

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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Advisory Opinion No. 2012-6

I. SUMMARY

This case follows the Commission's prior action against former councilmember Rod Tam, in which the Commission approved a settlement between staff and Mr. Tam. Mr. Tam denied any wrongdoing, but agreed to pay the city \$11,700 in restitution and \$2,000 in civil fines.¹ Mr. Tam also agreed to the publication of staff's investigation and resolution of the former matter which resulted in the publication of Advisory Opinion No. 2010-2 (Mar. 3, 2010). Advisory Opinion No. 2010-2 reviewed the reimbursements to Mr. Tam from July 1, 2006 through June 30, 2009. The Commission retained jurisdiction over Mr. Tam's use of the Annual Contingency Allowance after June 30, 2009 and resolves those remaining issues in this opinion.

The Ethics Commission found that Mr. Tam violated Revised Charter of Honolulu ("RCH") Sec. 11-104 when he sought reimbursement from his Annual Contingency Allowance ("ACA") for expenditures after June 30, 2009 in the amount of \$813.53. Mr. Tam used \$585.93 of city money to pay for 114 appreciation lunches for city employees for decorating Honolulu Hale for Christmas and \$227.60 of city money to pay for a Chinese dinner for foreign delegates. The Commission imposes an \$813.53 fine on Mr. Tam, and publishes this opinion which identifies Mr. Tam and his conduct.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Honolulu City Council ("Council") is vested with the city's legislative power.² Council can, among other things, adopt an executive operating and capital

¹ Please see **EXHIBIT A**; Bates Nos. 000060-69 (Stipulation Regarding Alleged Violations of Standards of Conduct, EC No. 09-042(o); Exhibit A (Mar. 3, 2010).

² Revised Charter of Honolulu ("RCH") Sec. 3-101.

program by enacting budget ordinances; and provide for independent financial and performance audits and investigations of city operations.³ Council also has the power to investigate any subject that the council may legislate.⁴ Each member of the Honolulu City Council receives an Annual Contingency Allowance (“ACA”) to cover discretionary expenses in carrying out his or her duties as a councilmember:

Discretionary expenses connected with Council duties include expenditures incurred when carrying out official duties or activities; enhancing accessibility to, and communication with, the community and constituents; and carrying out the public’s expectations of a councilmember’s role and responsibility to the community and constituents.⁵

Some examples of reasonable and necessary discretionary expenses include: community meeting expenses such as facility rental fees, security services, light refreshments, flyer handouts, lei for speakers and rental of special equipment.⁶

The Administrative Manual in effect at that time required expenses to conform to the Ethics Commission’s guidelines regarding appropriate use of public funds and provided that the ACA shall not be used for any personal, political, campaign related expenses or expenses related to the conduct of other than official duties and activities of a councilmember.⁷

The ACA reimbursement process requires that a councilmember submit receipts to the Council fiscal office with a description of the items purchased, justification for the expenditures and a signed statement by the councilmember that the information submitted with the form is “correct and true”. The fiscal officer then determines only whether there are sufficient funds available to reimburse the councilmember. So long as there are sufficient funds in the councilmember’s ACA fund, the councilmember is reimbursed. The councilmember has the duty to properly account for the expenses.⁸ From November 2009 through February 2010, Mr. Tam submitted the following claims

³ RCH Sec. 3-110, 3-113, -114.

⁴ RCH Sec. 3-120.

⁵ Please see **EXHIBIT C**; Bates Nos. 000070-000072 (Administrative Manual of the Honolulu City Council (June 2007) at I-2, Sec. 1, 2 “General Administration, Annual Contingency Allowance.”).

⁶ Please see **EXHIBIT C**.

⁷ Id. at Secs. 2 and 3.

