

OPINION NO. 93

Members of the legislature have requested "guidelines for disclosures" filed pursuant to HRS, §84-18. The relevant section of the law states:

Whenever an employee or legislator has a controlling interest in any matter or a substantial financial interest which he believes may be affected by a state agency, the nature and the extent of the interest shall be disclosed to the Commission ... by the legislator affected by actions of such state agency.

The information of the disclosure shall be confidential and the Commission shall not release the contents of the disclosures except as may be permitted pursuant to this chapter.

To assist legislators in satisfying the requirements of the disclosure law we shall discuss the rationale of financial disclosure and the categories of interests which in our opinion should be disclosed under law.

Financial disclosure has its origin in the law of trusts. The general rule is that a trustee must affirmatively disclose relevant information to those to whom he owes a duty. Any fiduciary is expected to disclose information concerning conflicting interests to the person he serves.

Since legislators are public trustees, it was reasonable for the legislature, in passing the State ethics law, to require financial disclosure of legislators under certain circumstances.

The State ethics law requires disclosure of financial interests which may conflict with the duties of the legislator. Since this disclosure made to the State Ethics Commission is by law confidential, a responsibility of the highest calibre is placed upon the Commission to assist legislators in fulfilling their public trust in accordance with the ethics law. Therefore, each legislator should be sensitive to avoiding conflicts which a prudent fiduciary would be expected to avoid and to disclose those conflicts or interests which a prudent fiduciary would disclose to his client. If there is conscientious disclosure by legislators to the Ethics Commission in a form which can be reasonably administered and reviewed, the people of the State of Hawaii will have a meaningful disclosure provision in their ethics law.

In Opinion No. 15 this Commission stated that: "The purpose of this section [HRS, §84-18] is to place a public servant's private interest on record so the Commission can view the action he takes in light of these interests."

The law requires a legislator to file a disclosure when he has a controlling interest or a substantial financial interest in any matter which may be affected by a state agency.

The Hawaii requirement differs from other jurisdictions in that the disclosure is made confidentially to a state agency rather than to the public; and the interest must be one which is substantial or controlling and which may be affected by a state agency. The Hawaii law

is, therefore, to be distinguished from the law at issue in *Carmel-by-the-Sea vs. Young*, 2 Calif. 3rd 259, 85 Calif. Rptr. 1, 466 Pac. 2d 225 (1970).

Each legislator should be aware that he must disclose the interests of his spouse and minor dependent children if they are substantial or controlling interests which may be affected by a state agency.

A controlling interest is defined under HRS, §84-3(3) to be "An interest which is sufficient in fact to control whether the interest be greater or less than 50%." We take this to mean that "de facto" control will be the rule rather than "de jure" control and that, therefore, the percentage of interest owned is not so important as the actual ability of an individual to manage or direct a business.

A substantial financial interest may be a sufficiently large interest in a) an ownership interest in a business; b) a creditor interest in an insolvent business; c) an employment interest or prospective employment interest for which negotiations have begun; or d) an ownership interest in real or personal property. Whether an interest is substantial or not will depend largely on certain relevant factors, such as 1) the other income and assets of the individual; 2) any other action regarding that interest which the individual may have taken; and 3) the position of the individual and his role in the decision-making process. See Opinion No. 30.

To assist legislators in filing their disclosures, we have designed a new disclosure form which lists categories of interests which present potential conflicts for legislators.[†] We recommend that each legislator inventory his assets in each category and list the nature and the extent of the interest.

We think that all employment should be disclosed, regardless of the amount of compensation. Any private employment of a legislator presents some conflict because at one time or another, the private employer will be specially interested in certain legislative action. Moreover, the private employment may be of a nature which may seriously interfere with the activities and duties of a legislator while the legislature is in session, thereby giving the appearance of a legislator using his office for his own purposes. It is in the public interest that this Commission should be able to observe the effect of private employment on his public office and to advise him whether he should consider terminating his private employment.

Besides disclosing all private employment, a legislator should disclose all his directorships and corporate (or other business-related) offices whether compensated or not. Even though a director or officer may not be paid for his services, he has a fiduciary duty to that corporation or business. This in itself, in our opinion, is a substantial financial interest.

A legislator should also disclose all personal and real property valued above \$5,000, except for personal effects or real property held for the exclusive use of the legislator and his family, such as a house or car, as distinguished from assets held for business purposes. The nature and extent of the interest should be disclosed.

[†]A sample form is attached as Exhibit A.

Lastly, we believe that all debtor interests above \$5,000 (except for mortgages on residences) should be disclosed, and the nature and extent should be described.

Each legislator has a unique set of personal circumstances. Since this is the case, the rule cannot be mechanically applied. This advisory opinion is a guideline only, not a rule. The categories of interests and the stated amounts we have listed are intended to assist each legislator in the filing of his disclosure. Depending upon special circumstances, more disclosure than described here may be proper in order to accomplish the purpose of the ethics law.

Dated: Honolulu, Hawaii, January 26, 1971.

STATE ETHICS COMMISSION
James F. Morgan, Jr., Chairman
Vernon F.L. Char, Vice Chairman
Gwendolyn B. Bailey, Commissioner
Walters L. Eli, Commissioner
S. Don Shimazu, Commissioner

EXHIBIT A

STATE ETHICS COMMISSION

1. Name: _____
Spouse: _____ Dependents: _____
2. Home Address: _____
Bus. Tel.: _____
3. Present office and number of terms in *present* office: _____
4. Legislative Committees and assignments for the current session:

A. Private or self-employment: (Professionals: Disclose clients on retainer or annual billings above \$5,000.)

Employer's Name	Duties	Compensation
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B. List all directorships, officerships, and private offices, whether compensated or not.

Corporation or Entity	Compensation or other benefit, if any
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- C. Personal Property. (Include stocks, bonds, and beneficial interests in trusts of \$5,000 or more)

Description of Interest	Extent of Interest
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- D. Real Property. (Include interests, partnerships, corporations, or joint ventures which have substantial real estate holdings of \$5,000 or more)

Description	Tax Map Key	Size
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- E. Debtor interest (except mortgage on residence; list if \$5,000 or more)

Name of Creditor	Amount and Terms
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I have read this statement, and I believe this is a full disclosure of controlling or substantial financial interests held by myself, my spouse, and minor children.

Signature

Date

- Note: 1. Fill out in duplicate; send original to Ethics Commission.
2. You are requested to amend or update this disclosure as necessary.