ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU
715 SOUTH KING STREET, SUITE 211, HONOLULU, HAWAII 96813-3091
Phone: (808) 768-7786 • Fax: (808) 527-6936 • EMAIL: ethics@honolulu.gov
Internet: www.honolulu.gov/ethics

MUFI HANNEMANN
MAYOR

CHARLES W. TOTTO
EXECUTIVE DIRECTOR & LEGAL COUNSEL

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PROCEDURES FOR HANDLING REQUESTS FOR ADVICE AND COMPLAINTS

I. Introduction

The purpose of this guideline is to describe the steps by which the Honolulu Ethics Commission (Commission) may ensure the fair and efficient processing of requests for advice and complaints from city personnel and the public. Responding to requests for advice and complaints of misconduct is one of the core functions of the Commission (along with ethics education and compliance enforcement). The procedures described herein are for general guidance only and shall not create any duty on the part of the Commission or create any right on the part of anyone requesting advice or submitting a complaint.

II. Requests for Advice

A. Background

A request for advice is the submission to the Commission of a question as to whether a future action of a city employee or officer would violate any ethics law. Written requests by city personnel must be responded to pursuant to Section 3-6.6(a), Revised Ordinances of Honolulu (ROH).[1] Similarly, though not required by

[1] Sec. 3-6.6 Request for opinions by officers or employees.

(a) Any officer or employee may request an opinion from the commission relating to any situation involving such officer or employee which may give rise to the possibility of a conflict of interest under Revised Charter, Article XI. Any officer or employee also may request an

law, the Commission has always answered oral requests from city personnel. The public, including the news media, may ask for advice from the Commission or file complaints as provided by the revised Charter and the revised ordinances.

B. Advice by the Commission or its staff

Commission staff (Staff) reviews a request for advice and makes an informal written or oral opinion. Staff answers the requests by applying the Charter, ordinances, and the Commission's prior advisory opinions to the specific facts presented by the requester. However, if one of the following factors exists, Staff will submit the request to the Commission:

1. The case raises an important issue of first impression, that is, the Commission has not taken a position on the issue in a formal advisory opinion;

2. The case raises a new or difficult policy issue;

3. The opinion is likely to set precedent for a number of similar cases;

4. The requester asks for a formal advisory opinion from the Commission; or

5. There are other unique aspects to the case of which the Commission should be aware.

Should the requester disagree with the staff opinion, the requester is informed that he/she may ask the Commission for a formal advisory opinion.

III. Complaints

A complaint is the submission inquiring whether or suggesting that the conduct of a city officer or employee breached the ethics laws. Anyone may file a complaint against a city officer or employee, and the Commission may

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opinion from the commission on a situation which may give rise to the possibility of unethical conduct under this article. Any officer or employee also may request an opinion from the commission relating to the solicitation, acceptance, or receipt of a gift.

independently commence an investigation. The Commission must respond to a written complaint and, in its discretion, may respond to an oral complaint. *See* Advisory Opinion No. 2006-1.

The complaint process generally follows these steps:

1. Receipt of complaint.[2]

2. Staff determination that the matter described in the complaint is within the jurisdiction of the Commission.[3]

3. Staff determination that the alleged conduct, if true, would constitute a violation of an ethics law by the subject of the complaint (Subject).

4. Investigative phase:[4] More information is gathered to determine whether the facts support a finding of probable cause that the Subject violated an ethics law;[5] including, for example:

    a. Interviewing the Complainant, Subject[6] or witnesses;[7]

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[2] The Commission or Staff may initiate a complaint based on credible information. Section 11-107, Revised Charter of Honolulu, and ROH Section 3-6.3(d).

[3] If not within the Commission's jurisdiction, the matter may be referred to the appropriate agency.

[4] Commissioners and Staff may not disclose the facts of an investigation, including the identity of the Complainant, except to the extent necessary to continue the investigation. ROH Sections 3-6.3(g) and 3-6.7(a).

[5] "Probable cause" means there is reason to believe that the Subject violated the ethics laws. The term does not mean that it is more likely than not that the Subject committed a violation. That issue is decided in a later hearing.

[6] If the Subject is a union employee, he/she is informed that of the right to have a union representative present for the interview. Non-union employees may have a representative or attorney present if they so request.