⁸ “There is no question that an officer with the authority to expend city funds has a duty to properly account for the expenses. This duty is imposed to prevent fraud against the public and to place the responsibility for public funds on the official charged with care of the funds.” Advisory Opinion No. 2010-2 citing American Jurisprudence 2d, Public officers and Employees, Secs. 241, 257.

in the total amount of \$813.53, among others, for reimbursement from ACA:

1. 24 bentos from Akyth, Inc. in the amount of \$132.17 on November 22, 2009 for “city employees installing city’s Christmas decorations (tree, lights, etc.) at City Hall”⁹ (referred to herein as “Allegation No. 1”);
2. 45 sandwiches from City Café in the amount of \$236.00 on December 2, 2009 for “city maintenance employees decorating City Hall for Christmas”¹⁰ and snack chips from Costco in the amount of \$28.76 on December 1, 2009 for “city maintenance employees. Mahalo for setting-up City Hall’s Christmas displays”¹¹ (referred to herein as “Allegation Nos. 2 and 3” respectively);
3. 45 oyster sauce chicken cake noodle lunches in the amount of \$189.00 from Liliha Seafood Restaurant on January 5, 2010 for city employees lunch in appreciation of City Lights set up and removal”¹² (referred to herein as “Allegation No. 4”); and
4. Dinner in the amount of \$227.60 at Empress Restaurant for “[h]osting meeting with delegates from Henan Province, China. Re: City and County of Honolulu’s democratic government vs. communism in China and formulating diplomatic relationship (sic) into the future for City Council”¹³ (referred to herein as “Allegation No. 5”).

On August 18, 2010, the Ethics Commission found probable cause¹⁴ that Mr.

⁹ Please see **EXHIBIT D**; Bates Nos. 000032-33 (R. Tam City and County of Honolulu City Council Claim for Disbursement from Annual Contingency Allowance (Nov. 24, 2009); Receipt from Akyth, Inc. in the amount of \$132.17 (Nov. 22, 2009).

¹⁰ Please see **EXHIBIT E**; Bates Nos. 000034-35 (R. Tam City and County of Honolulu City Council Claim for Disbursement from Annual Contingency Allowance (Dec. 3, 2009); Receipt from City Café in the amount of \$236.00 (Dec. 2, 2009).

¹¹ Please see **EXHIBIT F**; Bates Nos. 000036-37 (R. Tam City and County of Honolulu City Council Claim for Disbursement from Annual Contingency Allowance (Dec. 3, 2009); Receipt from Costco in the amount of \$56.08 (Dec. 1, 2009).

¹² Please see **EXHIBIT G**, Bates Nos. 000038-39 (R. Tam City and County of Honolulu City Council Claim for Disbursement from Annual Contingency Allowance (Jan. 5, 2010); Receipt from Liliha Seafood Restaurant in the amount of \$189.00 (Jan. 5, 2010).

¹³ Please see **EXHIBIT H**, Bates Nos. 000040-41 (R. Tam City and County of Honolulu City Council Claim for Disbursement from Annual Contingency Allowance (Feb. 19, 2010); Receipt from Empress Restaurant in the amount of \$227.60 (Jan. 13, 2010).

¹⁴ Probable cause for a violation exists when the facts and circumstances within one's knowledge and of which one has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been committed. See *State v. Maganis*, 109 Hawai'i 89, 93 (Haw. App. 2005) certiorari granted 109 Hawai'i 32 (Haw. 2005) opinion affirmed in part, vacated in part 109 Hawai'i 84 (Haw. 20005); *U.S. v. Lim*, 984 F.2d 331, 337 (9th Cir. 1993) certiorari denied 508

Tam violated the city's ethics laws (RCH Sec. 11-104 misuse of city resources) for seeking reimbursement for the above-listed meal expenses because they were neither directly related to a Council issue or a councilmember duty nor reasonable and necessary.

On August 24, 2010, Commission staff sent a Notice of Possible Violation ("Notice") to Mr. Tam via his attorney Jack Schweigert which provided notice of the above allegations of misconduct and an opportunity for Mr. Tam to respond to the allegations.¹⁵

On September 20, 2010, Mr. Schweigert responded to the Notice on behalf of Mr. Tam. The response alleged that Mr. Tam disputed all allegations that he violated the city's ethics laws. His justification for Allegation Nos. 1-4, above, was that purchasing food for city employees was allowable because it was Mr. Tam's "opportunity to network with City employees to discuss morale, clarification of job descriptions, and working conditions." Mr. Tam believed that this discussion is directly related to his duty as a councilmember because he helped to set the budget on city employee positions. In regard to Allegation No. 5, the dinner at Empress Restaurant on January 13, 2010, Mr. Tam alleged that the request came from a visiting delegation of Henan Province in China. The purpose was related to his purported duty to "formulate international diplomatic relations."¹⁶

Mr. Tam was termed out of office at the end of December 2010.

