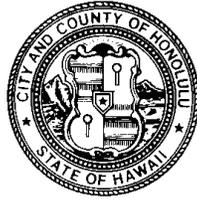


ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

715 SOUTH KING STREET, SUITE 211 • HONOLULU, HAWAII 96813-3091 • AREA CODE 808 • PHONE: 768-7786 • FAX: 768-7768 • Internet: www.honolulu.gov/ethics

KIRK CALDWELL
MAYOR



CHARLES W. TOTTO
EXECUTIVE DIRECTOR &
LEGAL COUNSEL

MINUTES
ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

Date and Place: December 4, 2013
Standard Financial Plaza
Conference Room, Suite 211

Present: Charles W. Gall, Esq., Chairperson
Michael A. Lilly, Esq., Commissioner
Katy Chen, Esq., Commissioner
Jeffrey Burroughs, Ph.D., Commissioner
Stephen Silva, Commissioner
Stanford Yuen, P.E., Commissioner
Charles W. Tutto, Executive Director and Legal Counsel (EDLC)
Laurie A. Wong, Associate Legal Counsel (ALC)
Carolee C. Kubo, Director, Department of Human Resources-DHR
Mark D. Wong, Director, Department of Information Technology-DIT
Kevin Mulligan, Hawaii Government Employees Association-HGEA
Natalie Iwasa, CPA and Interested Member of the Public
Gordon Y. L. Pang, Reporter-Star Advertiser
Nick Grube, Honolulu Civil Beat
P. F. Bentley, Photographer, Honolulu Civil Beat

Absent: Rachael S. Wong, Dr.PH, Vice Chairperson
Letha A. S. DeCaires, EC Investigator
Tierra L. Bickford, EC Po`okela Fellows Intern

Stenographer: Lisa P. Parker, Legal Clerk

I. CALL TO ORDER

The 475th meeting of the Ethics Commission (“Commission” or “EC”) was called to order at 11:36 a.m. by Chair Gall.

The Commission had before it the EDLC’s memorandum regarding the Agenda Items for the December 4, 2013 Meeting, Open Session, dated November 27, 2013.

II. OLD BUSINESS

- A. For Action: Request for a Motion to Approve the Minutes of the Open Sessions of the November 4 and 18, 2013 Meetings.

Chair Gall informed the Commission that the Minutes of the November 4 and November 18, 2013 meetings will be deferred for approval until the next meeting.

- B. Confirming the Date and Time of the January 6, 2014 Meeting at 11:30 a.m.

The January 6, 2014 meeting at 11:30 a.m. was confirmed by the Commission.

- C. Setting the Date and Time of the Meeting During the Month of February 2014.

The meeting was set and confirmed for February 19, 2013 at 11:30 a.m.

III. NEW BUSINESS

- A. For Action: Request for a Motion to Nominate and Elect Ethics Commission's Chair and Vice Chair for Calendar Year 2014.

Chair Gall asked the staff to advise the Commission of the nomination process.

The ALC informed the Commission that since the election is by ballot, according to the Robert's Rules, it's not necessary to make nominations as each member may vote for any eligible person whether or not nominated or not.

Commissioner Lilly asked about the remaining appointment of Vice Chair Wong. Chair Gall and Commissioner Yuen responded that her term would conclude at the end of the year. The EDLC stated that she could be a hold-over member until someone else is selected, or until she is re-appointed. The EDLC also stated that she asked to be reappointed a couple of weeks ago, but hasn't heard anything.

Commissioner Lilly nominated Chair Gall, as Chair of the Ethics Commission for calendar year 2014, Commissioner Yuen seconded the nomination and all were in favor.

Commissioner Lilly nominated Vice Chair Wong, as Vice Chair of the Ethics Commission for calendar year 2014. Commissioner Silva seconded the nomination and all were in favor.

- B. For Discussion: Disclosure of 25 Donors as Referenced in Ethics Commission Advisory Opinion No. 2013-3, Pursuant to a Media Request. (Moved to the end of the agenda.)

Chair Gall informed the Commission he would recuse himself in the discussion regarding this matter, and further asked that this agenda item be moved to the end of the agenda.