[7] After a formal resolution, the EC may issue a subpoena for witnesses and documents. ROH Section 3-6.3(e).

b. Reviewing documents that are relevant to the complaint;

c. Requesting the Subject to respond to the complaint; or

d. Holding an investigative hearing.[8]

5. If Staff finds that there is not enough evidence to find probable cause that the Subject violated an ethics law, the case is closed with a letter to the Complainant explaining the results of the investigation[9] and noting that, if the Complainant disagrees with Staff's analysis, the Complainant may ask the Commission to review Staff's conclusion and determine probable cause.

6. If Staff finds that the evidence supports a finding of probable cause, the matter is referred to the Commission for its determination of probable cause:

   a. If the Commission finds no probable cause under the facts available, an advisory opinion is rendered stating the reasons for the finding; or

   b. If the Commission finds probable cause that the Subject's conduct breached an ethics law, the Commission issues a Notice of Possible Violation of the Standards of Conduct ("NOPV"), which describes the misconduct and the specific laws violated.

7. The Subject may respond to the NOPV:

   a. By explaining his/her conduct; and/or

   b. By requesting a hearing (contested or investigative) before the Commission.

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[8] The EC may require witnesses to attend an investigative hearing before the Commission or the staff. Rule 5.3(a), Rules of Procedure, Honolulu Ethics Commission.

[9] This is similar to a police officer or prosecuting attorney determining that the case should not go forward because of a lack of evidence.

8. If the Subject fails to respond to the NOPV, the Commission is authorized to render an advisory opinion based on the information available to it.[10]

9. After a hearing or upon a recommended settlement from Staff and the Subject, the Commission renders an advisory opinion.

10. If the Commission recommends discipline, the appointing authority must state what action it will take on the Commission's recommendations.

IV. Anonymous complaints

The Commission determined that it was authorized to investigate anonymous complaints in Advisory Opinion No. 2006-1. A complaint may be anonymous for myriad reasons, including a fear of retaliation or to undermine the Subject's reputation.

Anonymous complaints raise several hurdles for the Staff. From an investigative standpoint, there is no one to ask questions about the points raised by other witnesses or the Subject. Without a Complainant, the investigator is likely to have insufficient leads to track.

It is important to remember that there are significant protections built into the 10-step complaint process discussed above, especially at the probable cause and disciplinary stages. If there is insufficient evidence to corroborate the anonymous complaint, it will likely be closed.

Besides following the 10-step process described above, the Commission and Staff will consider the following for anonymous complaints:

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[10] Sec. 3-6.7 Requests by third parties.
(c) Where no hearing is requested by the officer or employee involved, the commission shall render its opinion on the basis of the information available; provided, that the commission may request for additional information when deemed necessary.

1. The complaint should give sufficient information on its face so that the investigator may determine its truth or falsity through corroborating witnesses or documents.

2. The more serious the charge, the more detailed the information should be.

3. Anonymous complaints generally will be accorded lower priority when weighing them against other matters that demand the Commission's scarce resources.

4. Rather than conducting a traditional investigation, an alternative approach should be considered whereby Staff informs the Subject of the complaint or his/her supervisor that the complaint was submitted and ask the Subject or supervisor whether the complaint is valid. This puts the Subject or supervisor on notice and may result in cautioning the Subject without the need for further action.

V. Requests for general advice and news media requests

The Commission often receives requests asking for general advice about the operation of an ethics law. Staff will use its best efforts to respond to requests for general advice about the ethics laws, but should always caution a requester that the facts will determine whether an ethics violation might occur.

The news media often asks for opinions whether the conduct of an individual violates the ethics laws. The policy of the Commission is that no comment should be made to the media or other third parties on matters that may come before the Commission as a result of a request for advice or complaint. This will help avoid concerns that the Commission or Staff has prejudged a matter that may come before the Commission.

However, when asked by a member of the media, the Commission or Staff may describe generally the ethics laws and issues that may be relevant to the conduct of an officer or employee. In addition, the Commission or Staff may confirm whether an ethics complaint has been filed regarding a city officer or

employee by a third party where the media representative states that the third party states that such a complaint was filed with the Commission.

VI. Quarterly reports on unresolved complaints

On a quarterly basis, the Staff will inform the Commission of the status of any requests for advice or complaints that have not been concluded within 180 days from submission to the Commission.

Date: SEP 21 2006

LEX R. SMITH, Chair