



HAWAII STATE ETHICS COMMISSION

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

ADVISORY OPINION NO. 2019-3

June 20, 2019

A legislator requested an Advisory Opinion from the State Ethics Commission (“Commission”) as to whether the State Ethics Code, Hawai‘i Revised Statutes (“HRS”) Chapter 84, permits the legislator to represent a private client in submitting an offer to purchase state property from a state agency (“Agency A”).

As discussed below, the State Ethics Code does not prohibit the legislator – in the legislator’s private capacity – from representing a private client in an attempted purchase of state property from Agency A. That said, the Commission offers additional guidance to ensure that the legislator continues to maintain the high standards of ethical conduct required of legislators.

I. FACTS

Agency A has owned the property at issue (“Property”) for several years and has been interested in selling the Property for some time.

Agency A recently hired a third-party private company to market the Property, solicit bids, and present offers (with a recommendation on which offer to accept) to Agency A. Although Agency A will make the final determination on which offer to accept, Agency A’s Director described the proposed transaction as “arms-length” because the third-party company is handling virtually all aspects of the sale – including recommending which offer to accept.

In the legislator’s private capacity, the legislator works on a sales commission basis for a company that represents clients in various transactions. Before Agency A or its third-party private company made a formal announcement about the sale of the Property, word that the Property might be offered for sale began to spread among the business community. The legislator heard about the potential offer of sale through the legislator’s professional network – not through the legislator’s work as a legislator – and the legislator contacted Agency A’s Director to get more information. In a brief telephone call, Agency A’s Director referred the legislator to the third-party private company, which in turn provided the legislator with information about the sale.

Agency A's Director confirmed that the legislator was not given any confidential information about the sale, nor was the legislator given any special treatment because of the legislator's state position. Instead, Agency A's Director simply referred the legislator to the third-party private company for more information – the same action Agency A's Director would have taken for anyone who inquired about the sale of the Property.

Legislators vote on bills to appropriate funds to state agencies, including Agency A. However, the legislator does not have any more specific dealings with Agency A as a legislator and does not have significant oversight authority over Agency A beyond the legislator's ability to vote on the budget bill. Similarly, the legislator was not aware of having taken any legislative action affecting the Property or the sale thereof.

The legislator requested guidance from the Commission to ensure that there would be no concerns under the State Ethics Code if the legislator represented a private client in submitting an offer to purchase the Property and if Agency A decided to accept the legislator's client's offer.

II. ISSUE PRESENTED

The issue before the Commission is whether the State Ethics Code prohibits the legislator from representing a private client in a transaction to purchase state property. As discussed more fully below, the Commission concludes that, under the circumstances described herein, the Ethics Code does not prohibit this.

III. APPLICATION OF THE STATE ETHICS CODE

Legislators are subject to the requirements of the State Ethics Code. The purpose of the State Ethics Code is to prescribe a code of ethics for elected officers and employees of the State as mandated by Article XIV of the State Constitution. The Commission is charged with the responsibility of administering the ethics code so that public confidence in public servants will be preserved.¹

The Conflicts of Interests Law, HRS § 84-14, contains two provisions relevant to the legislator's question. First, HRS § 84-14(c) provides:

(c) No legislator or employee shall assist any person or business or act in a representative capacity before any state or county agency for a contingent compensation in any transaction involving the State.

¹ Preamble, HRS chapter 84.

In Advisory Opinion No. 89-7 (1989) (“AO 89-7”),² the Commission addressed a nearly identical situation as in the present case: that is, whether a legislator – in his or her private capacity as a commercial real estate agent – could solicit state agency clients and receive a real estate commission for securing a commercial lease. The Commission concluded that “section 84-14(c) did not prohibit the legislator’s involvement as a real estate agent in commercial lease transactions involving state agencies.” AO 89-7 at 3. As the Commission explained:

The Commission believed that the rationale underlying section 84-14(c) is that when private compensation paid to a state official is contingent upon action taken by a state agency, there exists a greater danger that the official will use his or her state position in an improper manner to obtain the desired state action. The Commission stated that this is especially the case where a state agency has jurisdiction or authority over a particular matter so that action taken by the agency will determine whether or not one is compensated for one’s private involvement in that matter.

The Commission did not believe that the same dangers exist in commercial lease transactions where the parties may each be represented by real estate agents and may negotiate with each other in order to reach a mutually agreeable result. Further, the Commission noted that in lease transactions involving state agencies, the State is only one of a number of potential tenants. [If] an agency does not enter into a lease agreement with a lessor, the Commission noted, the lessor can do business with other prospective tenants. The Commission stated that it had reviewed the legislative history of section 84-14(c), HRS, and had seen no evidence that in enacting this section of the ethics code, the Legislature intended to prohibit state officials from earning real estate commissions by privately engaging in real estate transactions involving state agencies. The Commission believed that if such a prohibition was desired, section 84-14(c) should be amended to expressly so provide.