C. For Discussion: Status of Fiscal Year 2015 Budget Request.

The EDLC informed the Commission that the date to meet with the Department of Budget and Fiscal Services (BFS) and the Managing Director (MD) has been rescheduled to the last week in December. He directed the Commission's attention to the information packet he had submitted to BFS and the MD that was provided in his memo. He explained that there are about 3,500 employees left to complete the mandatory ethics training by June 30, 2014. Assuming that there is a consistent pace in requests for advice based on the first half of the fiscal year, we will have a 40 percent increase in requests for advice and a 20 percent increase in complaints investigated in fiscal year 2014, and up to 500 requests for advice and almost 100 complaints investigated. The EDLC will keep the Commission apprised of the budget after he meets with the MD.

D. For Discussion: Corporation Counsel's and other Departments' Denials or Lack of Response to Certain Commission Staff Requests.

Chair Gall informed the Commission that this morning, Director Mike Formby, Department of Transportation Services, requested in writing that this item be deferred.

Chair Gall made a motion that with regard to DTS's portion of the matter, that it be deferred until the next meeting so that Director Formby can appear in person and discuss the issue with the Commission. Commissioner Yuen seconded. The EDLC asked to be heard on the motion.

The EDLC informed the Commission that he takes issue with the deferral request because this is the third time it's been on the Agenda. He stated that to date, DTS has not commented, submitted testimony, or sent anyone on his behalf to the Commission. EDLC was concerned about the ongoing delay to address these issues given that Bill 32, the bill related to ethics and DTS oversight of the Oahu Transit Services (aka "OTS" or "The Bus"), is pending before the Executive Matters and Legal Affairs Committee (EMLA).

The EDLC further stated that he requested some very basic information from the DTS Director that has gone unanswered including: 1) What is DTS' role in Oahu Transit Services (OTS) review of ethics complaints; 2) How does DTS ensure that the complaints of ethical misconduct are properly investigated and acted on by the management of OTS; 3) How many complaints has OTS investigated from 2010 to date regarding violations of their standards of conduct; 4) What disciplinary or corrective action has OTS or DTS taken as a result of the investigations.

Commissioner Silva asked the EDLC if Mr. Formby's non-responsiveness to the EDLC was because the EC did not have jurisdiction over OTS, and was seeking counsel. The EDLC agreed but

also stated the information will be helpful for everybody to conduct an educated discussion regarding Bill 32 which would determine if the Ethics Commission should have jurisdiction over the OTS employees.

Chair Gall asked if this issue is related to an ongoing investigation, and the EDLC responded in the negative. The EDLC further stated that currently the EC has no jurisdiction to investigate ethical misconduct of OTS employees although within the last few months the EC has received seven complaints of unethical conduct. The EC can only forward those complaints to DTS for further action. The EDLC wants to know, "how does DTS monitor the situation when OTS does their investigative review?" The EDLC stated that he thinks it's important for the public and Council to know this information.

[Commissioner Chen entered the meeting @ 11:51 am]

Chair Gall responded that he would like Director Formby to respond to the EDLC's questions before the Commission. Commissioner Lilly agreed and added that he found it troubling that Mr. Formby gave the last minute excuse that he couldn't attend the meeting

Chair Gall amended the pending motion such that the item will be deferred to the January 6 meeting, and asked for a second. Commissioner Yuen seconded. Commissioners Lilly and Silva were not in favor. Commissioner Chen abstained as she had just arrived and needed to be briefed on the agenda item.

Chair Gall briefed Commissioner Chen on the matter. Chair Gall asked EDLC what type of relief he is seeking today if the item is not deferred. The EDLC responded that the Commission could take whatever action it thought appropriate such as instruct staff that it is determining a particular action. Chair Gall responded that he was struggling to understand the EDLC's recommendation resolution. The EDLC suggested that the EC order the DTS Director to show cause as to: 1) Why he hasn't responded to the EDLC's questions; and 2) Why he has not responded to the EDLC's requests to meet with Bill 32 stakeholders.

Commissioner Lilly asked if the EDLC could report to the City Council Chair, since it's a matter with regard to their Bill, and if the Chair does not respond, then the EDLC could copy the Mayor.

The EDLC informed the Commission that they may want to consider whether Mr. Formby's refusal to respond or fully respond without justification is a misuse of a City position, and a potential case to be investigated. The EDLC further stated that Mr. Formby could be subpoenaed to come before the Commission. Commissioner Lilly asked that if this item is moved to January 6, he would recommend that the EDLC provide the EC with recommendations on what to do in the event it happens again, and the EDLC agreed.

