

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

715 SOUTH KING STREET, SUITE 211, HONOLULU, HAWAII 96813-3091
Phone: (808) 768-7786 · Fax: (808) 768-7768 · EMAIL: ethics@honolulu.gov
Internet: www.honolulu.gov/ethics

PETER B. CARLISLE
MAYOR



CHARLES W. TOTTO
EXECUTIVE DIRECTOR & LEGAL COUNSEL

Advisory Opinion No. 2012-2¹

I. SUMMARY

[(City Officer)] would have a conflict of interest if he/she worked on any [] project for his/her employer where the project falls within the [(Y)] jurisdiction of the [City Board (Board)]. Officer is a member of the Board. City Officer would have a financial interest, direct or indirect, which is incompatible with the discharge of his/her official duties or which may tend to impair the independence of judgment in the performance of his/her official duties in violation of RCH Sec. 11-102.1(c). As a result of the conflict of interest that would occur if City Officer is involved in his/her private capacity with any matter that falls within the jurisdiction of the Board, he/she must disclose and recuse himself/herself from participating or voting on the matter.

II. BACKGROUND FACTS

City Officer is a member of the Board and is also a [job position] at [(Company X)] which [description of duties at Company X]. Company X is one of the leading [type of (Y)] companies in the nation. Company X has [number of] projects throughout the nation which have some form of Y component. [Further description of Company X].

As a [position] at Company X, City Officer is responsible for [job responsibility description]. The position requires [skills related to Y].

The Board is a policy making body, consisting of [] members, of which [] are voting members, and [] non-voting member. Revised Charter of Honolulu (RCH) Sec.

¹ The Ethics Commission redacted all information identifying the requester of this advisory opinion because this information falls within the scope of the Uniform Information Practices Act, Hawaii Revised Statutes Chapter 92F exception to required disclosure that is based upon "a clearly unwarranted invasion of personal privacy, as well as the UIPA exception based upon "the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(1), (3) (1993). Office of Information Practices (OIP) Opinion Letter No. 96-2.

[cite]. The Board has the general power to, among other things, “promote, create and assist [Y] projects [description].” RCH Sec. [cite]. Y involves [description].²

In addition to being a general Board member, City Officer sits on the Board’s Y Committee that performs the following: (1) oversees Board’s efforts to create Y; (2) reviews proposed [description of projects] making recommendations to the full Board; and (3) identifies and develops recommendations to the full Board.³ The Board’s jurisdiction for Y is [description of areas].⁴ The following topics have been on the agenda for the monthly Y Committee meetings from [date] to the present:

- [Description of agenda items]

On [date], the [entity] issued a Request for Proposals (RFP) for [description of] project located at [address] (Project).

The Project is situated [description] within the Y jurisdiction of Board. It is located on the block bounded by [] Streets, T.M.K.: []. The Project is adjacent to [Location A] and within a half mile from [Location B]. [Further description of Project]. City Officer’s employer, Company X, intends to submit a proposal for the Project identifying City Officer as the [position] for this proposal.

III. ISSUE AND SHORT ANSWER

Does City Officer have a potential conflict of interest between his/her duties as a Board member and his/her private financial interests as a [position] for Company X that would prevent him/her from working on the Project?

Yes, City Officer has a potential conflict of interest in this situation because a reasonable person knowing all the facts may believe that City Officer would have a financial interest that may tend to impair his/her impartiality in carrying out his/her official Board member duties related to Y adjacent to [Location A]. The conflict of interest requires disclosure and recusal from participation in or voting on the financial interest if it comes before the Board.

IV. ANALYSIS

A. City Officer’s participation in the Project would create a conflict of interest in violation of RCH Sec. 11-102.1(c)

² See [] Board [Y] Committee Meeting Minutes (date) at III.

³ [] Board Permanent Committees of the Board of Directors Proposed Areas of Responsibility (date).

⁴ See [] Board [Y] Committee Meeting Minutes (date) at III.

“Conflicts of interests in the public sector are particularly important because, if they are not recognized and controlled appropriately, they can undermine the fundamental integrity of officials, decisions, agencies, and governments.”⁵ RCH Sec. 11-102.1(c) prohibits city officers and employees from engaging in any business transaction or activity or from having 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. See also, [] Board Reso. No. [] (date).

The city’s ethics laws prohibit actual as well as apparent conflicts of interest. For a public official, having an apparent conflict of interest can be as serious as having an actual conflict, because of the potential for doubt to arise about the official’s integrity, and the integrity of the official’s organization.⁶ In analyzing whether a particular situation presents a prohibited conflict under RCH Sec. 11-102.1(c), proof that one’s judgment in discharging his/her official duties is actually impaired is not required. The possibility -- or the reasonable appearance -- of impairment through conflicting loyalties is sufficient to establish a violation. See, e.g., Advisory Opinion No. 2001-06 (likelihood of real conflict of interest arising is sufficient to establish violation of RCH Sec. 11-102(c)); Advisory Opinion No. 158 (possibility of real conflict of interest arising is sufficient to establish violation of RCH Sec. 11-102(c)).

In order to identify a conflict of interest we look at several factors: (1) the official duties or functions of the city official; (2) whether the city official has a qualitative financial interest such that it would be reasonable to believe that the private interest could improperly influence the official’s performance of official duties; or (3) whether the official has a quantitative financial interest of such value that it would be reasonable to believe that the private interest could improperly influence the official’s performance of official duties.