On March 28, 2012, Ethics Commission staff sent a Notice of Investigatory Hearing; First Request for Answers to Interrogatories; and First Request for Production of Documents (collectively referred to herein as "Notice of Hearing" and "Discovery Requests") to Mr. Schweigert. The Notice of Hearing informed Mr. Tam via Mr. Schweigert that the matter was set for an investigatory hearing before the Honolulu Ethics Commission on April 25, 2012 at 11:30 am. The Discovery Requests asked Mr. Tam to, among other things, provide the names and contact information of witnesses who saw him distribute food, participants who consumed food, reasons justifying the expenditures, and all documents related to the expenditures.¹⁷ On May 17, 2012, Mr. Tam provided a response to the Discovery Requests.¹⁸

U.S. 965 (1993); U.S. v. Jit Sun Loo, 478 F.2d 401, 404 (9th Cir. 1973); Sunn v. City & County of Honolulu, 852 F.Supp. 903, 908 (D. Haw. 1994). See also, Honolulu Ethics Commission Advisory Opinion No. 2008-4; Honolulu Ethics Commission Procedures for Handling Requests for Advice and Complaints (Sep. 21, 2006).

¹⁵ Please see **EXHIBIT B**.

¹⁶ Please see **EXHIBIT I**; Bates Nos. 000162-164 (Email from Jack Schweigert responding to Aug. 24, 2010 notice of possible violations of the standards of conduct from Chuck Totto (Sept. 20, 2010).

¹⁷ Please see **EXHIBIT J**; Bates Nos. 000165-176 (Notice of investigatory hearing; first request for answers to interrogatories (March 28, 2012).

¹⁸ Please see **EXHIBIT K**; Bates Nos. 000177-190 (Answers to interrogatories via email from Jack

In regard to Allegations Nos. 1-4, Mr. Tam could not provide any names or contact information of witnesses who saw him distribute food, or participants who consumed the food. He explained that he was justified in providing lunch for city employees who decorated city hall because, "it was the most efficient and economical way to communicate with a large number of city workers about payroll budget issues confronting the city council. The expenditure made it possible to get a number of city workers together from different departments in one place at one time...if the [meals] were not provided, the workers would disperse and go to different locations to buy and eat their lunches."¹⁹

In regard to Allegation No. 5, Mr. Tam only identified by name one person. Mr. Tam explains that the expenditure was justified because he was enabling sister city relationships pursuant to City Resolution Nos. 91-240 and 03-52 which provides guidelines for the establishment and implementation of sister city relationships.²⁰ Nothing in the guidelines suggests that city council expenditures should include meals for foreign delegations to court a sister city relationship.

Mr. Tam requested a hearing before the Ethics Commission regarding the allegations contained in the Notice. Mr. Tam disputes all allegations that he violated the city's ethics laws. On August 30, 2012, Mr. Tam was heard before the Ethics Commission. On September 12, 2012, the Commission rendered this decision.

The hiatus between Mr. Tam's request and the investigatory hearing was pursuant to a request from Mr. Nelson Goo, Mr. Tam's criminal defense attorney to stay this case pending resolution and sentencing of Mr. Tam's criminal case regarding prior charges of false claims for food and restaurant bills. In November 2011, Mr. Tam entered a deferred guilty plea to 26 misdemeanor counts of theft and unsworn falsification to authorities and, as a result, was sentenced to two days in jail (December 30, 2011 through January 1, 2012) and 300 hours of community service.

III. ISSUES

Are Mr. Tam's reimbursements in the amounts of: (a) \$585.93 from the ACA for 114 lunches for city employees decorating Honolulu Hale for Christmas; and (b) \$227.60 from the ACA for a 10-course Chinese dinner for visiting Chinese delegates, a misuse of city resources in violation of RCH Sec. 11-104?

Schweigert (May 17, 2012).

¹⁹ Please see **EXHIBIT K**; Bates Nos. 000177-190 (Answers to interrogatories via email from Jack Schweigert (May 17, 2012), Response to Nos. 5, 12, 19, 26.

²⁰ Please see **EXHIBIT K**; Bates Nos. 000177-190 (Answers to interrogatories via email from Jack Schweigert (May 17, 2012), Response to Nos. 31-38; Reso. 91-240, 03-52.

