

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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Advisory Opinion No. 2002-2

I. Summary

Written requests drafted by city officials during city business hours with city equipment and on city letterhead stationery asking members of the public to voice their concerns or attend a Council budget meeting and oppose possible funding cuts by the Council do not violate the fair and equal treatment policy.

II. Facts

In early May 2002, various heads of city departments mailed approximately 10,000 letters to citizens and public groups the city administration believed would be concerned with possible reductions to be made by the Council to the Fiscal Year (FY) 2003 budget submitted by the administration. A sample of the letters shows that, by letters dated May 7, 2002, members of the Vision Teams were informed that . . . a key councilmember has proposed 25% cuts to the Capital Improvement Project budgets and also discussed 50% cuts to next year_s Vision Groups_ budget. Needless to say, these cuts to the CIP budget will directly impact upon your community, as you will not be able to undertake or complete all of the projects you have already prioritized as needed in your community._ A similar letter was transmitted to members of the Neighborhood Boards.

The Commission obtained information showing that as of May 7, 2002, a member of the Council Budget Committee had suggested at various Neighborhood Board and Vision Team meetings that a 25% reduction in the capital improvements of those projects asked for by the Neighborhood Boards and Vision Teams may be required because of the perceived bleak city

financial picture. This proposal was not adopted by the Council Budget Committee, but the Council raised significant issues focusing on whether there would be sufficient city revenues to meet the costs of the FY 2003 capital budget without cuts to projects.

The Executive Director of the Office of Economic Development wrote to participants in the Sunsets and Brunches on the Beach and Rediscover Oahu events stating that the cuts noted in budget Bill No. 19, CD1, would negatively impact or eliminate many of our important tourism and economic development related programs and activities. Tennis enthusiasts were notified that . . . the City Council is now threatening to cut the funding for the Tennis Complex [at the Central Oahu Regional Park], resulting in a partially completed facility. Other letters raised similar concerns about possible budget cuts that might be of concern to the recipient.

The letters went on to state that the administration's budgetary management and practices have been and continued to be sound, citing examples of improvement to the city and government services to the public. All the letters noted that, if the recipient were concerned about the potential reductions in the FY 2003 budget, he or she . . . may want to contact [city Councilmembers] to ask that they be restored. . . . You may also wish to testify at Honolulu Hale on May 16 at 9:00 a.m. when the Council Budget Committee holds its final budget meeting.

The letters were drafted on city time by city employees and officers, using city equipment and letterhead stationery from various departments and were signed by department heads and other high-ranking public officials. The estimated cost for postage is \$3,400. At the time of this budget debate, including the mailings, Mayor Jeremy Harris was a candidate for the office of governor.

One of the issues raised was whether the administration's letters misinformed the public regarding whether some capital projects supported by Neighborhood Boards or Vision Teams might be cut.

Along with several telephone complaints and inquiries, the Commission received a written request for an opinion, dated May 10, 2002, whether the administration's letter-writing campaign was a violation of the city ethics laws. The administration responded in writing to the request for opinion on July 22, 2002. Additional information was collected by the Commission staff.

III. Issue presented

The question raised here is whether the use of city resources by members of the city administration to notify the public of potential budget cuts and to request their participation in the debate over the FY 2003 budget violates the city's fair and equal treatment policy.

IV. Analysis

As a general rule, city resources may not be used for a project which is not related to the legitimate functions of city government. To do so would provide special treatment to the beneficiary of the city's resources. The fair and equal treatment policy stated in § 11-104, Revised Charter of Honolulu (RCH) provides:

Elected or appointed officers or employees shall not use their official positions to secure or grant special consideration, treatment, advantage, privilege or exemption to themselves or any person beyond what is available to every other person.

RCH § 11-104 is the cornerstone to prohibiting political activities on city time, the use of city equipment for private business projects, the use of a government position to leverage outside employment and many other attempts to use city resources for non-city business. See, Advisory Opinion No. 2001-1.

A key element to the existence of a violation of RCH § 11-104 is that the city resource must be misappropriated for a non-city use, that is, a use not within the scope of the duties expressly or implicitly associated with the position of the city officer or employee whose conduct is in question. Generally, the use of city resources for a project not within the officer's or employee's duties would be a violation of RCH § 11-104.

