OPINION NO. 95-1

A state legislator asked the Hawaii State Ethics Commission for advice on the application of the gifts disclosure law. The legislator wrote that he had received a courtesy upgrade from an airline on a recent trip to the mainland. The airline had upgraded his seat from coach class to first class. The legislator asked if he was required to disclose the upgrade on a gifts disclosure form.

The Ethics Commission's staff requested further information from the legislator. The legislator then explained that he had requested the upgrade from one of the airlines for a trip that he was taking in his state capacity. He said that he did not know how to value the upgrade. He also said that, although he had taken action affecting the airports and the regulation of the interisland airline industry, he had not taken any action directly affecting this airline. The legislator later told the staff of the Ethics Commission that he believed the airline gave him the upgrade because he was a frequent flyer, and not because he was a member of the Legislature. The legislator said that he asked a legislative staff member to approach the airline's lobbyist to request the upgrade. The legislator said that he had asked for upgrades from the lobbyist two or three times in the past. At other times, he had requested upgrades from the gate agent.

The Commission's staff spoke to the lobbyist about the legislator's request for an upgrade. The lobbyist did not remember the legislator's request. He said that his usual practice would have been to tell the requester about the airline's upgrade policy and then put the person in touch with the airline's business office.

The lobbyist explained the airline's upgrade policy. The airline granted upgrades to certain people if there was space available on the flight. The airline upgraded people who were frequent flyers and people who are dignitaries. The lobbyist acknowledged that a legislator would be considered a dignitary. He said that he did not know whether the legislator had received an upgrade because he was a dignitary or because he was a frequent flyer.

It may be the case that the legislator received the upgrade because he was a frequent flyer. However, in the situation that the legislator described, it appeared more likely that he received it because he was a legislator. He asked a legislative staff person to approach a lobbyist and request the upgrade. This indicated to the Commission that it was his position as a legislator that made the upgrade possible.

The legislator's original question to the Commission was whether he was required to report the upgrade as a gift under the gifts disclosure law. The Commission noted, however, that this situation raised issues under other sections of the ethics code as well. The gifts disclosure law does not address the issue of whether a gift may be accepted. That issue is addressed by HRS section 84-11. This section reads:

> §84-11 Gifts. No legislator or employee shall solicit, accept, or receive, directly or indirectly, any gift, whether in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form, under circumstances in which it can reasonably be inferred that the gift is intended to influence the legislator or employee in the performance of the legislator's or employee's duties or is intended as a reward for any official action on the legislator's or employee's part.

Section 84-11, the gifts law, forbids a legislator or state employee from accepting a gift if, under the circumstances, it is reasonable to infer that the gift is intended to influence or reward the legislator or employee.

The Commission explained to the legislator that, in determining whether a gift is acceptable, it examines certain factors. Among these factors are the value and nature of the gift, the relationship between the donor and the recipient, and whether the gift can be construed as a gift to the State. The legislator pointed out that the value of the upgrade was not easily determined. He said that the upgrade did not cost the airline anything because if he had not taken the first class seat, it would have been empty. The Commission explained, however, that the gifts law focuses on the appearance of a gift's influence on the recipient. For this reason, the Commission gives more weight to the gift's value to the recipient rather than its value to the donor. The Commission explained that although the upgrade may not have cost the airline anything, it had a definite value to the recipient. There was a difference of several hundred dollars between the cost of a first class ticket and a coach ticket.

The relationship between the legislator and the airline was also significant. The legislator stated that the airline had not had any legislation before the Legislature for several years. For this reason, the legislator had not recently taken any action directly affecting the airline. Nonetheless, he did approach a lobbyist for the upgrade. The Commission believed that gifts from lobbyists to legislators may raise inferences of impropriety, particularly when expensive gifts are involved.

Finally, although the legislator was travelling on state business, it was difficult to construe this upgrade as a gift to the State. The Commission noted that it was legislative policy that all travel be by coach class. This indicated to the Commission that the legislature considered first class travel to be a personal benefit rather than a benefit to the State.