Yes, because it is more likely than not that these expenditures were not for a legitimate public purpose as they were neither reasonable and necessary nor directly related to a discussion of a Council matter or a councilmember's duty including dealing with constituent concerns.

IV. ANALYSIS

Any expenditure of public funds must be for a legitimate public purpose. See Article VII, Section 4, Hawaii Constitution (No appropriation of public money shall be made except for a public purpose); Revised Charter of Honolulu (RCH) Sec. 11-104²¹ (prohibiting city officials from using city resources for purposes that are unrelated to their city job.)

The Commission clearly stated that, "for a meal to qualify for ACA reimbursement, the meal had to be directly related to a discussion of a Council matter or a councilmember's duty, including dealing with a constituent concern."²² In Advisory Opinion No. 2010-2, the Commission found that Mr. Tam did not use his ACA funds for a legitimate public purpose when he requested reimbursement for meals that were not directly related to his councilmember duties such as taking Chinese delegates out for meals to discuss broad issues such as "Hawaii's economy", "economic development", "city's economy", and "international relations". Id.

Further, expenditures used for a legitimate public purpose must be used for reasonable and necessary expenses. RCH Sec. 13-110 ("all officers and employees of the city shall be entitled to their traveling or other necessary expenses incurred in the performance of their official duties"); Commission's Guidelines on Gifts to City Agencies (the gift to the city [i.e., city resources] must only be used for reasonable and necessary expenses and not for the sole benefit of the affected officer or employee). In Advisory Opinion No. 2011-6 the Commission found that Mayor Peter Carlisle's use of city money to pay for his wife to accompany him to China was not a legitimate public purpose because her presence in China was not a reasonable and necessary expense for him to carry out his duty as a representative of Honolulu despite cultural protocol. Advisory Opinion No. 2011-6 (Jan. 17, 2012).

In a case such as this, an ethics violation occurs if there is a preponderance of the evidence, meaning greater than 50%, or more likely than not, that a city officer or employee knew or should have known that his/her expenditure was not directly related to his/her city job and was not used for a reasonable and necessary expense.

²¹ See RCH Sec. 11-104 which provides: "Elected or appointed officers of employees shall not use their official positions to secure or grant special condition, treatment, advantage, privilege or exemption to themselves or any person beyond that which is available to every other person."

²² Please see Exhibit L; Bates Nos. 000042-59 (Advisory Opinion No. 2010-2 (Mar. 1, 2010) at 7).

Here, the burden of proof has been met because the evidence shows that it is more likely than not that Mr. Tam knew or should have known that his expenses for appreciation lunches for city workers installing Christmas lights were not directly related to his city duties as a councilmember and also not reasonable and necessary expenses, therefore he should not have requested reimbursement for it.

The evidence also shows that Mr. Tam knew or should have known that dining with foreign delegates to continue discussions that could have been completed at the office was also not directly related to his councilmember duties and was not a reasonable and necessary expense.

A. Allegation Nos. 1 Through 4 Totaling \$585.93

Allegation Nos. 1 through 4 totaling \$585.93 in reimbursements from the ACA were for 114 lunches for city employees decorating Honolulu Hale for Christmas.

Mr. Tam's position is that the expenditures were authorized because they were directly related to his duties as councilmember as an opportunity to "network with City employees to discuss morale, clarification of job descriptions, and working conditions." Mr. Tam believes that this discussion is directly related to his duty as a councilmember because he helps to set the budget on city employee positions.

But, there was no such justification on the receipts or original claims for reimbursements.²³ The original explanations on the receipts stated that they were to show appreciation for the city employees who decorated City Hall for Christmas. There is no direct relationship between using taxpayer funds for an appreciation lunch for city employees and Mr. Tam's councilmember duties.

The Commission finds that the documentation of evidence submitted to the council fiscal officer for reimbursement most credible because it reflects the justification closest in time to the purchases; and Mr. Tam signed the forms stating that the statements were "correct and true". The weight of the evidence has shown that the expenditures for food items which amounted to 114 lunches for city employees on three separate occasions (Allegation Nos. 1-4) were simply "appreciation lunches" for the maintenance workers who decorated Honolulu Hale for Christmas.

