

ETHICS COMMISSION  
**CITY AND COUNTY OF HONOLULU**

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**Advisory Opinion No. 2011-1**

**I. Summary**

Former Council Chair Todd Apo introduced two resolutions and a bill regarding the Waimanalo Gulch Sanitary Landfill, a subject in which Mr. Apo had a conflict of interest. The resolutions were never voted on, but the bill was. Mr. Apo did not file a disclosure of conflict of interest for either of the two resolutions he introduced and did not file his disclosure on the bill until after he voted on the bill. The Commission had previously cautioned Mr. Apo that he was legally bound to file a disclosure of conflict of interest when the conflict first becomes apparent, and not later than the first vote on the measure. Because Mr. Apo failed to follow the prior advisory opinion, the Commission imposes a fine on him of \$500.

Section 11-103, Revised Charter of Honolulu ("RCH"), requires that a conflict of interest must be fully disclosed in writing by each city officer and employee when the conflict first becomes apparent. The law applies to councilmembers as they carry out their duties, such as reviewing and voting on legislation. If legislation creates a conflict of interest for the councilmember introducing the measure, the Commission expects that in most cases the conflict would be apparent at the time the legislation is being drafted. In such cases, the disclosure must be made immediately and no later than the introduction of the measure. For bills or resolutions that are introduced by others, a councilmember must file the conflict disclosure when the conflict is first apparent, but no later than before the first vote by the councilmember on the measure.

**II. Facts**

Mr. Apo introduced two resolutions and a bill related to the use of the Waimanalo Gulch Sanitary Landfill ("Landfill"). He does not contest that his private employer, Ko'Olina Community Association, had taken positions over several years to limit the operations of or to close the Landfill. Nor does he dispute that his private employer's interest created a conflict of interest for him under RCH Sec. 11-102.1(c)<sup>1</sup> that he was required to fully disclose in writing

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<sup>1</sup> **Section 11-102. Conflicts of Interest--**

1. No elected or appointed officer or employee shall:

under RCH Sec. 11-103. He admits that he filed his disclosure of interest for the bill after the first vote had been taken on the bill. The resolutions were introduced, but never voted on, and no disclosures were filed for them by Mr. Apo. In an earlier but nearly identical case, Advisory Opinion No. 2007-1, the Commission found that Mr. Apo should have, but failed to file his disclosure of conflict of interest before he voted on a bill.

Mr. Apo appeared before the Commission and argued that the triggering event for filing a conflict disclosure was not clear from RCH Sec. 11-103. He contended that an ambiguity exists in RCH Sec. 11-103 because the language appears, on the one hand, to require a councilmember to disclose when the conflict becomes apparent but, on the other hand, for the disclosure to be made part of the public record before the vote on the measure is taken.

#### **IV. Question presented**

When must a councilmember file a conflict of interest disclosure under RCH Sec. 11-103 regarding legislation that creates a conflict of interest?

#### **V. Discussion**

##### **A. RCH Sec. 11-103 requires disclosure of a conflict of interest when the conflict becomes apparent.**

We begin our analysis with the language of the revised Charter:

##### **Section 11-103. Disclosure of Interest --**

Any elected or appointed officer or employee who possesses or 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 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.

The first sentence of RCH Sec. 11-103 specifically applies the disclosure “when the conflict becomes apparent” standard to councilmembers and city officers and employees. The final sentence of RCH Sec. 11-103, which requires disclosure prior to voting, does not set a different

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(c) Engage in any business transaction or activity or have a financial interest, direct or indirect, which is incompatible with the proper discharge of such person's official duties or which may tend to impair the independence of judgment in the performance of such person's official duties.

disclosure trigger for councilmembers; it is a final safeguard to ensure that voting without disclosing nullifies the councilmember's vote.<sup>2</sup> There is no ambiguity in RCH Sec. 11-103.

