

ADVISORY OPINION NO. 97-1

The State Ethics Commission received a request for an advisory opinion from a state legislator who asked the Commission to determine whether he had violated the State Ethics Code in discussing a possible private business transaction with a businessman while the businessman had an important matter pending before the Legislature.

In his request for an advisory opinion, the legislator stated that he was a private businessman himself and had been interested for some time in developing a parcel of land owned by his family.

The legislator stated that sometime before the Legislature convened one year, he visited -- together with numerous other business people, investors, and legislators -- a project that had been developed by a prominent developer. The legislator stated that he was highly impressed at the time with the development and told the developer so. In talking with the developer, the legislator mentioned his plans to develop his family property, and asked the developer if he might be interested in taking a look at the project and perhaps participate in it. The developer said he would look into it and get back to the legislator. However, according to the legislator, the developer never responded with a definite answer.

The legislator stated that when he asked the developer whether he might be interested in the project, the legislator did so in his capacity as a private businessman. The legislator stated that he considered this a straightforward business proposal no different from proposals he had made to other developers and bank representatives concerning the same project. The legislator stated that it never occurred to him that there might be something wrong with what he did because there was never the slightest suggestion, on his part or the developer's, that the proposal would affect the legislator's obligations as a legislator in any way. The legislator also stated that he could say without reservation that the proposal had not at any time affected the performance of his official duties.

In his request for an advisory opinion, the legislator pointed out that during a particular legislative session and a special legislative session thereafter, the developer had a major matter pending before the Legislature. The legislator stated that during this period, as he did not expressly withdraw his proposal made to the developer, it was technically still pending. But, because of the developer's failure to respond with respect to the legislator's private business proposal, the legislator stated that he came to believe that the developer was not really interested in his project.

The legislator asked the State Ethics Commission to advise him as to whether his conduct violated any of the provisions of the State Ethics Code, set forth in chapter 84 of the Hawaii Revised Statutes ("HRS").

The State Ethics Commission issued this advisory opinion to the legislator, stating that the advisory opinion was based solely on the information contained in his advisory opinion request. For purposes of this opinion, the State Ethics Commission assumed that the information in the legislator's request was an accurate and complete account of his dealings with the developer.

The State Ethics Commission has jurisdiction over state legislators with respect to a number of provisions in the State Ethics Code. However, part of the conflicts-of-interests provision of the State Ethics Code, section 84-14, HRS, does not apply to legislators. A second provision, the Fair Treatment law, does apply to legislators. The Fair Treatment law reads, in its entirety, as follows:

§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, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.
- (3) Using state time, equipment or other facilities for private business purposes.
- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

Nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, serving on committees or from making statements or taking action in the exercise of the legislator's legislative functions. Every legislator shall file a full and complete public disclosure of the nature and extent of the interest or transaction which the legislator believes may be affected by legislative action.

In general, the Fair Treatment law forbids a state legislator or a state employee from using his or her position to grant anyone, including himself or herself, an unwarranted benefit, unwarranted advantage, privilege, or special treatment. This section of the law would also prohibit a "quid pro quo" that resulted in an unwarranted advantage to oneself or anyone else.

The last paragraph of the Fair Treatment law, it should be noted, echoes Article III, Section 7 of the Hawaii State Constitution. Article III, section 7, in part, reads:

No member of the legislature shall be held to answer before any other tribunal for any statement made or action taken in the exercise of the member's legislative functions....

Legislators occupy a unique position within state government. In many instances, the Legislature itself is responsible for governing the behavior of its members. The State Ethics Code does not prohibit a legislator from engaging in some activities which it would prohibit if a state employee or state board member attempted to perform the same actions. For example, the State Ethics Code generally would forbid a state board member from voting on a matter that directly affects his or her own private financial interests. However, it would not prohibit a state legislator from voting on a matter that affects his or her own financial interests.

The State Ethics Code generally does not in any per se fashion prohibit a state legislator from engaging in business transactions with people or organizations that may also be affected by legislative action. Although the Legislature itself may place limits on this type of activity, the only restriction contained in the State Ethics Code is that found in the Fair Treatment law: a legislator may not misuse or attempt to misuse his or her state position to give himself or herself or anyone else an unwarranted benefit. The Fair Treatment law, however, would not apply if a legislator were engaged in a legislative function. For example, it would not apply to a legislator who was engaged in voting on a matter or discussing a legislative matter in a legislative committee.

Based solely on the information that the legislator provided in his request for an advisory opinion, it did not appear that the legislator had misused his state position in violation of the Fair Treatment law. In his private capacity, he had approached a developer who had business before the Legislature and asked for the developer's help on a private project. The legislator, as he stated, did not promise any special treatment or consideration in exchange for the developer's assistance, and did not grant any special treatment or consideration to the developer. His actions did not amount to a misuse of position under the State Ethics Code, based on the information provided to the State Ethics Commission.

The State Ethics Commission informed the legislator that he should keep in mind that it is possible for a legislator to violate the ethics code as a result of mixing his or her legislative activities with his or her private financial activities. The Commission stated that the legislator should take care that he does not give the impression that a person will be accorded special consideration at the Legislature in return for assistance on a private business matter. The Commission stated that if the legislator approached anyone for assistance on land development or on some other private matter, he should make it clear to that person that he was acting in his private capacity, and that any response to his request for assistance would have no impact at all on his actions as a legislator.

Further, the State Ethics Commission pointed out that section 84-13(3), HRS, specifically prohibits legislators from conducting private business with the use of state time, equipment, or facilities. The State Ethics Commission informed the legislator that any private business must not involve the use of his state office or equipment or other similar state resources. The State Ethics Commission has long stated, as well, that to be safe, it is best to keep official business and private business as distinct as possible.

Dated: Honolulu Hawaii, May 21, 1997.

STATE ETHICS COMMISSION
Cassandra J.L. Abdul, Chairperson

Bernard E. LaPorte, Vice Chairperson
Carl T. Sakata, Commissioner

Note: Commissioners Kirk Cashmere and Bernice Pantell were not present during the discussion and consideration of this matter.