Even if Mr. Tam's thank you lunches which could be characterized as a "community meeting" with the city employees to discuss concerns, there is still no justification for such generous expenditures. Taxpayer money may only be used for reasonable and necessary expenses that are directly related to a councilmember's duties. City Council's Administrative Manual specifically provides an example of what is

²³ Please see **Exhibits D-G**.

acceptable for community meetings: facility rental fees, security services, light refreshments, flyer handouts, lei for speakers, and rental of special equipment.²⁴ Even the Executive Branch, Customer Services Department that is in charge of City Lights, did not use taxpayer money to provide meals or a Mahalo Party to city employees for decorating City Hall.²⁵ According to projected budgeting for the event, all such meals were to be donated by supporting non-profit organizations.²⁶ Here, Mr. Tam treated 114 employees, some more than once, to entire lunches on three separate occasions.²⁷

Even if topics related to setting the city budget were discussed, the evidence has also shown that these lunches were not reasonable or necessary for Mr. Tam to carry out his city duties as he claims. The evidence has shown that other city departments regularly hold “brown bag” sessions where employees attend on their own time and bring their own lunch to a conference room where issues are discussed or information is disseminated.

B. Allegation No. 5 Totaling \$227.60

In regard to Allegation No. 5, the reimbursement from ACA in the amount of \$227.60 for dinner at Empress Restaurant on January 13, 2010, Mr. Tam states that he invited the delegation to dinner due to cultural protocol after they formally visited him at Honolulu Hale²⁸. During the dinner they discussed the characteristics of the cities, the delegation’s comfort in coming to Hawaii, Chinese restaurant food, student teacher exchanges, and Hawaii tourism. Mr. Tam states that the purpose of this expenditure was related to his duty to “formulate international diplomatic relations.”

The Commission found in Advisory Opinion No. 2010-2, that these very same types of expenditures for discussions related to broad subjects such as “Hawaii’s economy,” “economic development”, “international relations,” were not directly related to Mr. Tam’s city duties and were not reasonably or necessary expenses.²⁹

²⁴ Please see **EXHIBIT C**; Bates Nos. 000070-000072 (Administrative Manual of the Honolulu City Council (June 2007) at I-2, Sec. 1, 2 “General Administration, Annual Contingency Allowance.”).

²⁵ Please see **EXHIBIT M**; Bates Nos. 000004-13 (City and County of Honolulu Expenditure Transaction Detail For Accounting periods 1 to 13).

²⁶ Please see **EXHIBIT N**; Bates Nos. 000002-3 (Projected Expenses/Budget 2009 City Lights Programs by J. Manke (Oct. 8, 2009)).

²⁷ See **Exhibits D, E, and G.**

²⁸ Please note, this contradicts his September 20, 2011 statement (**Exhibit I**) where he claimed the Chinese requested the dinner.

²⁹ Please see **EXHIBIT L**; Bates Nos. 000042-59 (Advisory Opinion No. 2010-2 (Mar. 3, 2010) at Sec. II.D.1. Please see **EXHIBIT Q**; Bates Nos. 000014-25 (Councilmember ACA Expenditure Reports).

The Discovery Requests asked Mr. Tam to justify the expenses and describe how he formulated a diplomatic relationship with Henan Province delegates into the future for City Council through the \$227.60 meal. Mr. Tam's response states: "Initial communication of Henan Province and City and County of Honolulu's characteristics." Mr. Tam indicates that this expenditure was authorized by Resolution Nos. 91-240 and 03-52 to help in the process of developing international government relationships and the invitation was a matter of cultural practice, protocol and was the "proper way to establish a business relationship with the delegation."

First, Mr. Tam did not justify this expense as an attempt to establish sister city relationships in any of the original documentation. The original documentation states: "Food for meeting with delegates from Henan Province, China; RE: City & County of Honolulu's democratic government vs. communism in China and formulating diplomatic relationship into the future for City Council."

Second, nowhere do the referenced resolutions authorize city officials to treat foreign diplomats to dinners as a means of establishing sister city relationships.

Third, no other City Councilmember requested reimbursement for these types of expenditures for foreign delegates. For example, Councilmember Ikaika Anderson was instrumental in establishing the sister city of Marjuro Atoll, capital of the Republic of the Marshall Islands, yet Councilmember Anderson did not make similar claims for meal reimbursement.