Deputy Corporation Counsel Kam suggested that the EC take testimony today, and continue this same agenda item for January 6 for additional testimony and to decide on a resolution they want to make at that time.

Chair Gall asked for a motion to take testimony and discuss the issue today, with further testimony from the DTS Director on January 6, 2014, should he choose to attend. If he does not attend, the EDLC will advise of available remedies and recommend a course of action.

Commissioner Chen asked if they could subpoena Mr. Formby to attend the January 6 meeting. Chair Gall asked if they needed a contested case hearing in order to issue a subpoena. After a short recess, the EDLC cited that under ROH Sec. 3-6.3(h), there does not need to be an ongoing investigation to subpoena Director Formby to attend the January 6th meeting.

Chair Gall asked for further comment on the matter.

Natalie Iwasa, CPA and interested member of the public, testified that it's been very frustrating, knowing that there have been 7 new complaints regarding ethics issues at OTS recently, and not knowing if anyone is investigating these complaints in a timely manner. She further stated that delaying the investigation of these complaints hinders the ability to investigate thoroughly. She added that serving a subpoena on Director Formby seemed to be overbearing.

Commissioner Lilly stated that he did not think that the EC should issue the subpoena unless Mr. Formby does not attend the January 6, 2014 meeting. The EDLC stated that the EC has the power to make a recommendation to the Mayor or City Council on issues that foster the ethical culture within the city and that determining the ethical climate or concerns of DTS' oversight of OTS is fairly a matter before the Commission which would support a subpoena.

Commissioner Chen asked how many times the EDLC has formally requested Mr. Formby to attend. The EDLC replied he had not specifically asked for attendance but the Director has most likely been informed that the EC has been discussing this matter for the last two meetings. Commissioner Lilly commented that in his communication, Mr. Formby indicated that he had intended on being at the meeting today, but couldn't attend.

Chair Gall reiterated the pending Motion. Commissioner Lilly seconded the motion. The motion passed unanimously.

EDLC asked to comment on Bill 32. Bill 32 contemplates that OTS would administer and enforce its own internal standards of conduct with DTS' oversight as opposed to the EC having jurisdiction over OTS officers and employees. EDLC has never been aware of a situation where a stakeholder has not been allowed to comment on pending legislation like how the EC has been excluded as to Bill 32 by DTS. Chair Gall directed further discussion be deferred to the January 6, 2014 meeting.

Ms. Carolee Kubo, Director of Human Resources, was invited to speak. She provided a memo to the EC stating her position on the EC's requests for obtaining electronic files for an EC investigation. She stated that she has been in labor relations for 23 years with the union. She has seen many grievances filed for harassment, and intimidation when employees are compelled to speak or to provide information for investigations. Therefore, she is reluctant to release information unless she is provided a narrow scope of time and type of information. She stated that she is protecting the contractual, state and federal rights of the employees. She stated that she has witnessed arbitrations where employers have been sued for releasing personnel information.

Chair Gall asked her about the requirement that the EC provide her with sufficient factual information to establish probable cause that the employee violated the ethics laws as provided in her memo. He stated that this standard is problematic for the EC because the EC's preliminary investigation is to determine whether probable cause exists. Therefore, using a probable cause standard in a preliminary investigation is not practical. Therefore, he recommended that she use a different standard.

Ms. Kubo replied that some of the requests that she received and signed were for witnesses who have contractual rights. Chair Gall reiterated that he is just addressing the standard. Ms. Kubo stated that she would review every request that would come in to determine if we need further information and would discuss the requests with Mr. Totto.

Chair Gall asked her if she had any legal basis or done any legal research supporting her probable cause standard.

She replied that the standard was based on her experience in labor relations that she has seen go to arbitration on this same issue. She stated that perhaps her predecessors were not that experienced in that field and so they were not cognizant of the ramifications of disclosure.

Commissioner Lilly asked her if the arbitrations were in regard to ethics complaints or investigations. She replied that she believed some of them were. He further asked if the arbitration reached a decision as to the release of information and what kinds of limits.

