yuen added that sometimes the cases are overcome by events, and the EDLC agreed, and that sometime they work themselves out.

Chair Marks asked the EDLC if he kept track of phone calls, and the EDLC confirmed that all the phone calls requesting advise or making complaints are given EC numbers and logged into the Inquiries Log, with a short description, and also gave an example of an HPD phone call complaint. The EDLC confirmed that the description would be listed as "oral advice," as opposed to an email request.

The EDLC informed the Commission that the six (6) requests for advice, that were pending, had been closed.

Chair Marks asked if there were any questions, and Commissioner Yuen asked if the responses to the requests for advice were in writing, like an email, or just a phone call. The EDLC explained that it would depend on whether the request was based on few straight forward facts. If so, then it would not be necessary to require a written request. However, if the request is more complex, such as from someone who would be leaving the City and later came back to the City and was also involved in matters with who they worked for, they are asked to write an email description. The EDLC would respond with questions. Commissioner Yuen concluded

that it takes only a few minutes to make a complaint but it may take the EDLC several days work to address the complaint. The EDLC explained in further detail about the reasons for requests for advice in writing and concluded that requests for advice can be addressed more quickly than complaints.

4. FY16 website hits through 3/31/16: 4,319

There was no discussion.

5. FY 16 New Employee Ethics training through 3/31/16: 548

There was no discussion.

6. Financial Disclosure Compliance.

There was no discussion.

7. Fiscal Year 2016 Budget Issues.

There was no discussion.

8. Fiscal Year 2017 Budget.

There was no discussion.

9. Report on the Ethics Commission's Proposed Charter Amendment Before the Charter Commission, and Other Proposals Affecting the Ethics Laws.

Chair Marks asked if there was any update with the Charter Commission, and the Vice Chair commented that one of the problems was the position level for the ALC was limited, and asked the EDLC if the adopted draft would avoid that situation. The EDLC confirmed and further stated that the ALC would be an exempt attorney and not an SR-26.

Commissioner Amano asked the EDLC if he was satisfied with the salaries approach by the Charter Commission, and the EDLC confirmed he was. The EDLC further stated that CC member Paul Oshiro researched the matter carefully. The EDLC also informed the Commission that his only concern was that the EDLC salary would be set at an excluded managerial compensation plan, which would mean that DHR (Department of Human Resources) would come in to assess, but at present the EDLC salary is an EM-7, which has a broad range of \$80K to \$140K, which would certainly cover the range of the salaries of comparable attorneys at Corporation Counsel.

Commissioner Amano thanked the EDLC for his work and Vice Chair Lilly commented that going to the Charter Commission solved the issue and the salary issues were the reason for going to them in the first place.

10. 2015 Service Efforts and Accomplishments Report and National Citizen

Survey for Honolulu.

The EDLC explained that the SEA Report was a project conducted by the City Auditor and that initially it was a brief report of each City agency, but in the last 2 or 3 years they've used an additional survey, the Commission was then given these very broad statements about the trust in government. The EDLC does not think that the Ethics Commission is the sole determinant of whether or not people trust government.

11. Work Flow Charts for Requests for Advice and Complaints Requiring Investigation.

Chair Marks informed the Commission about the rules survey that compared and contrasted the procedural rules of the Ethics Commission, Hawaii County, Maui County, Kauai County and State of Hawaii ethics agencies, as well as the Office of Disciplinary Counsel, Department of Commerce and Consumer Affairs' Administrative Rules, Department of Land and Natural Resources' Rules, Civil Rights Commission's Procedural Rules, Department of Health's Procedural Rules and the Honolulu Liquor Commission's Procedural Rules.

Chair Marks asked the EDLC to explain the Honolulu Ethics Commission's probable cause procedure. The EDLC responded that in talking with Les Kondo of the State Ethics Commission, the State equates its "charge" with the finding of probable cause. Commissioner Marks then asked if the State gets approval by their Commission, and the EDLC confirmed. The EDLC continued that the concern he had in drafting the rules was to make it clear what steps must be taken to comply with Rule 5 to reach decisions on probable cause. He thinks Rule 5.8 is a "good faith" safeguard so that the system cannot be abused. The EDLC further stated that the requirement of having the EC decide probable cause ensures the process used is fair and states the rights for subjects of investigations.

The EDLC informed the Commission that he only perused Mr. Simon's work, but he did notice that he may have missed an important issue. Chair Marks asked for the page number, and the EDLC responded that it was on Page 13 of the survey, entitled, "Complaints Notification to the Respondent." However, Rule 5.9 was not mentioned, which is critical because if the Commission finds probable cause, the EC is mandated to file a Notice of Alleged Violation (Notice), unless it's a de minimis case. The EDLC continued that the Notice states the facts and law as well as the rights and responsibilities for the subject who is being notified.