Mr. Tam relies on HRS Sec. 46-9 for justification of funds. HRS Sec. 46-9 provides:

Any county...may make expenditures of public funds, whenever the funds are available in order to further the ties of friendship, understanding, and goodwill existing under sister-city relationships entered into by resolution duly adopted by the respective legislative bodies of each county...(Emphasis added.)

This law is inapplicable to the situation here, as there were no "existing" sister-city relationships between Honolulu and the cities in Henan Province.

Finally, Mr. Tam could have conducted all of these communications with the delegation when they visited him at Honolulu Hale. This 10-course Chinese meal at the largest Chinese restaurant in Honolulu was not a reasonable and necessary expense directly related to Mr. Tam's duties as a councilmember. Mr. Tam could have paid for this meal out of his own pocket, but not out of the city taxpayer's.

The Commission finds that the documentation on the ACA reimbursement forms submitted to the council fiscal officer to be most credible because they were made closest in time to the purchases and Mr. Tam signed the form stating that the information on the

form was “correct and true”. The weight of the evidence shows that there was no justification of the expense to “establish sister city relationships”. But, even if establishing sister city relationships was truly the purpose of the expenditure, the expense was still not reasonable and necessary because the discussions could have been held in Mr. Tam’s office and no other councilmember has such expenditures.

C. The Commission Imposes A \$813.53 Civil Fine On Mr. Tam Based On Restitution To The City

The Commission weighs the twelve mitigating and aggravating circumstances of the individual case to determine the appropriate imposition of a civil fine employee was cooperative in the investigation. See RCH Section 11-106 and ROH Section 3-8.5(a); ROH Sec. 3-8.5(d)(2).³⁰ Under ROH Section 3-8.5(d), the Commission may impose civil fines of up to \$5,000 or three times the amount of the financial benefit sought or resulting from each violation, whichever is greater. In deciding whether to impose a civil fine, the Commission evaluates the aggravating and mitigating factors below.

The nature and seriousness of the violations are at the level of negligence. Mr. Tam knew or should have known that the appreciation lunches and dinner for foreign dignitaries were not directly related to his councilmember duties and were not reasonable or necessary expenses.

The financial loss to the city for these expenditures was about \$813.53 for conduct that occurred over a four month period. Portions of at least 21 days of Ethics Commission’s staff attorney’s time have been invested in this case.

By using the ACA fund to treat 9 foreign dignitaries and 114 city employees to meals, Mr. Tam enhanced his goodwill with these groups at the taxpayers’ expense. This likely increased his stature in the community and inured

³⁰ Section 11-106. Penalties and Disciplinary Action for Violations –

The failure to comply with or any violation of the standards of conduct established by this article of the charter or by ordinance shall be grounds for impeachment of elected officers and for the removal from office or from employment of all other officers and employees. The appointing authority may, upon the recommendation of the ethics commission, reprimand, put on probation, demote, suspend or discharge an employee found to have violated the standards of conduct established by this article of the charter or by ordinance.

ROH Sec. 3-8.5 Violation--Penalty.

(a) The failure to comply with or any violation of the standards of conduct of this article or of Article XI of the revised charter shall be grounds for impeachment of elected officers and for the removal from office or from employment of all other officers and employees. The appointing authority may, upon the recommendation of the ethics commission, reprimand, put on probation, demote, suspend or discharge an employee found to have violated the standards of conduct established by this article. Nothing contained herein shall preclude any other remedy available against such officer or employee.

to his political benefit - Mr. Tam ran for Mayor shortly thereafter.

Mr. Tam placed an unnecessary burden on the Commission by firing his attorney two days before the investigatory hearing and then submitting over 102 pages of new documents less than 24 hours prior to the hearing. Much of the information he produced in those pages is highly suspect.