The factors set forth above led the Commission to conclude that HRS section 84-11 would forbid the solicitation and acceptance of the upgrade. Section 84-11 was not the only relevant section of the ethics code. Issues were also raised under the "Fair Treatment" section of the ethics code. In relevant part, the Fair Treatment law reads:

> §84-13 Fair treatment. No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemption, advantages, contracts, or treatment, for oneself or others....

In the past, the Commission interpreted the Fair Treatment law as prohibiting state employees and legislators from using their positions to solicit members of the public for a personal benefit. In Advisory Opinion No. 93-3, the Commission considered a situation in which a state agency wished to solicit donations for a conference from private companies. The Commission wrote:

> a state agency's solicitation of a private company for a state employee's personal benefit would be a violation of the fair treatment law. This type of solicitation would amount to the use of one's state position for an unwarranted personal benefit.

Similar reasoning applied in this situation. The Commission believed that section 84-13 prohibited a state legislator or employee from using his state position to solicit a personal benefit. Consistent with current legislative policy, an upgrade to first class would be viewed as a personal benefit. The Commission believed, therefore, that the legislator could not use his position as a legislator to obtain an upgrade for himself.

The gifts disclosure law was the final section of the ethics code that was pertinent. The Commission explained that the gifts disclosure law, located in HRS section 84-11.5, required the public disclosure of certain gifts. The gifts disclosure law requires every legislator and state employee to file a gifts disclosure statement with the Commission on June 30 of each year if two criteria are met. The first criteria for reporting is that the legislator or employee, or the spouse or dependent child of the legislator or employee, received, from one source, a gift or gifts valued singly or in the aggregate in excess of $200. The second is that the source of the gift or gifts has interests that may be affected by official action, or lack of action, by the legislator or employee. The gifts disclosure report covers the period from

June 1 of the preceding calendar year to June 1 of the current year. The Commission explained that there are a number of exceptions to the reporting requirement. However, none of the exceptions appeared to apply in this situation.

The gifts disclosure law states that a gift may be in the "form of money, service, goods, or in any other form." The legislator received a gift in the form of an upgrade to first class. According to the airline, there was approximately a $600 difference between coach fare and first class fare for a one-way ticket from Honolulu to the mainland destination. Thus, the gift clearly had a value in excess of $200. In addition, the legislator took action that might affect the interests of the airline. Although the airline had not recently appeared before the Legislature, this could alter at any time. The fact that the airline employed a lobbyist indicated that the airline had interests that might be affected by the legislator's official action. For these reasons, the Commission believed that HRS section 84-11.5 required the legislator to report the gift of the upgrade.

The answer to the legislator's original question was that he must report the gift that he received on his gifts disclosure form. The solicitation and receipt of this gift, however, raised other concerns with the ethics code. HRS section 84-11 would forbid the acceptance of the gift. The Commission believed that it was reasonable to infer that the gift was intended to influence the legislator in the performance of his official duties. HRS section 84-13 was also involved. The Commission believed that it was inappropriate for the legislator to use his position to solicit a personal benefit from a member of the public.

The Commission was aware that, in the past, members of the Legislature flew first class as a matter of course. The Legislature recently acknowledged, however, that there was no legitimate state purpose for flying first class. The Commission believed that, absent a state purpose, an upgrade to first class amounted to a personal benefit. The solicitation and receipt of a personal benefit created problems with the ethics code.

The Commission appreciated the patience and cooperation the legislator exhibited throughout the Commission's review of this matter. The Commission also appreciated the legislator's contacting the Commission to discuss this matter. The Commission realized that this may not initially have appeared to be a serious ethics problem to the legislator. It did, however, raise significant issues under the ethics code. It was the Commission's belief that the ethics code required the legislator to refrain from accepting such gifts and from using his position to solicit such gifts.

Dated: Honolulu, Hawaii, January 11, 1995.

STATE ETHICS COMMISSION
Carl T. Sakata, Chairperson
Cassandra J.L. Abdul, Vice Chairperson
K. Koki Akamine, Commissioner
Sharon "Shay" Bintliff, Commissioner

Note: Commissioner Don J. Daley was present during the discussion and consideration of this opinion but was unavailable for signature.