

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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Advisory Opinion No. 2004-2

I. Summary

Only when sufficient safeguards are used against potential conflicts of interest or special treatment, may a city officer in his private capacity solicit donations for a private, nonprofit entity from actual or potential vendors to the officer's department.

II. Facts

A city officer ("Officer") requests advice whether he may solicit donations to benefit a nonprofit organization ("Nonprofit") from potential vendors to his department ("Department"). Nonprofit is a private organization formed to support a specific type of public safety throughout Hawaii. The members of Nonprofit include active and retired officers from state, county, federal and private public safety departments in Hawaii. Others interested in public safety may become associate members. Associate members include, among others, actual and potential vendors to government agencies, such as Department.

Recently Nonprofit held its annual conference at a Waikiki hotel. The annual conferences allow the members to discuss public safety issues, listen to presentations from experts and examine the products and services available from vendors. The conferences are especially important because of Hawaii's relative isolation from mainland sources of public safety expertise and experience.

In order to defray the costs of the hotel conference rooms and other conference expenses, as President of Nonprofit, Officer mailed a written request to various businesses seeking monetary donations to support the conference. The solicitation letter was written on Nonprofit stationery and requested that the solicited entities become Nonprofit conference sponsors at levels of contribution ranging from \$250 to over \$2500. Nonprofit received money and in-kind services from 26 donors valued at about \$15,000. According to Department, at least half of the contributors are past, current or likely future

vendors to Department. Vendors were also allowed to set up exhibits and were charged for the space by the hotel.

The government members of Nonprofit were not on government time for the time spent at the conference. Generally, they individually pay for their travel, meals and accommodations for the conference.

Officer is also a high-ranking official within Department with significant discretionary authority and is responsible for procurement, among other things. Normally, this duty at Department might bring Officer into contact with some of the vendors that Officer solicited for contributions to Nonprofit's conference. However, Department and Officer have taken several precautions against potential vendor influence, such as delegating procurement to other officers and various expert committees and using a competitive procurement process for the vast majority of purchases of services and products. Officer's role regarding procurement is to ensure that the process is fair and equitable, not to select individual vendors.

Officer informed the Commission that, if a no-solicitation policy to potential Department vendors were required, Nonprofit would probably have to stop holding the conference because of lack of sufficient funds.

III. Issue

The question presented here is whether a city officer with significant discretionary authority to affect the interests of donors, who is acting in his private capacity as an officer of a non-profit organization, may solicit donations from past, present or future vendors to his department.

Discussion

A. Gift solicitation

Initially, it is important to distinguish between gifts that benefit a city officer or employee from those that benefit the private organization. In this matter, Nonprofit's members who were also Department officers paid their travel, meals and accommodations out of their own pockets. The contributions from vendors were used to offset the expenses of the hotel and associated conference expenses on behalf of Nonprofit and not for the personal benefit of Department officers. Therefore, there is no concern that the solicitations redound to the benefit of the individual employees.

It is reasonable to assume that the vendors making contributions to Nonprofit's conference knew that Officer is both the President of Nonprofit and also the officer responsible for procurement in the Department. Although Officer is responsible for ensuring a fair procurement process, he has significantly limited his involvement with vendors and the purchase of specific services and products by delegating much of the procurement responsibility.

These circumstances raise the issue whether the solicitation of Department vendors by one who is both the Nonprofit's President and a high-level officer of the Department may create a conflict of interest between Officer's duties to Department and his duties for Nonprofit. The gift laws prohibit solicitations by city officers under circumstances where a reasonable person could conclude that the gift was intended to influence or reward the solicitor in performing his or her official duties. See, RCH Sec. 11-102(a) and ROH Sec. 3-8.7(b).¹ Traditionally, the Commission has reviewed eight factors to determine whether a solicitation violated the gift laws:

- a. The official duties of the solicitor, especially whether they include official action directly affecting the donor;
- b. The business relationship between the solicitor and the donor;
- c. The existence of past, present or predictable future contracts between the donor and the city, including whether the contract was made through an open, public process;
- d. Whether the gift relates to the job of the solicitor and thus redounds to the city's benefit or whether the solicitor gains a personal benefit;
- e. Whether the gift impugns the integrity of the solicitor's agency;
- f. The benefit, if any, the solicitor stands to gain from soliciting the gift;
- g. The value of the gift; and
- h. The custom and practice in the community with regard to soliciting gifts.