Ms. Kubo stated that they put limits on the type of information that can be released like personnel information and the type of disciplinary action taken. Commissioner Lilly asked how many arbitrations involved investigations by the Ethics Commission.

Ms. Kubo replied that she did not know about the Honolulu Ethics Commission, but she represented people in the state and counties of all the other jurisdictions in Hawaii.

Commissioner Lilly asked for confirmation that she was asserting that there were arbitrations involving other ethics investigations in the state that ruled against disclosure of information.

She stated that she could not provide any specifics at this time. Commissioner Lilly asked if the arbitration decisions were public. Ms. Kubo responded that they were. He asked for copies for those cases. She stated that she could look for them. He asked if the primary concern is the privacy of the information. She replied that she needs to balance the public's right to know and the employee's privacy. Commissioner Lilly responded that when the EC deals with personnel issues the investigations and discussions are private, therefore he is not sure where her privacy issue arises.

She replied that she saw a recent case where a decision was rendered and it was emailed to a lot of people, so the employee could be stigmatized. She also stated that there was a recent case in her office of an investigation of an employee and she took appropriate disciplinary action. The EC wanted to know exactly what she did, but she believed that the information was confidential. So she would not release personnel information.

Commissioner Chen asked Ms. Kubo to cite the exact cases that show the applicable standard for obtaining information for investigations to the city's Ethics Commission as opposed to citing a standard based on her general experience because Ms. Kubo's probable cause standard runs counter to how the EC has historically obtained information.

Commissioner Lilly reiterated that the EC does not make private information public and that he is concerned about her standard because it hampers the EC's investigations. Ms. Kubo reiterated that she wanted a narrowed time period and also information showing that the person did in fact violate the ethics code before releasing information.

The EDLC stated that the US Supreme Court stated that the standards to release information in response to an administrative subpoena, is that the information be "reasonably relevant."

The EDLC provided a recent example of a request. The EC received a complaint that someone is using their email for political purposes and the EC staff was already provided with a political email sent by this employee. The EC staff requested DHR to obtain the emails from that employee's account. Staff has credible information that this person had misused this email and needed to check if there was further misuse. Staff kept the request confidential, and cited the laws that show that the EC has the authority to make this request for information that is reasonably relevant to the investigation.

The EDLC stated that he appreciates the need to narrow the time period for documents that the EC is requesting but, it is impractical to provide her with an itemized list of the specific documents the EC is seeking as she is requesting in her memo. The EDLC asked from a practical standpoint, would a DHR or DIT employee review all of the documents and pull out only the political emails? The EDLC stated that the EC staff wants to work with DHR, but Ms. Kubo's approach is not acceptable.

The EDLC stated that he believed that his holds on the systematic deletion of stored emails had been released, and the EC has lost emails needed for its investigation which is a destruction of evidence. The EDLC stated that he has never encountered a delay of six weeks to respond to a request for information or this type of demand of proof for a request in his 14 years as the EDLC.

Commissioner Lilly commented that the standard for discovery in civil litigation is relatively low. Parties are entitled to anything that is reasonably likely to lead to the discovery of admissible evidence. He asked Ms. Kubo if EC staff has been provided with the emails requested related to the political misuse. Ms. Kubo stated that DIT is responsible to provide the email. EDLC confirmed that staff has not received the emails.

Commissioner Lilly stated that perhaps the EC should issue subpoenas. Chair Gall asked if there were further comments.

Ms. Kubo stated when the EDLC requested the political email she could see reasonable cause to provide him the other political emails. Commissioner Chen asked if she meant probable cause. Ms. Kubo corrected herself. She felt that Mr. Tutto had “probable cause” because he had that one email. She did not think it was proper to grant EC staff access to everything in the employee’s email box because it is not what the EC is investigating. She believes the request should be tailored to the subject of the investigation.

Commissioner Silva stated that if you are going to go in you have to see if there is other misuse of resources because you can’t just pinpoint one thing on the request.

Chair Gall asked if there were any other questions for Ms. Kubo, and upon hearing none, he asked if anyone else wanted to testify.

