

## INFORMAL ADVISORY OPINION NO. 2004-18

An individual (hereinafter "complainant") filed a formal Charge with the Hawaii State Ethics Commission against a state official. In the Charge, the complainant alleged that the state official had not complied with the gifts disclosure law, a part of the State Ethics Code, set forth in chapter 84, Hawaii Revised Statutes ("HRS"). Specifically, the complainant alleged that the state official failed to disclose (1) two trips paid for by two different organizations and (2) gifts received from a 501(c)(3) organization that had been established to further the interests of the official's own state agency. In the Charge, the complainant noted that the state official had filed gifts disclosure statements with the Hawaii State Ethics Commission in June of 2002 and in June of 2003, and stated on both disclosure statements that he had received no reportable gifts.

Through his attorney, the state official filed an Answer to the Charge with the Hawaii State Ethics Commission. In his Answer, the state official denied the allegations set forth in the Charge. The state official's Answer was filed after the state official requested and was granted a number of extensions by the Hawaii State Ethics Commission for legitimate reasons.

At one of its regularly scheduled adjudicatory meetings, the Hawaii State Ethics Commission voted to issue this informal advisory opinion to the state official to address the issues raised in the complainant's Charge.

The State Ethics Code's gifts disclosure law is set forth in HRS section 84-11.5. The gifts disclosure law states, in its entirety, as follows:

**§ 84-11.5 Reporting of gifts.** (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:

- (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;
  - (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
  - (3) The gift is not exempted by subsection (d) from reporting requirements under this subsection.
- (b) The report shall cover the period from June 1 of the preceding calendar year through June 1 of the year of the report.
- (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, fiancé, fiancée, any relative within four degrees of consanguinity or the spouse, fiancé, or fiancée 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 to a 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.

In accordance with HRS section 84-11.5, legislators, state officials, and state employees are required to file a gifts disclosure statement with the Hawaii State Ethics Commission on June 30 of each year if certain conditions are met. There are essentially three conditions. The first condition requires that the legislator, state official, or state employee, or spouse or dependent child of a legislator, state official, or state employee, receives 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. The second condition for filing a gifts disclosure statement is that the source of the gift or gifts has interests that may be affected by official action or lack of action by a legislator, state official, or state employee. The third condition exempts certain gifts from being reported, and these exempted gifts are set forth in the law. For example, lawful political campaign contributions are not required to be reported as gifts.

Any legislator, state official, or state employee who meets the requirements for filing a gifts disclosure statement must file the statement on June 30 of the applicable calendar year. The June 30 report covers gifts received from June 1 of the preceding calendar year through June 1 of the year of the report.

#### Trip Received from Organization A

The complainant alleged in his Charge that the state official violated HRS section 84-11.5 by not disclosing a trip he received from Organization A on his June, 2002, gifts disclosure statement filed with the Hawaii State Ethics Commission. The trip occurred in December, 2001. In his Answer to the Charge, the state official asserted that he had no decision-making authority over Organization A, or other official authority over Organization A, and that the gift was not a "personal" gift.

The Commission has long interpreted the gifts disclosure law, HRS section 84-11.5, to apply both to gifts that are personal in nature and gifts that are given to a state official to perform official duties. In regard to the case at hand, the Commission determined that the trip paid for by Organization A was a disclosable gift.

Although in his Answer the state official denied taking official action affecting Organization A, in his Answer, the state official quoted the president of Organization A, who said that Organization A invited the state official so that the members of Organization A could familiarize themselves with the state official's views regarding his future plans for his state agency. The state official was new to his position, so his remarks to Organization A about his plans for his state agency were of importance to Organization A. The president of Organization A went on to state that the purpose of the trip was to allow Organization A to learn about the state official's "vision" for a particular facility that Organization A had a strong interest in.

In his Answer, the state official stated that his presentation to Organization A served as an opportunity to "benefit" his own state agency. The state official stated that his state agency needed to maintain a "good relationship and open dialogue" with Organization A.

The Hawaii State Ethics Commission believes that in light of the language of the gifts disclosure law, the gift from Organization A was a disclosable gift. Organization A was specifically interested in the state official's "vision" for the facility Organization A had a strong interest in. The gift of the trip from Organization A was exactly the kind of gift that the Hawaii State Ethics Commission has required to be disclosed since the inception of the gifts disclosure law in 1992.

It should be noted that HRS section 84-3 defines "official action" to mean a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority. The state official's "vision" for the facility of interest to Organization A certainly involved discretionary choices by the state official that impacted Organization A. The state official also had filed his state agency's "Travel Form," which thus indicated that the official took this trip in his official capacity for official purposes. In light of the above, the Commission believed that the trip paid for by Organization A was a disclosable gift.

#### Trip Received from Organization B

In the year 2001, the state official received a gift of travel to a foreign country from Organization B. The state official stated in his Answer that Organization B informed then Governor Cayetano that it wished to send notable individuals to the foreign country. This was shortly after the terrorist attack that took place on September 11, 2001. According to the state official's Answer, Governor Cayetano asked the state official to accompany him on the trip.