Chair Marks asked if potential respondents' would be notified if complaints had been filed before the filing of a Notice. The EDLC responded that sometimes they are, and sometimes they are not notified. The EDLC noted that, if there is a concern for potential witness or document tampering, the subject may not be informed. Also, if the case is factually or legally weak it may be closed without the subject being made aware of the investigation. The EDLC further explained that if probable cause was found and if there had been a written complaint, the written complaint is attached to the Notice with the identity of the complainant removed.

Vice Chair Lilly asked the EDLC for clarification about complaints in writing, and referred to Page 7 of the Rules and Ordinance, which was designed for complaints that did not need to be initiated in writing. The EDLC explained that each county and the State, as well as the Honolulu Ethics Commission, allow for complaints by the public or by the ethics agency.

The EDLC continued in detail on other reasons and procedures from past cases and that, before a Notice is approved and filed by the Commission, it would need to follow the basic steps given in Rule 5.

To Vice Chair Lilly's question the EDLC confirmed that the complaint does not need to be written and referred to Advisory Opinion 2006-1. The EDLC explained in detail that 2006-1 dealt with an oral complaint, requiring the staff and EC to decide whether the EC had jurisdiction over oral complaints. Thereafter it was made very clear in the Ordinance in 2011 that the Commission could entertain oral complaints, written complaints or could open-up an investigation based on any information.

Chair Marks asked for clarification because ROH Sec. 3-6.4 discusses the EC staff, suggesting a distinction between the Commission and Commission staff. She also asked whether the Rules allow for delegation of duties to the EDLC and the staff. The EDLC responded that there is a general delegation of duties in the Rules. Chair Marks stated that it was Rule 1.14 states the general delegation. The EDLC responded that the preliminary investigation states that it be conducted under the control of the legal counsel, as referred to in Rule 5.7, and that it is clear that the scope of the preliminary investigation is up to the legal counsel. The EDLC continued that when staff determines probable cause, it makes a recommendation to the Commission so the EC ultimately makes the probable cause decision.

Chair Marks referred the Commission to ROH Sec. 3-6.7, "The employee or officer whose conduct is the subject of the complaint shall have an opportunity to respond in writing...after receiving a copy of the complaint." She asked whether the EDLC was interpreting the complaint to mean the initial written complaint, and the EDLC confirmed. Chair Marks continued that in Rule 5.6, it says, "you may send a copy...", and that "may" and "shall" did not go together. The EDLC stated that the Commission could always decide on clarification, and thought it would be important for the staff to have the chance or ability to determine the timing when the subject receives a complaint given that the subject may interfere with collecting evidence and witness statements. Chair Marks responded that the Commission and staff will need to review the matter.

Chair Marks asked if there were any questions, and since there were none, she asked the Commission to refer back to Open 3 of the Open Session Memo, regarding pending complaints and requests. **REFER BACK TO ITEM 3 FOR FURTHER DISCUSSION.**

[The EDLC interjected that no names should be used while in Open Session.]

After discussion of Item 3, Chair Marks came back to Item 10 regarding the flow charts and asked if there were any questions. Commissioner Suemori responded that they were helpful.

Chair Marks responded that she thought the flow charts were a good start, however, she was looking for more details so that staff would know what they are supposed to do, and that it looked like a lawyer's point of view with no concrete information. Commissioner Suemori asked who would answer the phone, and what if the Legal Clerk answered. The EDLC responded that the Legal Clerk would transfer the call to him, and if not she would take a message and sometimes the message would be detailed, and that it has been a practical office

procedure. The EDLC further explained that because the office was blessed with experienced investigators, a checklist was not proposed in the flow chart, however, they do have checklists and that they may use it if they choose to use it.

Commissioner Suemori asked if the phones were set-up on a rotating system, and the EDLC was not clear, however, the calls would go to him first and then go to the Legal Clerk.

Chair Marks concluded that part of the purpose of the flow charts was to have the staff and investigator be informed of what is going on and what they should be doing, and in some offices they have their clerical staff screen calls. The EDLC responded that he does not have the staff screen calls since he thinks that the callers need to be listened to by trained personnel (attorneys or investigators) and in order to be able to give immediate feedback after determining whether or not they have an issue within the ethics jurisdiction.

Commissioner Suemori asked the EDLC if he took calls anytime, and the EDLC responded that he takes calls anytime during the week days and that messages are also taken and that the Integrity Hotline was also utilized, and that it is a city government, 24/7 open intake service.

Chair Marks inquired about the twenty (20) different types of cases and if the EDLC had the elements of each case or an outline, in case the investigator was asked to work on the case. The EDLC explained that not all of the cases had an outline, but if it were a gift case, the investigator would be informed orally about the elements of the case.

Commissioner Suemori asked if there were checklists for lobbyists or gift cases, and the EDLC responded that there were none. Chair Marks remarked that it was a good start and also requested a checklist in addition to the flow charts, with basically more details.