¹ **Section 11-102. Conflicts of Interest --**

No 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 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.

Although there are no city cases directly on point, the Hawaii State Ethics Commission (HSEC) has decided a very similar matter under its gift statute, which is virtually identical to the applicable city law. HSEC Advisory Opinion No. 335 involved a state employee who solicited gifts on behalf of private organizations from a number of businesses, including tenants of the facilities under the worker's supervision in his state employment.

In examining the factors stated above and determining that the employee had not violated the state gift law, the HSEC noted that the gifts were not solicited for the employee's personal use or benefit but were intended for the use and benefit of the organizations he represented. The commission stated that they found no evidence that those tenants who contributed to the employee's organizations had been granted any advantage regarding their leases as a result of the donations. It also noted that the solicitation was made to a broad base of businesses, not just those over whom the employee had some control. The HSEC stated that there was no evidence that the gifts were intended to influence or reward the employee in the performance of his official duties. Id.

The state advisory opinion is consistent with the opinions in which this Commission has permitted city officers to raise funds for private, nonprofit groups, as long as certain conditions are followed. In Advisory Opinion No. 272 the Commission permitted a city officer who was an unpaid director of a noncommercial radio station to raise funds by a letter solicitation as long as it was done without using the officer's city title, city stationery or other city resources. Similarly, in Advisory Opinion No. 269 the Commission permitted an officer to fundraise by letter only and without using the officer's city title in the correspondence. The Commission explained that fundraising by correspondence tended to minimize the possibility of coercion that could arise during face-to-face or telephone solicitations. Advisory Opinion No. 263. Finally, in Advisory Opinion No. 2003-2, the Commission noted that in-person solicitations to pay for social events to donors who were also licensees of the soliciting agency raised an appearance of a conflict of interest and special treatment.

Department, Nonprofit and Officer appear to have complied with the safeguards employed by past state and city advisory opinions to avoid an appearance of a conflict of interest:

1. Officer has removed himself from the operations of the procurement process that would directly affect the interest of the donor/vendors.
2. The solicitations on behalf of Nonprofit were made to a group of possible donors, many of whom are not potential vendors to the Department.
3. The solicitations were made only on Nonprofit letterhead stationery, signed by Officer without reference to Officer's city title or position and communications were to be addressed to Nonprofit's address.

4. The conference participants from Department paid for their travel, lodging and food out their own pockets. Donations paid for the cost of the conference site and associated expenses.
5. Nonprofit supports many programs that are of significant benefit to the federal, state and county public safety departments. These programs ultimately benefit the public.
6. The likelihood of coercing contributions is reduced because the donor/vendors benefit by having a conference where potential purchasers are gathered in one place.

B. Fair and equal treatment policy

There is a possibility that a request for donations from the head of Department's procurement process may appear to or actually coerce donors that are also current or potential Department vendors. Another concern is that some donor/vendors may expect special treatment as a result of their contribution to Nonprofit's conference. Should these circumstances occur, they would constitute a violation of the city's fair and equal treatment policy, Section 11-104, Revised Charter of Honolulu (RCH).² For the reasons expressed above, we find that there are sufficient protections against an appearance of impropriety in this matter.

V. Recommendation

We commend the Department, Nonprofit and the Officer for taking these precautions and bringing this matter to our attention.

Along with the safeguards employed by Department, Nonprofit and Officer, the Commission recommends that Nonprofit add to its donor solicitation to current or potential vendors to Department a disclaimer stating that a contribution, or lack thereof, will not be taken into account should the vendor offer services or products to Department. This will create a record of the understanding between Nonprofit, its officers and the vendors.

Dated: March 3, 2004

/S/
ROBIN DAVID LIU, Chairperson
Ethics Commission

² **Section 11-104. Fair and Equal Treatment --**

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 that which is available to every other person. (*Reso. 83-357*)