Mark Wong, DIT Director introduced himself and stated that for the record, today was the first day he has ever heard about the EC requesting political emails. He stated that he was aware of an email from EDLC that was sent directly to a DIT employee and that this email was forwarded to several employees. He stated that upon learning of this, he referred the employee who received the EDLC’s email to the DIT security policy which he (Wong) alleged that he had learned about during his Ethics Training class. He referred to the policy and stated that holding of email requires the approval of the DIT, DHR and Managing Directors in writing, which he had not received.

He stated that he received an email from the EDLC dated November 20th asking why DIT had not held these requested emails. After receiving EDLC’s email, he found that DIT was allegedly not complying with the EC’s request, according to a Civil Beat article. Director Wong reiterated that he did not receive any request to hold emails. He reiterated the policy that no DIT employees will hold any files without written authorization because that process could be abused and he did not have any record of the requests. Director Wong believed that the request needed to come from the Department Director - Corporation Counsel.

Commissioner Lilly clarified that the EC is an independent Commission from the Department of Corporation Counsel, and the EC would be issuing the request. Director Wong consented to this. He stated that a communication to a DIT employee in the ranks is insufficient. He further stated that this policy had been in effect since February 3, 2003.

Director Wong stated that he responded to ethics issues in the past in a timely matter. Director Wong stated that he was resentful that he read about his noncompliance to an ethics request in the media.

Chair Gall asked the EDLC to state the issues before the EC. EDLC stated that the issue was whether the DIT director had knowledge that the EC had requested that a DIT employee hold specific emails for the subjects of the EC's four investigations; and whether the DIT director then removed the hold on the emails which may have resulted in the destruction of evidence. The EDLC stated that he asked the information to be held pending formal written authorization. He added that staff did not ask the employee to provide the EC with the files.

Chair Gall asked if the information was being held. Director Wong responded that he did not know. Director Wong stated he did not release the hold.

Commissioner Lilly asked if emails are "scrubbed" after 90 days? Director Wong responded that the issue is how long after an email is *deleted* can DIT recover it. Director Wong stated that every email an employee keeps in their inbox will stay there until the employee deletes it. If an employee deletes an email today, there is a back up every day of the file system, not of the mail boxes. Let's say DIT keeps the back up for 30 days. If the email is deleted after that time, DIT cannot retrieve it. But, if it is within the 30 days, DIT will have to look through the entire Exchange Server (backup) which is like looking for a needle in a haystack and could take up to 2 weeks. Also, DIT does not make any judgment on whether EC needs the data or not. If EC obtains authorization, EC will get the information.

Director Wong stated that he will treat the request and approval for electronic records as highly confidential such that his deputy, secretary, and even the DIT head of security would not be aware of it. Director Wong stated that he would take the request with the original signatures and go directly to the employee who is responsible to retrieve the emails. Director Wong stated that he was aware that the EC's investigation could be jeopardized if the wrong person finds out about the investigation.

He advised that if there is a time constraint associated with the request, EDLC should call him directly and let him know that there is a formal written request pending approval. Director Wong would then speak with the DHR Director and the Managing Director to assess if they would likely be approving the requests. If so, he would instruct the DIT employee in charge of retrieving the emails to hold the emails. He stated that he was here to cooperate with the EC but he needs the

proper authorization and that, upon receiving proper approval, he would sign the authorization within 5 minutes of receipt.

Chair Gall asked for clarification if all four requests for approvals had been signed by DIT, to which the Legal Clerk confirmed. Chair Gall asked if there was any concern that the evidence requested may have been deleted. Director Wong stated that the employees are working on our requests now. He confirmed that DIT only has the ability to retrieve deleted emails a certain amount of time after deletion.

Chair Gall reconfirmed the process for approval. Director Wong stated that the EC needs to contact him directly or walk the request over, and to not email him with the request.

Chair Gall asked if there were any further comments or questions, for Director Wong, hearing none, he thanked Director Wong and invited the next speaker to address the EC.

Kevin Mulligan, HGEA introduced himself. He was concerned about a comment made during the meeting that he found disturbing. He stated that HGEA employees have bargaining rights and protections. He felt that one of the Commissioners made an inappropriate side comment that insinuated a presumption of guilt of employees. He was concerned whether the EC would be treating the employees fairly and reminded that employees have Weingarten rights.

Chair Gall assured Mr. Mulligan that the EC treats everyone fairly and objectively. He asked if there were any further comments or questions on the issue, hearing none, he proceeded to the next item on the agenda.