As a member of the Board, City Officer may vote to promote, create and assist Y projects [description]. Further, as a member of the Board’s Y Committee, City Officer participates in Board’s efforts to create Y projects [certain locations], reviews proposed joint [] projects involving [], and makes recommendations to the full Board.

City Officer’s job as a [position] on the Project for Company X is the qualitative and quantitative type of financial interest that would be reasonable to believe may affect his/her impartiality in carrying out his/her official duties. The Project is adjacent to Location A which is within Board’s jurisdiction for Y. The value of being awarded the agreement for the Project will no doubt be highly coveted and valuable. A reasonable person could question whether City Officer may participate in discussions and cast his

⁵ Howard Whitton and Janos Bertok, Organisation for Economic Co-operation and Development, Managing Conflict of Interest in the Public Sector A: Toolkit 3 (OECD 2005).

⁶ See Howard Whitton and Janos Bertok, Organisation for Economic Co-operation and Development, Managing Conflict of Interest in the Public Sector: A Toolkit 13 (OECD 2005).

vote on Y, [], or [certain locations] based on what would benefit Company X as opposed to the public.

For instance, if Company X were to obtain the agreement to [action] the Project, Company X must, [description of Project requirements]. It would be in Company X's interest to promote Y in the area long before the Project is complete in order to provide current incentives for [certain group of people]. As a member of the Board, City Officer may vote to [action] for Y, and may be able to influence policies on how the city intends to capture Y value [further description], all of which could directly benefit the Project and Company X. The interests of Company X may not align with the best interests of the public. As a result, City Officer would have a conflict of interest because his/her official duties could be affected by his/her private financial interests.⁷

The Commission understands that there are several competing policies to consider. On one hand, the Commission does not want to discourage citizens with relevant industry knowledge and interest from participating on volunteer boards. On the other hand, the Commission must ensure that the city's ethics laws are followed so that the public trust is maintained. Trust in the integrity of the official and the organization can be seriously damaged by suspicion that the public official's performance or official duties could be affected by a personal conflict of interest.⁸

We commend City Officer for coming to the Commission for advice in advance of work on the Project.

B. Prohibitions on Future Employment After Serving on the Board

As part of his/her inquiry to the Commission, City Officer also asked for guidance on the restrictions he/she would face after the conclusion of his/her service on the Board. Therefore, we advise him/her on the restrictions on his/her employment after leaving city service.

For one year after City Officer's services ends with the city, he/she may not receive compensation from a private interest for any services rendered that involve a discretionary matter⁹ in which he/she participated or to which he/she was given access to

⁷ See also, Letter to [] from J. Hardin, Chief Advisory Attorney, Ohio Ethics Commission (date) at 1 (advising that a councilmember who has or whose business associates have, ownership or development interests in property that is directly adjacent to [], which are subject to the power and discretion of city council, will receive a particular, definite, and direct benefit or detriment from the [] development; therefore Ethics Laws prohibit such a council member from discussing, deliberating about, voting on, or participating in any other way, in any matters related to the [], including authorization of appropriations or authorization of the issuance of bonds to build it.)

⁸ Howard Whitton and Janos Bertok, Organisation for Economic Co-operation and Development, Managing Conflict of Interest in the Public Sector A Toolkit 17 (OECD 2005).

⁹ "Matter" includes, but is not limited to, cases, applications, projects, contracts, or proceedings that involve the use of discretionary authority by the city. In addition, "matter" is not limited to the specific case or

confidential information while working for or serving the city.¹⁰ Here, the Commission understands that City Officer has not yet participated in any discretionary matters related to the Y of the [locations] adjacent to the Project. Therefore, as the record appears to us now, City Officer could participate and receive compensation as [position] for the Project within a year after leaving city office.

V. CONCLUSION AND RECOMMENDATION

We advise City Officer not to work on any [] projects that are within the Y jurisdiction [location] of Board while he/she is a member of the [] Board. In the alternative, if City Officer chooses to work on any projects that are within the Y jurisdiction of the Board while he/she is a member of the Board, he/she must disclose his/her conflict of interest pursuant to RCH Sec. 11-103 and recuse himself/herself from participating or voting on those matters.

Finally, if City Officer chooses to resign from the Board, he/she could participate as [position] for the Project within a year after leaving city office because, to date, he/she has neither participated in any discretionary matters nor been given access to confidential information related to the Y of the [location] adjacent to the Project.

Dated: July 18, 2012

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

APPROVED AS TO FORM
AND LEGALITY:

/S/
CHARLES W. TOTTO, Executive Director and Legal Counsel
Honolulu Ethics Commission

application. Instead, it refers to the broader subject. For example, if a business wishes to develop a certain parcel of land and makes repeated applications for such development to City agencies, the “matter” is the development of the parcel of land and not the individual application. Honolulu Ethics Commission Guidelines for Employment After Leaving City Employment (Aug. 27, 2004).

¹⁰ See RCH Sec. 11-105 which provides: No person who has served as an elected or appointed officer or employee of city hall shall, within a period of one year after termination of such service or employment, appear for compensation before any agency of the city, or receive compensation for any services rendered on behalf of any private interests in relation to any case, proceeding or application with respect to which such person was directly concerned, or which was under such person’s active consideration, or with respect to which knowledge or information was made available to such person during the period of said service or employment. See also, Honolulu Ethics Commission Guidelines for Employment After Leaving City Employment (Aug. 27, 2004).