



# HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

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## ADVISORY OPINION NO. 2013-1

A state investigator employed by a division that regulates a particular industry asks whether his outside employment as a private investigator creates conflicts of interests with his state position under the State Ethics Code, Hawaii Revised Statutes (“HRS”) chapter 84.<sup>1</sup> The Commission concludes that certain aspects of his work as a private investigator will create conflicts of interest and also appear likely to violate both the fair treatment and confidential information provisions of the State Ethics Code.

### **Facts**

From the request and certain clarifying information provided by the employee’s supervisor, the Commission understands the relevant facts to be as follows and bases this Advisory Opinion on those facts:

The employee is the sole proprietor and principal detective of a private investigation firm, which is licensed in Hawaii and on the mainland.<sup>2</sup> The employee expects that at least 60% of the firm’s work in Hawaii will involve investigations of possible criminal conduct within the industry regulated by his state division.<sup>3</sup> The other 40% of the firm’s work will involve litigation support in various areas, including industry-related law suits. The firm’s Hawaii clients will be, chiefly, industry companies and attorneys retained by these companies.

The employee is an investigator within a particular branch of the division. Although another branch within the division is concerned with the investigation of criminal complaints within the industry (the “Criminal Branch”), a criminal complaint can also give rise to a related complaint before the employee’s branch. When such a situation occurs, assigned investigators within the employee’s branch will confirm with

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<sup>1</sup> The request for advice also asks if the employee’s outside employment will violate another law outside of the State Ethics Code. In particular, there is a specific statute that appears to prohibit certain employment by an employee of the division as well as certain private financial interests of the employee. This statute is outside of the Commission’s jurisdiction, and the Commission advises the employee to consult with his state agency about the application of this law.

<sup>2</sup> The employee obtained a State of Hawaii private investigator’s license prior to becoming a state employee.

<sup>3</sup> Because the firm has not yet performed work in Hawaii, the Commission assumes that the employee’s expectation that 60% of the firm’s work in Hawaii will involve investigating possible criminal conduct in the industry is based on the firm’s work in the other jurisdictions.

the Criminal Branch that a criminal investigation is ongoing and, once confirmed, will close their branch's investigation.

The employee explained that when investigating other types of complaints, investigators in his branch determine the scope and manner in which to conduct their investigations and, based on the findings from those investigations, recommend appropriate action to the head of the division. According to the employee, his supervisor estimates that only a small percentage of those complaints handled by his branch also involve related criminal complaints before the Criminal Branch.

### **Application of the State Ethics Code**<sup>4</sup>

As a state investigator, the individual is an "employee," as defined by the State Ethics Code.<sup>5</sup> As such, he is required to adhere to the standards of conduct set forth in the statute, which include provisions relating to, among other things, conflicts of interest, misuse of position (or fair treatment), and confidential state information.<sup>6</sup>

#### **Conflicts of Interests**

a. **HRS section 84-14(b)**

The State Ethics Code does not allow an employee to acquire a private financial interest that is reasonably likely to be subject to his action as a state employee. Specifically, the statute provides:

**§84-14 Conflicts of interests.** (b) No employee shall acquire a financial interest in any business or other undertaking which the employee has reason to believe may be directly involved in official action to be taken by the employee.

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<sup>4</sup> The Preamble to the State Ethics Code recites the statute's primary purpose: to foster and preserve public confidence in public servants. HRS chapter 84, Preamble. To achieve that purpose, the legislature directed that the statute be "liberally construed to promote high standards of ethical conduct in state government." HRS section 84-1. The legislature's statutory intent is the foundation of the advisory opinion and of every Commission decision.

<sup>5</sup> HRS section 84-3.

<sup>6</sup> HRS section 84-2.

