OPINION NO. 95-3

The State Ethics Commission received a request for an advisory opinion from a state employee. The employee asked four questions concerning HRS section 84-11.5, the portion of the Ethics Code that requires the reporting of gifts. The employee asked the following four questions:

1) HRS section 84-11.5, the gifts disclosure law, requires the disclosure of gifts whenever the source of the gifts has interests that may be affected by official action by the employee who receives the gift. How is "may" interpreted? Does it mean "likely to", "probable", or "possible"?

2) How should an employee report lunches and dinners given to the employee's spouse when these meals are approximately reciprocal or evenly exchanged over the reporting period? Is the exclusion for "exchanges of approximately equal value" applicable only to special occasions such as holidays or birthdays, or are reciprocal exchanges for other occasions also excluded?

3) If an employee formally recuses himself or herself from taking official action concerning the donor, do gifts from that donor have to be reported?

4) If a company purchases tickets to a fund raising event for a non-profit organization and then gives tickets to an employee and the employee's spouse, is there a reportable gift? How should the value of the gift be calculated?

The gifts disclosure law reads:

> §84-11.5 <u>Reporting of gifts.</u> (a) Every legislator and employee shall file a gifts disclosure statement with the state ethics commission on June 30 of each year if all the following conditions are met:
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> (1) The legislator or employee, or spouse or dependent child of a legislator or employee, received directly or indirectly from one source any gift or gifts valued singly or in the aggregate in excess of $200, whether the gift is in the form of money, service, goods, or in any other form;
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> (2) The source of the gift or gifts have interests that may be affected by official action or lack of action by the legislator or employee; and
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> (3) The gift is not exempted by subsection (d) from reporting requirements under this subsection.
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> (b) The report shall cover the period from June 1 of the preceding calendar year through June 1 of the year of the report.
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> (c) The gifts disclosure statement shall contain the following information:
> (1) A description of the gift;
> (2) A good faith estimate of the value of the gift;
> (3) The date the gift was received; and
> (4) The name of the person, business entity, or organization from whom, or on behalf of whom, the gift was received.
>
> (d) Excluded from the reporting requirements of this section are the following:
> (1) Gifts received by will or intestate succession;

(2) Gifts received by way of distribution of any inter vivos or testamentary trust established by a spouse or ancestor;

(3) Gifts from a spouse, fiance, fiancee, any relative within four degrees of consanguinity or the spouse, fiance, or fiancee of such a relative. A gift from any such person is a reportable gift if the person is acting as an agent or intermediary for any person not covered by this paragraph;

(4) Political campaign contributions that comply with state law;

(5) Anything available to or distributed to the public generally without regard to the official status of the recipient;

(6) Gifts that, within thirty days after receipt, are returned to the giver or delivered to a public body or bona fide educational or charitable organization without the donation being claimed as a charitable contribution for tax purposes; and

(7) Exchanges of approximately equal value on holidays, birthday, or special occasions.

(e) Failure of a legislator or employee to file a gifts disclosure statement as required by this section shall be a violation of this chapter.

(f) This section shall not affect the applicability of section 84-11.

The Commission noted that this law requires state employees and legislators to file gifts disclosure reports with the Ethics Commission if they receive, from one source, any gift or gifts valued singularly or in the aggregate in excess of $200 and they take official action that may affect the interests of the donor of the gift or gifts. The law provides for some exceptions to the reporting requirement.

1. <u>The statute requires reporting if, among other things, the recipient of a gift takes official action that may affect the interests of the donor of the gift. How is "may" interpreted?</u>

The law requires legislators and employees to file gifts disclosure statements if the legislator or employee receives a gift or gifts of a certain value and:

> the source of the gift or gifts have interests that may be affected by official action or lack of action by the legislator or employee

The employee asked how the Commission interpreted the word "may". The employee essentially asked if the word denoted a possibility, a probability, or some other degree of likelihood.

The gifts disclosure law was enacted in 1992. The Senate Judiciary Committee added the text of the gifts disclosure law to an existing House Bill. Both the Senate Judiciary Committee and a Conference Committee issued reports on the bill. The Conference Committee Report was vague on the specifics of the gifts disclosure provisions. It stated only that the law would promote public confidence in public officials. The Standing Committee Report was slightly more expansive. After summarizing the law, the Standing Committee Report stated:

> Your Committee finds that this bill facilitates greater openness in matters that the public has the right to know; that is, information on gifts and other "freebees" received by government employees and legislators as a result of their employment or position.

The Committee Report indicated that the legislature was most interested in the reporting of gifts received as a result of the state position of a legislator or employee. This information was helpful to the Commission in generally interpreting the gifts disclosure law.

As previously noted, "may" could denote anything from "probable" to "possible". The Commission believed that by defining "may" as "probable," the Commission would be unduly restricting the application of the gifts disclosure law. It was the Commission's impression that gifts were sometimes given in order to create an atmosphere of good will. They were not only given when the donor knew the recipient would take action that would probably affect the donor. Nonetheless, a gift given to create good will was a gift given because of a legislator's or employee's state position. For this reason, the Commission believed that these gifts should be reported.

Similarly, the Commission believed that by interpreting the word "may" as meaning "possible", the Commission would be overly expanding the reach of the gifts disclosure law. Some state employees could take action "possibly" affecting the interests of anyone in the State. However, the Commission recognized that it would be unduly onerous to require these employees to report every gift given to them or their spouses for whatever reason.

The Commission interpreted "may" as expressing a degree of likelihood between "probable" and "possible". The Commission believed that if a donor of a gift had interests and it was "reasonable to believe" that these interests may be affected by action that the employee would take, then the employee had to report that gift. The Commission thought that the employee's "reasonable belief" should be based upon the employee's knowledge and experience and the facts and circumstances surrounding the gift.