Advisory Opinion No. 2007-1 dealt with Mr. Apo's failure to file his disclosure until after he voted on certain bills dealing with the Landfill. In his argument to the Commission, Mr. Apo focused on the last line in this quote from Advisory Opinion No. 2007-1 as controlling when disclosures must be filed:

In this case, each of the bills had a fundamental issue in common – how the Landfill would be used after its intended closing date. The key to determining if a conflict of interest existed here is not whether the Association's position was directly aligned with the bills; it is whether the Association had an interest that may have been affected by each of the bills. The Association's interest, that is, its concern over the nuisance factor of the Landfill, had been publicly stated before the introduction of the bills. A reasonable person could have viewed Councilmember Apo's employment with the Association as potentially affecting his decision making on the bill. Therefore, Councilmember Apo was required to fully disclose his private employment in writing before he voted on any of the versions of Bill 37.<sup>3</sup>

Although we find no ambiguity in RCH Sec. 11-103, the last sentence in the quote above could have been stated more clearly. For example, the Commission could have stated: "Therefore, Councilmember Apo was required to fully disclose his private employment in writing once the conflict became apparent, and at the latest when he introduced Bill 37."

Mr. Apo's narrow interpretation of Advisory Opinion No. 2007-1 fails to take into account the important public policy to ensure that councilmembers, as well as other city officials, inform the public about conflicts of interest at the earliest opportunity. For an official to hold off making a disclosure until just before a vote would limit the public's opportunity to respond to and take action regarding the conflict of interest. The Commission noted in Advisory Opinion No. 2007-1:

RCH Section 11-103 is worded broadly: disclosure is required whenever a city officer or employee has an interest that '**might reasonably tend** to conflict with the public interest. . . .' Furthermore, to narrowly read RCH Section 11-103

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<sup>2</sup> The Hawaii Intermediate Court of Appeal found that a councilmember's failure to properly disclose a conflict of interest does not invalidate the council action if there are enough votes without the councilmember's to pass the measure, but does nullify the councilmember's vote. *Hui Malama Aina O Ko'olau v. Pacarro*, 4 Haw. App. 304, 666 P.2d 177 (1983)

<sup>3</sup> The Commission's website displays the redacted version of Advisory Opinion No. 2007-1 that does not identify Mr. Apo by name. Because Mr. Apo failed to follow the Commission's disclosure instruction made in Advisory Opinion No. 2007-1 and because the Commission will identify Mr. Apo in this opinion, the Commission will replace the redacted version of Advisory Opinion No. 2007-1 with the unredacted opinion.

would undermine the policy of informing the public when a councilmembers' private interests could affect legislation. (Emphasis supplied in opinion.)

The public policy to disclose conflicts of interest requires that disclosure occur when first apparent. The Commission believes that in most cases when a council member introduces legislation any conflict of interest will first be apparent no later than the time the legislation is introduced

**B. The impact of the disclosure requirement on Council practices.**

Mr. Apo pointed out that the normal practice of the Council at first reading of legislation is to use a “mass motion” to pass out all the measures in one group. Because of this practice, councilmembers may not be careful to determine if they have conflicts of interest and file their disclosures. Mr. Apo was concerned that those councilmembers who did not introduce a measure and so may not be familiar with it might unintentionally fail to disclose a conflict in violation of RCH Sec. 11-103. Yet, Mr. Apo felt that the Council could modify its practice if the Commission explains how the requirements of RCH Sec. 11-103 must be met.

We reiterate that RCH Sec. 11-103 requires disclosure when the conflict is first apparent. The current practice of voting measures out *en masse* requires a vote by councilmembers. A councilmember who has a conflict requiring disclosure, but who participates in the vote *en masse* without making the requisite disclosure would violate RCH Sec. 11-103.

In practice, a councilmember who introduces a bill or resolution would be reasonably expected to disclose the conflict immediately, but not later than the date on which notice of a hearing on the measure is given under the Uniform Information Practices Act, Hawaii Revised Statutes §§ 92-1, et seq. For those councilmembers who do not introduce the legislation, but the legislation creates a conflict for them, we expect the disclosure would occur immediately upon the conflict becoming apparent which should be no later than the councilmember’s first vote on the bill or resolution. The Commission is aware that not all conflicts of interest will be apparent when legislation is being drafted or introduced because the conflict may be created after those events occur. We believe, however, that the majority of conflicts will be apparent when the legislation is drafted or introduced.