Commissioner Yuen informed the EDLC that he agreed, because it allows for flexibility, and if the Commission wanted to get into details, he was sure there were existing SOPs in each block depicted in the flow chart. Chair Marks remarked that she didn't know if it was written. Commissioner Yuen expressed that the Commission was strapped in resources, so it will take time to get the details on what they are requesting, so it could be on one of the things to do, but he would not suggest that it be done by next month. Commissioner Suemori responded that it would help the investigator. Commissioner Yuen further stated that the Commission should be mindful that they are not micro managing, and Commissioner Suemori agreed.

The EDLC asked the Commission where would be the best place to start on the chart to have the elements and any major legal issues that might fall within those elements stated on the drop down box. Commissioner Suemori expressed her concern about the investigator having to ask the EDLC for guidance on all of the twenty (20) issues, which she felt would take up a lot of the EDLC's time.

Commissioner Yuen stated that he would defer to the EDLC on how it should be presented or what should be included, since he is the EDLC and the person who is running the office, and that the EDLC could then present the details or elements at the next meeting and that

it should be the EDLC's call on what should be presented and what should be included, and the EDLC agreed.

12. Process to Transfer Complaint and Investigation Report to Department
When the Complaint's Subject is a Civil Service Employee.

No Discussion.

- C. For Discussion and Action: Modification of Personnel Evaluation Form for the Executive Director and Legal Counsel.

Chair Marks asked Vice Chair Lilly for his suggestion in the modification of the personnel evaluation form, and the Vice Chair asked that the matter be deferred until next month. He also informed the Commission that he received forms from other agencies and would be interested in the EDLC's thoughts on the idea of whether it was valuable or helpful. The EDLC responded that it would be more helpful to understand what it is the Commission wants to know about so they can evaluate the EDLC, and Vice Chair Lilly referred to the "blocks." Vice Chair Lilly responded that it was their call, and the EDLC asked if the Commission would look it over to see if anything was missing, a category or set of categories. Vice Chair Lilly asked that the Commission review the categories to make sure they are comfortable with the categories when rating the EDLC and if they are appropriate and if they needed to add, delete or emphasize. Chair Marks asked if the Vice Chair was willing to do a comparison or contrast for best practices, and the Vice Chair responded that an EDLC would be similar to the lead counsel at the ODC or Corporation Counsel, and also stated that the EDLC was a unique department. The EDLC stated that he asked for an evaluation form on the Cabinet level but didn't get a response, as well as asked how the section heads and division heads were evaluated and was told they used the same form that would be used for the ALC, with adjustments for supervisory responsibilities. Chair Marks responded that it could be combined with the Vice Chair's evaluation to have a numerical value. Vice Chair Lilly concluded that he would review the forms.

Chair Marks asked for a motion to move out of open session to go into executive session. Commissioner Yuen so moved and Commissioner Amano seconded. All were in favor and the motion passed unanimously.

Chair Marks reported that Commissioner Suemori moved the Commission out of executive session and into open session. Commissioner Silva seconded and the motion was unanimously approved at about 3:10 p.m.

IV. EXECUTIVE SESSION SUMMARY

- A. For Action: Pursuant to HRS Sec. 92-5(a)(2) and (a)(4), Motion to Approve the Minutes of the Executive Session of the January 20, February 11, February 17, and March 16, 2016 Meetings.

Chair Marks reported that Commissioner Amano moved to approve the executive minutes of the January 20, February 11, February 17 and March 16, 2016 meetings. Commissioner Silva seconded and the motion was approved unanimously.

B. For Discussion and Action:

1. Pursuant to HRS Sec. 92-5(a)(2), Regarding the Hire, Evaluation, Dismissal, or Discipline of an Officer or Employee to Provide the Status Regarding the Retention of an Independent Ethics Investigator Required Due to a Conflict of Interest.

The Commission is complying with procurement code requirements and the Managing Director would be contacted.

2. Pursuant to HRS Secs. 92-5(a)(2) and (4), Regarding the Hire, Evaluation, Dismissal, or Discipline of an Officer or Employee, and to Consult with the Commission's Attorney on Questions and Issues Pertaining to the Commission's Powers, Duties, Privileges, Immunities, and Liabilities.

No action was taken.

3. Regarding the Formation of a Permitted Interaction Group Under Hawaii Revised Statutes § 92-2.5(b) to Review Proposals and Negotiate the Position of the Commission Regarding the Evaluation and/or Dismissal of an Officer or Employee of the Commission.

There was a motion made by Chair Marks and seconded by Commissioner Suemori to create a permitted interaction group (PIG), consisting of Vice Chair Lilly and Commissioner Amano. The action was unanimously carried.

V. ADJOURNMENT

The meeting adjourned at approximately 3:15 p.m.