2. <u>How should an employee report lunches and dinners given to the employee's spouse when these meals are approximately reciprocal or evenly exchanged over the reporting period? Is the exclusion for "exchanges of approximately equal value" applicable only to special occasions such as holidays or birthdays, or are reciprocal exchanges for other occasions also excluded?</u>

This question asked whether reciprocal meals had to be reported. The Commission noted that the gifts disclosure law contains an exception for reciprocal exchanges of gifts of approximately equal value on holidays, birthdays or special occasions. The law does not explain what events would constitute a special occasion.

The Commission believed that an interpretation of this exception had to focus on the reciprocity of the exchange rather than on classification of an event as a "special occasion". The Commission believed that this exception had to be read in the context of the entire disclosure law. According to the legislative history of the law, the gifts disclosure law was intended to require the reporting of gifts so that gifts given as a result of one's state position would be subject to greater scrutiny. Meals that were reciprocally exchanged would not appear to be improper because there was no net benefit to the employee. The Commission believed that reciprocal exchanges of meals over the reporting period were, therefore, covered by this exception. For this reason, reciprocal gifts of meals did not need to be reported.

3. <u>If the employee formally recuses himself or herself from taking official action concerning the donor, do gifts from that donor have to be reported?</u>

The gifts disclosure law states that an employee must disclose a gift if, among other things, the source of the gift has interests that may be affected by official action or lack of action by the employee. This question asked whether gifts had to be reported if the employee recused himself or herself from taking official action affecting the source of the gifts. The Commission noted that official action is defined by the ethics code as discretionary action.

The Commission envisioned several situations in which a state employee could both recuse himself or herself from taking action affecting a person and could also receive a gift from that person. For example, an employee could recuse himself or herself from taking action affecting a person for the purpose of avoiding the reporting requirement. Alternatively, an employee could recuse himself or herself for a legitimate reason and then receive a gift from the person. The Commission believed that the former situation was clearly a misuse of position. The latter situation was at least subject to abuse.

HRS section 84-13 concerns a state employee's misuse of position. In relevant part, this section reads:

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

The Fair Treatment section forbids a state employee from misusing his or her state position to grant himself or herself or anyone else an unwarranted benefit. The Ethics Commission believed that if an employee were to recuse himself or herself from his or her state job in order to avoid reporting a gift, then the employee would be misusing his or her position in violation of this section. Because the Fair Treatment section would not allow recusal in order to avoid the reporting requirement, the gift had to be reported.

The Commission believed that the situation in which an employee recused himself or herself for a legitimate reason and then received a gift was also subject to problems. In this situation, the public could never be sure whether the recusal was properly motivated. In addition, HRS section 84-11, concerning the acceptance and receipt of gifts, could also be relevant. This section reads:

> §84-11 <u>Gifts.</u> No legislator or employee shall solicit, accept, or receive, directly or indirectly, any gift, whether in the form of money, service, loans, 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 official duties or is intended as a reward for any official action on the legislator's or employee's part.

The gifts law prohibits an employee from accepting a gift if, under the circumstances, it is reasonable to infer that the gift is given to influence or reward the employee. The Commission thought that if an employee recused himself or herself from taking official action affecting a person and then accepted a gift from that person, then it might be reasonable to infer that the gift was a reward for the recusal.

The Commission believed that allowing employees to avoid the reporting requirement if they recused themselves from taking action affecting the donor would create a large loophole in the gifts disclosure law. Employees could be tempted to abandon their state duties and would be rewarded for this by being relieved of the reporting requirement. The Commission noted that HRS section 84-1 required the Ethics Commission to liberally construe the Ethics Code in order to promote high standards of ethical conduct. In keeping with this mandate, and to avoid the promotion of abuse in this area, the Commission believed that the gift disclosure law had to be interpreted to require the reporting of a gift even when the employee had recused himself or herself from taking action affecting the donor of the gift.

<u>4. If a company purchases tickets to a fund raising event for a non-profit organization and then gives tickets to the employee and the employee's spouse, is there a reportable gift? How should the value of the gift be calculated?</u>

This question involved a straight forward interpretation of the gifts disclosure law. The question supposed that an employee and his or her spouse received a gift of fundraiser tickets from the company. If the gift met the requirements for disclosure, then it had to be reported. The Commission noted that fund raising tickets generally come in two forms. If the ticket carried a dollar value, then the value of the gift was this dollar value. If the ticket was styled as a donation, then the value of the gift was the fair market value of the benefit received. For example, if an employee received a ticket styled as a "$25 donation" and then attended the event and ate a plate of spaghetti, the value of the gift was the fair market value of the plate of spaghetti.

In the state employee's request for an advisory opinion, the employee did not refer to any specific situations. For this reason, the Commission reminded the employee that the advice in this opinion should be considered general advice only. The precise application of the law may depend upon the facts of a particular situation. The Commission asked the employee to contact the Commission for more detailed advice if a specific situation arose. The Commission stated that it appreciated receiving the request for advice and also appreciated the employee's sensitivity to ethical considerations.

Dated: Honolulu, Hawaii, October 11, 1995.

STATE ETHICS COMMISSION
Carl T. Sakata, Chairperson
Cassandra J.L. Abdul, Vice Chairperson
Sharon "Shay" Bintliff, Commissioner
Bernard E. LaPorte, Commissioner

Note: Commissioner Arlene Kim Ellis was present during the discussion and consideration of this opinion but was unavailable for signature.