For purposes of the State Ethics Code, it is the Commission's position that the employee acquires a new financial interest in each industry company client when that client engages or retains his private investigation firm.<sup>7</sup>

Based on the duties of a state investigator as reflected in the employee's position description and as described by the employee, it appears reasonably likely that, in his official capacity, he may be tasked with investigating the same industry companies that likely will be clients of his private investigation firm. The Commission understands that there are approximately 1,000 industry companies authorized in Hawaii. A number of those companies are unlikely to be the subject of an investigation by either the employee's division or the private investigation firm because of their particular area of operation.<sup>8</sup> However, given the finite and relatively limited number of industry companies authorized to operate in the State and given the broad jurisdiction of the employee's branch, it appears sufficiently likely that one of the private investigation firm's industry company clients will be the subject of action by the employee's branch.

For that reason, the Commission believes that HRS section 84-14(b) prohibits the employee from being hired by or otherwise working on behalf of industry companies in his private investigator capacity. Based on the Commission's interpretation of HRS section 84-14(b), the Commission also believes that the private investigation firm is prohibited from acquiring industry company clients or working on behalf of such companies, even if the employee is not personally involved in the particular matter. This belief is based upon the Commission's understanding that the employee is the sole owner of the private investigation firm. The Commission also believes that HRS section 84-14(b) prohibits the employee from entering into new financial arrangements with

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<sup>7</sup> A financial interest is defined as including an employment interest. HRS section 84-3. Specifically, the statute defines "financial interest" as:

- an interest held by an individual, the individual's spouse, or dependent children which is:
1. An ownership interest in a business.
  2. A creditor interest in an insolvent business.
  3. An employment, or prospective employment for which negotiations have begun.
  4. An ownership interest in real or personal property.
  5. A loan or other debtor interest.
  6. A directorship or officership in a business.

Employment is in turn defined as any rendering of services for compensation. HRS section 84-3.

<sup>8</sup> The employee's supervisor explained that there are some industry companies that have not been the subject of any complaints to his branch because of their particular field of operation. In contrast, some areas within the industry generate frequent complaints and actions. The industry companies that operate in those areas frequently are the subject of complaints that are investigated by the employee's branch. Moreover, those same industry companies also are more likely to be involved in complaints of suspected criminal conduct and in industry related litigation.

industry company clients in other jurisdictions, if those clients also do business in Hawaii.

b. HRS section 84-14(a)

Another of the conflicts of interest provisions prohibits an employee from taking action, in his state capacity, with respect to his own private business or an undertaking in which he is a consultant. HRS section 84-14(a) reads, in relevant part:

**§84-14 Conflicts of interests (a)** No employee shall take any official action directly affecting:

1. A business or other undertaking in which the employee has a substantial financial interest; or
2. A private undertaking in which the employee is engaged as legal counsel, advisor, consultant, representative, or other agency capacity.

As explained above, HRS section 84-14(b) does not allow the state employee, on behalf of his private investigation firm, to newly acquire industry company clients or to presently accept work on behalf of those companies. HRS section 84-14(a) applies to matters that predate the employee's employment with the State. Accordingly, if, for example, his private investigation firm, operating in another state, was involved in matters for or on behalf of an industry company prior to his state employment, the State Ethics Code does not require that he now terminate those engagements. HRS section 84-14(a), however, requires that the employee recuse himself from participating in any state investigation or other work at his branch involving those same industry companies.

c. HRS section 84-14(d)

The final conflicts of interests provision relevant to the request is HRS section 84-14(d), which prohibits an employee from assisting or representing a private organization, for pay, on matters before his state agency.<sup>9</sup> For purposes of this section,

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<sup>9</sup> HRS section 84-14(d) reads:

**§84-14 Conflicts of interests. (d)** No legislator or employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which the legislator or employee has participated or will participate as a legislator or employee, nor shall the legislator or employee assist any person or business or act in a representative capacity for a fee or other compensation on such bill, contract, claim, or other transaction or proposal before the legislature or agency of which the legislator or employee is an employee or legislator.

the Commission has consistently interpreted the term “state agency” as meaning “state department.” Thus, an employee of a division in a department is prohibited from assisting or representing another, for pay, before another branch or division of the same state department.