EDLC thanked Directors Wong and Kubo for attending the meeting.

E. For Information: Corporation Counsel's Response to the Commission's Amended Request Scope of Representation of City Personnel by Corporation Counsel in Ethics Matters, Dated September 6, 2013.

Chair Gall stated that there was a request from Corporation Counsel Donna Leong to defer Item III.E to the next meeting. He asked for a motion to that affect. The EDLC stated that he would like to address the EC now about Ms. Leong's recent memo as it was an immediate subject of concern.

Commissioner Lilly made a motion to defer Item III.E as to COR's presentation, but would hear staff and the testimony of the people present before the EC today. Commissioner Chen seconded the Motion. The Motion was approved unanimously.

EDLC explained that Ms. Leong sent a memo to all Department Directors informing them that COR provides ethics advice. EDLC stated that he was not initially aware of the memo because he was not provided with a copy. The EDLC believed that the memo undermines the

EC's authority as it causes confusion over the proper source of advice, inconsistent advice, forum shopping, perception of administrative pressures on COR deputies, and unnecessary duplicative work. He provided several examples of these problems and further stated that this same procedure was implemented during the Harris administration but was abandoned because it was so problematic. The EDLC confirmed that although COR has the right to provide ethics advice, it is poor policy to do so.

The EDLC confirmed that he is planning to send an advisory to city personnel that the EC does not recommend obtaining ethics advice from COR because ultimately the EC is the only agency that can determine ethics violations and enforce ethics laws.

Commissioner Lilly confirmed that one of the problematic scenarios that could occur is that an employee could get ethics advice from a COR deputy, and then come before the EC and the EC could find a violation. Therefore, it puts the employee at risk.

The EDLC added that an employee could use obtaining advice from COR deputies as a mitigating factor in the ethics violation, also, the employee may decide not to waive their attorney-client privilege and withhold the advice.

The EDLC confirmed to Chair Gall that he intended to issue the memo before the next meeting under his own authority in order to mitigate the confusion caused by Ms. Leong's memo.

Natalie Iwasa reintroduced herself and stated that COR providing ethics advice was inefficient, and there is a public perception that COR has an inherent conflict of interest. She stated that there have been recurring issues that have put pressures on the EC and asked the EC to consider proposing a Charter amendment for more independence.

Commissioner Lilly commented that the State Ethics Commission is under the State Auditor for administrative purposes, and the Auditor is under the Legislature, whereas the EC is under the Administration.

The EDLC added that in 2006 EC staff went before the Charter Commission asking to: (1) define "administratively attached," and (2) requested that the EC have a guaranteed percentage of the city's budget that would not decrease. Both were opposed by COR and did not pass out of the Charter Commission.

Chair Gall asked if there were any other discussion or comments regarding this issue. EDLC distributed Ms. Leong's memo to the EC for their records.

Chair Gall recused himself as to the next agenda item. He designated Commissioner Lilly as Chair Pro Tem.

- B. For Discussion: Disclosure of 25 Donors as Referenced in Ethics Commission Advisory Opinion No. 2013-3, Pursuant to a Media Request. (Taken out of order.)

The ALC stated that the EC staff received a media request to disclose the 25 Donors referenced in Advisory Opinion No. 2013-3 who donated \$127,000 to the Mayoral Transition Committee, \$45,000 of which was used for the Inaugural Luau - a prohibited gift to the Mayor. The ALC stated that staff had contacted the OIP attorneys to get their advice on this matter and the OIP attorneys stated that there were arguments for disclosure and withholding the information which is why the issue is now before the EC. The ALC asked if the EC wanted additional legal advice in addition to the memo provided, so that the EC could enter into Executive Session.

Commissioner Burroughs moved that the EC enter Executive Session, Commissioner Yuen seconded the Motion. All were in favor.

During Executive Session the EC obtained counsel from the ALC and EDLC.

Commissioner Yuen made a motion to exit Executive Session. Commissioner Silva seconded the Motion. All were in favor.

Pro Tem Chair Lilly announced that during the Executive Session, the Commission moved to disclose the 25 Donors to the public in response to the request under HRS Chapter 92F.

VI. ADJOURNMENT

Commissioner Burroughs moved to adjourn the meeting and Commissioner Chen seconded. All were in favor.