**VI. Conclusion and recommendations**

**A. Mr. Apo violated RCH Sec. 11-103 by failing to disclose his employment conflict of interest until after the bill was voted on.**

Mr. Apo should have disclosed his employment conflict of interest when the conflict became apparent. Since Mr. Apo drafted the bill, the conflict of interest was apparent prior to the bill’s introduction at Council. Even under Mr. Apo’s own interpretation of RCH Sec. 11-103, Mr. Apo still violated RCH Sec. 11-103 by failing to disclose the conflict of interest after the Council voted on the bill. We do not find that Mr. Apo committed further violations of RCH

Sec. 11-103 for failing to disclose a conflict of interest related to the two resolutions based on Mr. Apo's reasonable, but incorrect, interpretation of Advisory Opinion No. 2007-1.

**B. The Commission imposes a civil fine on Mr. Apo in the amount of \$500.**

Mr. Apo admits that he failed to timely file his disclosure regarding the bill. Mr. Apo failed to follow the directive in Advisory Opinion No. 2007-1, a prior case dealing with Mr. Apo's failure to disclose his conflict of interest before voting. Mr. Apo knew or should have known that he needed to file his disclosure statement prior to the vote taking place. Even if the Council's practice circumvents the disclosure law by passing measures at first reading without checking for conflicts of interest, that is not a sufficient reason to excuse Mr. Apo's conduct in light of Advisory Opinion No. 2007-1.<sup>4</sup>

Because Mr. Apo is no longer a councilmember, the Commission may not submit a recommendation for the Council to discipline him. But, ROH Sec. 3-8.5(d)<sup>5</sup> allows the

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<sup>4</sup> In Advisory Opinion No. 2007-1, the Commission emphasized: "... this opinion should act as a reminder to all councilmembers, board and commission members, and officers and employees to file a full disclosure in writing whenever they have an interest that may tend to conflict with their duties to the public."

<sup>5</sup> **Sec. 3-8.5 Violation--Penalty.**

- (d) In addition to any other penalty, sanction or remedy provided by law, the ethics commission may impose a civil fine against a former or current officer or exempt employee of the city who has been found by the ethics commission to have violated the standards of conduct in Article XI of the revised charter or this article. For the purposes of this section, "officer" has the same meaning as in Section 13-101.4 of the revised charter and "exempt employee" means all employees of the executive and legislative branches of the City and County of Honolulu who are exempt from civil service pursuant to revised charter Sections 6-1103(a) – (d) and (i) and 6-1104(a) – (d), but shall not mean exempt employees in clerical positions or employees within a bargaining unit as described in Section 89-6, Hawaii Revised Statutes.
- (1) Where a civil fine has not otherwise been established in this article, the amount of the civil fine imposed by the ethics commission for each violation shall not exceed the greater of \$5,000 or three times the amount of the financial benefit sought or resulting from each violation.
- (2) In determining whether to impose a civil fine and the amount of the civil fine, the ethics commission shall consider the totality of the circumstances, including, but not limited to:
- (A) The nature and seriousness of the violation;
  - (B) The duration of the violation;
  - (C) The effort taken by the officer or exempt employee to correct the violation;
  - (D) The presence or absence of any intention to conceal, deceive or mislead;
  - (E) Whether the violation was negligent or intentional;
  - (F) Whether the officer or exempt employee demonstrated good faith by consulting the ethics commission staff or another government agency or an attorney;
  - (G) Whether the officer or exempt employee had prior notice that his or her conduct was prohibited;
  - (H) The amount, if any, of the financial or other loss to the city as a result of the violation;
  - (I) The value of anything received or sought in the violation;
  - (J) The costs incurred in enforcement, including reasonable investigative costs and attorneys' fees;
  - (K) Whether the officer or exempt employee was truthful and cooperative in the investigation; and
  - (L) Any other relevant circumstance.
- (3) No civil fine shall be imposed unless the requirements of Chapter 91 and HRS Section 46-1.5(24), have been met.
- (4) The ethics commission may recover any civil fines imposed pursuant to this section and may, through the

Commission to impose a civil fine on current or former officers, such as councilmembers. Without enumerating each factor, we focus on the salient exacerbating and mitigating factors in this case. Mr. Apo's disregard of the Commission's prior opinion in Advisory Opinion No. 2007-1 significantly raises the seriousness of what could be viewed as a technical violation. That Mr. Apo had no explanation for not filing his disclosure until after the vote was taken on the bill raises a question about whether he had much concern for the consequences of violating the disclosure law. As the Chair of the Council he was the head of the legislative branch of city government and had a responsibility to the public, his constituents and the other councilmembers to ensure he performed his duties with the highest ethical standards.