Despite the aggravating factors listed above, the Commission believes that a large mitigating factor in this case is the lack of guidance provided by the ACA Manual that was available at that time. When Mr. Tam made the subject requests for reimbursement, the City Council lacked appropriate policy and guidance related to ACA expenditures. According to the June 2007 Administrative Manual of the Honolulu City Council, each member of the Honolulu City Council receives an Annual Contingency Allowance (“ACA”) to cover discretionary expenses in carrying out his or her duties as a councilmember:

Discretionary expenses connected with Council duties include expenditures incurred when carrying out official duties or activities; enhancing accessibility to, and communication with, the community and constituents; and carrying out the public’s expectations of a councilmember’s role and responsibility to the community and constituents.³¹

The Commission believes that this guidance is too broadly worded to provide Mr. Tam with enough notice to justify imposing a fine of more than \$813.53, the cost of the meals. The Commission understands that the ACA Policy has since been revised and is under further review by the City Auditor. The Commission encourages the City Council to continue to strengthen the ACA reimbursement requirements.

Based on review of the totality of the above factors, the Commission believes that imposing a fine of \$813.53 on Mr. Tam is warranted here in order to make the city whole for its loss.

D. The Commission Will Publish An Opinion Detailing Mr. Tam’s Identity And Misconduct

The Commission must weigh the public’s interest in knowing the conduct of its government officials as well as the Commission’s work to enforce the ethics law against the privacy interests of the government official. A government record, such as a formal advisory opinion, may not be disclosed if disclosure would constitute “a clearly unwarranted invasion of personal privacy.” However, disclosure of a government record

³¹ Please see **EXHIBIT C**; Bates Nos. 000070-000072 (Administrative Manual of the Honolulu City Council (June 2007) at I-2, Sec. 1, 2 “General Administration, Annual Contingency Allowance.”).

does not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interest of the individual. Public interest in disclosure includes official information that sheds light on the conduct of government officials (Mr. Tam) and on an agency's (the Commission) performance of its statutory purpose.

In balancing a government employee's privacy interests against the public's interest in disclosure, a court should consider several factors, including: (1) the government employee's rank; (2) the degree of wrongdoing and strength of evidence against the employee; (3) whether there are other ways to obtain the information; (4) whether the information sought sheds light on a government activity; and (5) whether the information sought is related to job function or is of a personal nature. The factors are not all inclusive, and no one factor is dispositive.

See Office of Information Practices ("OIP") Op. Ltr. No. 10-03, at 7 citing Perlman v. United States Dept. of Justice, 312 F.3d 100, 107-08 (2d Cir. N.Y. 2002), vacated, 541 U.S. 970 (2004). See also, National Archives and Records Administration v. Favish, 541 U.S. 157 (2004) (holding that "where there is a privacy interest protected by [Freedom of Information Act] Exemption 7(c) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must . . . produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.").

Mr. Tam has committed five more ethics violations costing the city \$813.53 through the continued abuse of the ACA fund reimbursement. This is especially egregious because he held a high position in the city government and he had already admitted what he called "blind errors due to recalling from memory" for similar allegations in a May 2009 Memo to the Ethics Commission, yet he continued to make these claims for reimbursement and claims no wrongdoing. The evidence against Mr. Tam is strong as there are documents made at or near the time of the actual expenditure that support every one of the claims. There is no other means for the public to find out that Mr. Tam has continued to violate the city's ethics laws and what is being done to resolve the violations. Finally, Mr. Tam's identity and the details of the Advisory Opinion would shed more light on what the Ethics Commission is doing to enforce the city's ethics laws.

All of the factors above weigh in favor of identifying Mr. Tam in an advisory opinion pursuant to the Uniform Information Practices Act, HRS Chapter 92F. Under the Commission's Opinion Policy, Mr. Tam will be given notice and a copy of the opinion 10 days before the opinion is published.

V. CONCLUSION

The Commission finds the following:

(1) Mr. Tam violated RCH Sec. 11-104 because it is more likely than not that Mr. Tam used city resources for purposes that were not reasonable and necessary and not directly related to his city position as stated in Allegation Nos. 1-5 in the Notice;

(2) Ethics Commission hereby imposes a civil fine in the amount of \$813.53 on Mr. Tam to be paid forthwith; and

(3) The Ethics Commission is authorized to publish this advisory opinion identifying Mr. Tam and detailing his conduct.

DATED: OCTOBER 1, 2012

APPROVED:

/S/
CHARLES W. GALL, CHAIR

APPROVED AS TO FORM:

/S/
CHARLES W. TOTTO, EXECUTIVE DIRECTOR AND LEGAL COUNSEL