As part of a private investigation of suspected criminal conduct in the industry, the employee, as a private investigator, generally prepares a report for his client that summarizes the investigation and includes recommendations. The employee believes that the industry company client likely considers his report in deciding whether or not to act on a matter.

If the private investigation determines that criminal conduct likely occurred, the client may be required to report the conduct to the Criminal Branch. That branch will then likely review, among other things, the employee’s private investigation report to the client, including the conclusions and recommendations.

HRS section 84-14(d) is intended to prevent an employee from benefiting from his relationships with his co-employees by prohibiting the employee from “switching hats” to assist or represent, for pay, a private organization before his own state agency. In the Commission’s opinion, HRS section 84-14(d) prohibits the employee from “assisting” industry company clients in matters involving other branches within the employee’s state division.

### Fair Treatment

The fair treatment section, HRS section 84-13, also appears applicable to the employee’s situation.<sup>10</sup> This section, generally, prohibits a state employee from misusing his state position to grant himself or anyone else any unwarranted benefit or

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<sup>10</sup> In relevant part, this section 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, 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.

advantage. The statute also specifically prohibits an employee from engaging in a substantial financial transaction with a business that the employee supervises or inspects.

The Commission does not narrowly construe the term “supervise or inspect.” The purpose of HRS section 84-13(4) is to prohibit an employee from misusing his state position in the context of a substantial financial transaction. In enacting this provision, the legislature determined that certain relationships are unequal and create a situation that is inherently coercive or unfair. In the Commission’s view, consistent with that legislative intent, the phrase “supervise or inspect” must also include similar types of official duties, such as regulation, investigation and enforcement. Stated differently, the Commission construes HRS section 84-13(4) to prohibit an employee from engaging in a substantial financial transaction with a person or business that the employee regulates, may investigate or may take enforcement action against.

With respect to this situation, the employee, as a state investigator, has a regulatory role over the industry companies, the same companies from which his private investigation firm will receive payment. The Commission believes that this subsection prohibits the employee from entering into private financial arrangements with the industry companies that are regulated by his branch and may be subject to his official action.

### Confidential Information

Finally, there are significant concerns about confidential information. HRS section 84-12 prohibits a state employee from using or disclosing any confidential state information.<sup>11</sup> As a state investigator, the employee may be privy to confidential information about, for instance, the manner in which the division considers and resolves complaints and other issues. Some of the information may be pertinent to or useful in his private investigations. The Commission believes that, because of the relative similarities between the type of work that he performs as a state investigator and the type of work that he proposes to perform on behalf of his private investigation firm, it will be virtually impossible for the employee to reasonably separate and disregard any confidential state information gained through his state employment for purposes of his private investigator work.

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<sup>11</sup> HRS section 84-12 reads, in relevant part:

**§84-12 Confidential information.** No legislator or employee shall disclose information which by law or practice is not available to the public and which the legislator or employee acquires in the course of the legislator’s or employee’s official duties, or use the information for the legislator’s or employee’s personal gain or for the benefit of anyone. . . .

### **Conclusion**

For the reasons discussed above, the Commission believes that the State Ethics Code prohibits the employee from newly acquiring industry companies that do business in Hawaii as clients of his private investigation firm. For those industry companies that may be active, existing clients of the private investigation firm, the employee must recuse himself from investigating or otherwise being involved as a state investigator in matters relating to those companies.

The Commission's authority is limited to the State Ethics Code, HRS Chapter 84. For that reason, the Commission strongly recommends that the employee consult with the head of his division or the Department of the Attorney General as to the applicability of other laws to his work as a private investigator.

Dated: Honolulu, Hawaii, May 29, 2013.

#### HAWAII STATE ETHICS COMMISSION

Maria J. Sullivan, Chairperson  
Cassandra J. Leolani Abdul, Vice Chairperson  
Susan N. DeGuzman, Commissioner  
Edward L. Broglio, Commissioner

Note: There was a vacancy on the Commission when this Advisory Opinion was considered.