Id. at 2-3. The Commission applies the same rationale to transactions involving the sale of the Property at issue here: HRS § 84-14(c) does not prohibit the legislator from seeking to represent a private client in the purchase of the Property.

² Available at <http://files.hawaii.gov/ethics/advice/AO1989-7.pdf>.

Second, HRS § 84-14(d) provides:

(d) No legislator . . . 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 . . . , nor shall the legislator . . . 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

HRS § 84-14(d) prohibits the legislator from assisting or representing anyone for compensation on a transaction or proposal in which the legislator “participated” or will “participate” as a legislator. However, merely voting on a budget bill to appropriate funds to Agency A – along with all of the legislator’s legislative colleagues – does not constitute “participat[ion]” in this transaction for purposes of HRS § 84-14(d). As the Commission explained in AO 89-7:

The Commission did not believe that the mere act of voting on a budget bill constituted significant contact with a state contract or lease that is included as a budget item in the bill. The Commission stated that some additional direct involvement by a legislator with that particular contract or lease was required. In determining whether or not a legislator has participated or will participate in a particular contract or lease for purposes of section 84-14(d), the Commission stated that it would consider a number of factors, including whether the legislator participated or will participate in any committee hearings or discussions regarding the contract or lease (and if so, what the nature of that participation was or will be); whether the legislator has lobbied others to support the contract or lease; whether the legislator has participated or will participate in any other bills relating to the contract or lease; whether the legislator has communicated, in an official capacity, with the administering agency regarding the contract or lease; whether the legislator has received any inside information that might provide an unfair advantage to an applicant for the contract or lease; and whether the legislator otherwise has played or will play a significant role in the funding or approval of the contract or lease. The Commission stated that voting on the budget bill appropriating funds for the contract or lease is a factor to be considered by the Commission but will not be

dispositive on the issue of whether a legislator has participated or will participate in the contract or lease.

The Commission concluded in this case that where the legislator's participation with respect to a particular state lease was limited to voting on the budget bill, and where the legislator has had no other direct involvement as a legislator with that state lease, section 84-14(d) did not prohibit the legislator's private involvement as a real estate agent in negotiating the lease.

AO 89-7 at 4. In this case, the legislator did not participate as a legislator in any discussions regarding the sale of the Property; did not lobby any of the legislator's colleagues (or Agency A) to sell the Property; did not participate – and does not anticipate future participation – in any other bills relating to the sale of the Property; and did not receive any inside information regarding the sale of the Property. Although the legislator did contact Agency A's Director to inquire about the sale of the Property, the legislator did not do so in the legislator's official capacity, did not make any remarks that could have been construed as asserting the legislator's official authority, and was immediately referred to the third-party private company. In considering all these factors, the Commission concludes that – as in AO 89-7 – HRS § 84-14(d) does not prohibit the legislator's involvement in this transaction.

Although the Conflicts of Interests law does not prohibit the legislator's involvement in this transaction, the Commission advises the legislator to be mindful of the Fair Treatment law, HRS § 84-13, and its application to the legislator's official conduct. As the Commission explained in AO 89-7:

The Commission advised the legislator that section 84-13 prohibited him from using or attempting to use his official position as a legislator to obtain unwarranted advantages for himself, the real estate broker that employed him, or his private clients. The Commission stated that section 84-13(1) further prohibited the legislator from seeking private employment for himself as a real estate agent by the use or attempted use of his state office.

To avoid any possible misuse of his state office, the Commission advised the legislator to take steps to minimize or neutralize the influence of his state position when assisting or representing the broker that employed him or his private clients in business transactions with state agencies. The Commission stated that the legislator should refrain from referring to his legislative office when transacting private business with state agencies. Likewise, the

Commission advised, when conducting legislative business, the legislator should refrain from referring to private business matters in which he was involved as a real estate agent.

The Commission further noted that section 84-13(3), HRS, prohibited the legislator from using state time, equipment, or facilities for private business purposes. The Commission explained that this prohibition extended to the use of the legislator's state office and state telephone for private business purposes.

AO 89-7 at 5. The Commission reiterates these concerns and advises that the legislator take care to separate private work from legislative work to help maintain the highest standards of integrity at the Legislature.

Similarly, the Commission advises the legislator to comply with the Confidential Information law, HRS § 84-12, which prohibits the disclosure or use of confidential information obtained in the legislator's official state capacity. The legislator claimed not to have obtained any confidential information in the legislator's official capacity relating to the sale of the Property, thus obviating any potential ethics concerns.

IV. CONCLUSION

For the reasons discussed above, the Commission believes that the legislator is not prohibited from representing a private client seeking to purchase the Property from Agency A. The Commission thanked the legislator for seeking guidance on this issue.

Dated: Honolulu, Hawaii, June 20, 2019.

HAWAII STATE ETHICS COMMISSION

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