As to mitigating factors, Mr. Apo has been cooperative in the investigation of his case. The failure to disclose a conflict of interest would normally mean that Mr. Apo's vote would be nullified. Neither the bill nor the resolutions became law, reducing the impact of the misconduct. The city was not harmed financially. The failure to disclose alone is a relatively minor violation. Mr. Apo's private employment and his and his employer's interest in limiting or closing the Landfill are publicly known facts.

The Commission believes that a civil fine of \$500 is reasonable under the circumstances. The fine shall be paid to the city treasury within 30 days of the date of this opinion.

**C. Mr. Apo will be identified in this advisory opinion and in Advisory Opinion No. 2007-1.**

Under Section 3-6.3(k), Revised Ordinances of Honolulu,<sup>6</sup> the Commission may disclose the identity of an ethics law violator if doing so is in accordance with the state open records law, Chapter 92F, Hawaii Revised Statutes. Office of Information Practices Opinion Letter No. 10-03 recommends evaluating several factors to determine whether the employee's privacy interest in maintaining confidentiality is outweighed by the public interest in identifying the violator. The essential criteria are discussed below:

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- corporation counsel, institute proceedings to recover any civil fines.
  - (5) Pursuant to Chapter 1, Article 19, the ethics commission shall have executive authority to add unpaid fines by administrative order to any taxes, fees or charges.
  - (6) Notwithstanding Section 3-6.3(c), no civil fine may be imposed under this subsection:
    - (A) If the applicable complaint or request for advisory opinion is submitted more than four years after the alleged violation occurred; or
    - (B) For an investigation commenced by the commission on its own initiative, if the investigation is commenced more than four years after the alleged violation occurred.

<sup>6</sup> **Sec. 3-6.3 Powers, duties and functions.**

- (k) The commission may disclose the name of any officer or employee who has been determined by the commission, following investigation and a hearing or opportunity for a hearing, to have violated any of the provisions of Article 8 of this chapter or of Article XI of the revised charter in accordance with HRS Chapter 92F.

1. The rank of the government employee: Mr. Apo was the Chair of the Council and the head of the legislative branch of city government and, therefore, at the pinnacle of city government. The Hawaii Supreme Court has noted that government officials with significant discretionary or fiscal power, as opposed to officials without such power, may reasonably expect that their private information may be revealed to the public. *Nakano v. Matayoshi*, 68 Haw. 141 (1985) (financial statements of high-level government official may be publicly disclosed even though other officials' statements are protected from disclosure).
2. The degree of wrongdoing and strength of evidence against the employee: The facts are not contested. Although the violation in and of itself is minor, Mr. Apo failed to follow the Commission's instructions to him in Advisory Opinion No. 2007-1.
3. The availability of other means to obtain the information: There is no other means for the public to find out if Mr. Apo violated RCH Sec. 11-103. But, an opinion that does not name Mr. Apo would show the public that the Commission is carrying out its statutory duties.
4. Whether the information sought sheds light on government activity: Identifying Mr. Apo would show how Mr. Apo interpreted the conflict disclosure law and Advisory Opinion No. 2007-1 and that he failed to timely file his conflict disclosure.
5. Whether the information is related to a government job function, or is of a personal nature: The information in this case is related to Mr. Apo's duties as a councilmember.

We find that each of these factors weigh in favor of disclosure of Mr. Apo's identity in this case.

**D. The Council should modify its practices so that a councilmember has sufficient time to determine whether he or she has a conflict of interest and file the disclosure.**

The Council should review its practices and determine if changes are needed so that the councilmembers are able to comply with the requirements of RCH Sec. 11-103 as described in

this opinion. Some time may be needed to modify the Council practices. The Commission recommends that the changes be instituted by May 2, 2011.<sup>7</sup>

Dated: February 28, 2011

By: /S/  
CHARLES W. GALL, Chairperson  
Honolulu Ethics Commission

APPROVED AS TO FORM  
AND LEGALITY:

/S/  
CHARLES W. TOTTO  
Executive Director and Legal Counsel

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<sup>7</sup> The Commission is authorized to recommend action to the mayor or the Council that will maintain or foster ethical conduct. Revised Ordinances of Honolulu, Section 3-6.3(f).