OPINION NO. 285

A chief of an office of a department requested this opinion and provided this information to us. In addition to a great number of duties, his office registered a number of certain events occurring in the State and had records dating back to 1843. A record or knowledge of an event so recorded might be useful to citizens for personal or legal reasons. Because the index searching and retrieval of these records had not been automated and had to be done manually and because there was a shortage of staff in his office, there was a large backlog of requests for this kind of information. Consequently, unless the individual who requested the information knew at least the approximate date and location of the event he wished certified, the request had to be either refused or given such a low priority that it would not have been serviced by his staff for several months or, on occasion, even years after the request had been filed.

The employee advised us of his efforts to secure additional funds to staff a position to provide this service on a more timely basis but, to this point, his requests had been denied. He proposed that either a present staff person or a retired department employee familiar with these records service these requests and that such person be directly compensated by the individual requesting the service. If the individual providing the service should also be a state employee then the work would be done on non-state time. If a retired employee could be hired for this kind of work then the work could and would be done during normal state hours. The employee wished to know if this proposal would be in violation of the state ethics code.

HRS §84-13 (Supp. 1975) had most direct application to the request he presented to us for consideration. That section prohibits an employee from using "official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for himself or others; including but not limited to the following:

(1) Seeking other employment or contract for services for himself by the use or attempted use of his office or position;

(2) Accepting, receiving, or soliciting compensation or other consideration for the performance of his official duties or responsibilities except as provided by law;

(3) Using state time, equipment or other facilities for private business purposes."

The employee indicated that a state employee providing this service would perform the work required on his or her own time; that would be in conformance with paragraph 3. We stated that while state facilities would of necessity be used in this person's work, should we approve his proposal, such use could be made only under his direction and supervision and, in the particular circumstances of this matter, would not constitute a misuse of position. Our greater concern here was with the prohibition against the use of position to gain unwarranted advantage or compensation for duties that were part of the individual's job description. Because the individual providing this additional service was required to provide very similar services in his or her own state position, there was a concern that an appearance of use of position might be created by this juxtaposition of duties.

The employee indicated that the clerks who handled these records did not make decisions with regard to whether a request for the research of a record could be satisfied immediately or must be given a low priority status. He advised us that he was responsible for making all such

decisions. He also indicated that because of budgetary problems, certain information could not be provided except on a low-priority basis. Again, a determination of the priority given to a request was solely this employee's decision. Despite the control he exercised over this procedure, however, we had two particular concerns.

First, the priority to be assigned to a request for information and the delay involved in providing the data requested was dependent upon the backlog of work in that office. The more efficiently his present employees worked, and the more effective new procedures for handling the workload became, the quicker requests for this information would be provided. At the same time, employees providing this information on their own time would be earning substantial income. The concern here was an obvious one--would the potential of earning additional income, a potential that became more realizable with a growing backlog, affect the employee's state work. We were concerned that, even with the best of intentions and controls, the employee's state work could be seriously affected.

Secondly, we felt that to the taxpaying public the appearance of impropriety involved in the procedure would have a seriously undermining effect upon the integrity of his office. The individual would be told that while the office was too busy to provide the requested information at normal state fees, a state worker would provide the information on his or her own time at a fee of $5 per hour of work. We believed that this situation spoke for itself. A member of the public would very likely wonder if he or she was being fairly treated in a situation where the state worker received a substantial fee for doing work that was generally expected to be done in his or her state capacity. The circumstances were such that an inherent conflict would arise between the employee's state duties and his private business. A use of position in violation of HRS §84-13 would be unavoidable. Accordingly, we held that a state employee may not be permitted to do this work on his or her own time. We pointed out that the same concerns did not arise in the retaining of a non-state employee, even one recently retired, to provide these same services. We stated that even here certain guidelines should be followed. Even if a retired employee was available, an attempt should be made to offer this opportunity to all interested and qualified individuals on an equal basis. Otherwise, an appearance would be created that he was using his position to grant an unwarranted advantage to a retired employee. It would be his responsibility to establish fair criteria should he attempt to retain a person to provide those services.

Finally, we indicated that should he retain an individual to provide these services, he should post a notice at this office to advise persons seeking information of the backlog in his office and of the availability of an individual to perform this work for an additional charge.

We emphasized that we did not doubt the integrity of either the employee's office workers or himself in his proposing this procedure. We were quite certain that his motivation was to provide a needed service more efficiently. It was simply our view that his proposal raised concerns that could not be cured even with the best of controls.

We noted that the employee's request for an opinion evidenced a sensitivity to ethics questions and we commended him for coming to the Commission at an early time.

Dated: Honolulu, Hawaii, January 14, 1977.

STATE ETHICS COMMISSION
Paul C.T. Loo, Chairman
I.B. Peterson, Vice Chairman
Audrey P. Bliss, Commissioner
Dorothy K. Ching, Commissioner

Note: Commissioner Gary B.K.T. Lee was excused from the meeting at which this opinion was considered.