Therefore, we must review whether the letter-writing campaign carried out by the executive branch to support its proposed FY 2003 budget is within the ambit of duties of the administration. Executive power is vested in and exercised by the mayor as the chief executive officer of the city. RCH §§ 4-101 and 5-103. The mayor is required to submit an operating and capital program and budget to the Council for its consideration and action. RCH §§ 5-103(g) and 9-102 and 9-103. The mayor is responsible for explaining and justifying to the Council the financial program and operating and capital budgets. Id. It is the Council's responsibility to pass a budget bill, which may or may not contain the appropriations requested by the mayor. See, RCH § 9-104. Assuming there is no veto, the budget passed by the Council must then be implemented and enforced by the mayor and the administration, RCH § 9-106.

It is evident that the mayor, through the department heads and other city officers and employees, is responsible for submitting the operating and capital budgets to the Council, for justifying the submitted budgets and for carrying out the budget passed by the Council. The

mayor also has the power to submit periodic reports informing the public as to city policies, programs and operations. RCH _ 5-103(j). Because the city budget is essential to the function of the city government, it is inherent that the executive branch may comment or oppose the budgetary modifications offered by the legislative branch of government. This is especially true when available revenues may be strained to meet the competing demands for government services.

The administration's letter-writing campaign is reasonably viewed as a means by which the executive branch, through public comment, may influence how the Council amends the budget bill submitted by the administration. Given the administration's stake in the outcome of budget deliberations and its right to comment on the policies and actions of the legislative branch, the Commission finds that it is within the scope of the discretionary duties and responsibilities of the administration to inform the public of the administration's position on budget matters and to encourage the public to state their concerns to the Council. Similarly, if the Council has concerns about the preparation of the administration's budget or the execution or enforcement of the final budget law, the Council's may invite members of the public to shed light on these issues.

The criticism of the letter-writing campaign focused on concerns that the letters were efforts to lobby the Council, furthered a political agenda of Mayor Harris, were excessive in cost and time or misled the public by overstating the risk of cuts contemplated by the Council. We discuss each of these concerns in turn.

Because we find that it is within the discretion of the executive branch to present information to the public and the Council regarding budget issues, we do not find that the administration's attempt to sway the Council or the public about its version of the proposed budget is in violation of the ethics laws. We have found no law that prevents the administration from using city resources to advocate on behalf of the administration's view of any bill, whether budgetary or other. In contrast, federal law prohibits lobbying of members of Congress by employees of the executive branch departments through the use of federally appropriated funds, except through a limited process. See, 18 U.S.C. _ 1913.

The fact that, at the time of the letter-writing campaign, Mayor Harris was a candidate for the office of governor does not necessarily lead to the conclusion that the letter-writing campaign was primarily motivated by his candidacy and not by the administration's belief that the proposed budget cuts were inappropriate from a government operations viewpoint. It is inherent in a democracy that elected officials sometimes will weigh the consequences of their actions on the scale of reelection or election to other offices. Under the facts in this case, the political factor, to the degree that one existed, did not transform the otherwise legitimate government action into an unlawful political activity.

Whether the cost of the administration's letter-writing campaign was excessive is a question for public discussion. However, the Commission will not second-guess the administration's determination of what costs were justified by the budget issue under the facts presented here. Although the cost of a project conducted by city officials may be relevant to answering some ethics questions, we determined that the letter-writing campaign was a legitimate method to mobilize public support for portions of the budget that were felt to be at risk. Therefore, the cost issue is not one we will examine.

Finally, we examine whether the administration's letters misled the public because of any misstatement or omission of material fact. Specifically, one councilmember believed that the May 7, 2002 letters to the Vision Team and Neighborhood Board members may have misled the public because those letters raised the specter of budget cuts but failed to note that the Council had assured the administration that Vision Team and Neighborhood Board capital projects would not be cut.

As of May 7, 2002, the administration's concern about potential budget cuts was a valid subject for public discussion. By that date, a member of the Council's Budget Committee had suggested at public meetings that a 25% cut was needed to the capital improvement projects introduced by the Vision Teams and Neighborhood Boards. Although the Council publicly assured those interested that the capital projects requested by these community groups would not be reduced, potential budget cuts for these and other projects remained open issues for public debate. Also, the administration's phrasing generally characterized the budget reductions as a possibility, not as a reality, reflecting some caution on the administration's part.

We find that, on the whole, the administration had reason to believe that the Council might cut the operating and capital budgets in a manner which would be of serious concern to some members of the public. Therefore, we find no misstatement or omission of material fact.

Based on the foregoing, the Commission finds no violation of the city ethics laws.

Dated: September 6, 2002

/S/
ROBIN DAVID LIU, Chairperson
Ethics Commission