

OPINION NO. 129

A member of the state legislature and his administrative assistant requested an advisory opinion regarding the following situation.

In October 1971, they formed a business entity which specialized in writing reports for projects involving state funds or state land. It was contemplated that the business would be a registered general partnership consisting of the legislator and his assistant.

The reports are a requirement of a Governor's Executive Order, under which each state agency was given responsibility to develop procedures for securing such statements from private individuals, for reviewing them and then submitting them to a specified state agency prior to approval by the Governor. The approved report is required for release of state funds.

Both the legislator and his assistant indicated that the services are contracted directly with the private individual and that the services are rendered for a specific fee which is due at the time the report is submitted to the specified state agency. The fee is not contingent on approval of the report, and is paid for by the individual requesting the report.

The legislator and his assistant have also indicated that the writing of the reports does require contact with many state and county agencies in order to collect pertinent data. However, their representations have been at all times in behalf of the business entity.

We initially stated that our jurisdiction with respect to legislators under the State ethics law did not extend to the consideration of violation of HRS, §84-14, relating to conflicts of interest. Therefore, as to the legislator, this opinion is limited to the appropriate provisions of the ethics law applicable to legislators. As to the assistant, we did not find a possible violation of HRS, §84-14, since his responsibilities in the legislature did not include the review of such statements, nor was there reason to believe that the statements or the business enterprises would be involved in official action to be taken by him.

We first considered whether HRS, §84-12, relating to confidential information, was violated by the organizing of this business entity by the legislator and his assistant shortly after the issuance of the Executive Order. Confidential information under the statute is such information which, by law or practice, is not available to the public. Our investigation concerning the formation of this business entity indicated that the business did not result from any use of confidential information because the requirements imposed by virtue of the Executive Order were widely known. The business entity was started in October, 1971, and was registered in November, 1971. The close time sequence was not indicative of any use of confidential information since we noted that it is not difficult to form a business of this type in a short period of time.

Secondly, we considered whether the circumstances constituted a violation or probable violation of HRS, §84-13, which states in part that "No legislator ... shall use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts or treatment for himself or others."

We did not find evidence to indicate that this provision had been violated. The legislator and his assistant have stated, and we did not find evidence to the contrary, that (1) they submitted their reports pursuant to the procedural rules; (2) they collected data through the assistant who did not

publicize the fact that he was a legislative assistant; (3) they have not used government time or equipment in rendering these services; (4) they did not utilize studies or information not generally available to the public; and (5) they have not sought clients by the influence or publication of their state positions.

We considered, in particular, whether they used their official position to obtain unwarranted treatment or advantage for their clients or themselves.

It was our conclusion upon the examination of the facts that there had been no use of official position to obtain unwarranted treatment or advantage for themselves or their clients. First, the work product was submitted to the private client, then to the reviewing agency under the name of the sponsoring state agency, pursuant to the procedural rules for the submission of the reports. They have not been involved with the report at the reviewing agency level or in the submission of the report to the Office of the Governor for approval. The anonymity which was provided here would negate any suggestion of unwarranted advantage, however subtle, which could arise from the legislator's position. Secondly, the legislature is not involved in the review of such statements. Since neither the legislator nor his assistant will be involved with such matters in their legislative capacity, the opportunity for the abuse of official position for private gain was considerably lessened. Thirdly, with respect to the sponsoring agency, we found that the agency had a co-extensive interest with the private client, who has contracted for services from the business, for the purpose of submitting a reliable report to the designated state agency. Moreover, the payment for these services was due at the time the report was submitted to the sponsoring agency and was not contingent upon its acceptance by it. Therefore, in this instance, there was no advantage accruing either to the client or the legislator and his assistant by virtue of the legislator's authority over the budget or appointments of the sponsoring agency.

Finally, while some competitive advantage may accrue by the affiliation of a state official with a business, we could not say that such advantage was necessarily unwarranted and conclusively the result of a use of official position. The possession of such a financial interest by a legislator and his assistant certainly increases the opportunity for such misuse of position to occur. However, HRS, §84-13, does not prohibit ownership of this type of interest. It does prohibit the use of official position or influence. We did not have evidence to indicate that there had been such use of official position.

Mindful that the legislature may have passed or may pass rules more stringent than the statutory code, we advised that this legislator and his assistant should continue to act in a conscientious, ethical manner.

Dated: Honolulu, Hawaii, March 15, 1972.

STATE ETHICS COMMISSION
Vernon F. L. Char, Chairman
Walters K. Eli, Vice Chairman
Audrey F. Bliss, Commissioner
Fred S. Ida, Commissioner

Note: Commissioner Gwendolyn B. Bailey abstained from voting on this opinion.