Trips are often offered to the heads of state agencies, or to supervisors in state agencies, who then determine the appropriate state officials or employees for the trip. The Hawaii State Ethics Commission has always interpreted HRS section 84-11.5 to require that the recipient of the trip has the duty to disclose the trip, presuming the trip is a disclosable gift. In the state official's case, even though the gift was offered to Governor Cayetano, the state official was one of the recipients of the trip to the foreign country. Further, there was no

doubt in the Commission's mind that the state official's acceptance of the trip was of importance to, and affected, Organization B.

According to a news story at the time, then Governor Cayetano stated that the state official was invited on the trip to establish relations with certain entities in the foreign country, and that the functions of the state official's state agency were of great importance to Organization B. Further, the state official's state agency maintained specific programs that were of particular importance to Organization B. There was no doubt in the Commission's mind that the actions the state official took on this trip were of importance to, and were meant to further the interests of, Organization B. For the purposes of this trip, the state official completed his state agency's "Travel Form," which thus indicated that the state official went on the trip in his official capacity for official purposes. The Hawaii State Ethics Commission concluded that the trip paid for by Organization B was a disclosable gift in accordance with HRS section 84-11.5. As with the gift of travel from Organization A, Organization B, as the source of the gift of travel to the foreign country, had "interests that may be affected by official action or lack of action" by the state official.

### Gifts From Organization C

The Hawaii State Ethics Commission believed that the gifts the state official received from Organization C to him for personal or official purposes were disclosable gifts. The gifts from Organization C consisted of monies the state official received from Organization C in order to perform his state duties. Organization C was created solely for the purpose of assisting the state official's state agency. Since Organization C was a 501(c)(3) non-profit corporation, it was thus not a state agency, but a private corporation. Organization C derived its status as a 501(c)(3) corporation from the Internal Revenue Service. Although the gifts from Organization C to the state official were given to further the interests of his state agency and were not personal gifts, the Commission has never interpreted the gifts disclosure law in a way that distinguishes personal gifts from gifts given for the performance of official duties. The first gifts disclosure statements were filed in June of 1993. State officials since that time have been disclosing trips they have received from corporations or other entities. The Commission has maintained, from the inception of the gifts disclosure law, that gifts must be disclosed if they are personal gifts or if they are given for the performance of official duties.

In the state official's Answer, the state official argued that the gifts from Organization C were not "personal" gifts, but were gifts to his state agency. The Hawaii State Ethics Commission generally has not prohibited or required the disclosure of gifts that are in actuality given to a state agency. However, the Commission did not believe that this was the case here. If a gift were given to a state agency in its capacity as a state agency, then there would be a state government record of the gift. The Commission noted that Organization C might in fact make such gifts to the state agency. However, the gifts in question here were gifts from Organization C given personally to the state official.

The Commission believed that there was no doubt that the state official took official action affecting Organization C. The state official's state agency on an annual basis entered into a significant contract with Organization C. Further, the state official, in his official capacity, had appointed the individual who headed Organization C. Since Organization C

existed to benefit the state official's state agency, the state official had considerable input as to how Organization C contributed to the state official's state agency.

In his Answer, the state official argued that gifts from Organization C were part of his "compensation." However, this did not, in fact, seem to be the case. These gifts were not included in the employment contract between the state official and his state agency. Rather, a letter to the state official from the Chair of the board that oversaw the state official's state agency set forth certain benefits the state official would be accorded once employed. This letter stated that Organization C would provide monies each year to the state official in a certain amount. The letter also stated that another organization would provide to the state official supplemental travel funds each year for a number of years.

The Hawaii State Ethics Commission believed that the monies from Organization C could not be considered compensation for purposes of the State Ethics Code. HRS section 84-13(2) of the State Ethics Code bars a state employee from "[a]ccepting, 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."

In a letter to the complainant from a high-ranking state employee in the state official's state agency, the employee informed the complainant that monies from Organization C were provided as a "resource" to the state official for him in performing the duties and functions of his office. The state employee's statement in his letter to the complainant conveyed the opinion of the general counsel of the state official's state agency. The general counsel had advised the state official that he was not required to report monies from Organization C on the Hawaii State Ethics Commission's annual gifts disclosure statement. It was clear from the opinion of the general counsel that the monies from Organization C were a "resource" that had been provided to the state official to assist the state official in the performance of the "duties and functions" of his office. Hence, monies used from Organization C were not compensation, but rather resources for the state official's use in carrying out his official duties.

Organization C has ardently maintained its independence from the state agency it was created to support. In testimony presented to the Legislature in 2004, the Chairman of Organization C's Board of Trustees stated that Organization C was not a government agency or even a quasi-governmental entity. The Chairman further noted that Organization C was a private nonprofit corporation recognized by the Internal Revenue Service as a 501(c)(3) organization, with its own Board of Trustees, officers, employees, offices and records entirely separate from the state agency it supported. The Chairman further stated that Organization C was a private charity recognized as a 501(c)(3) organization, and unlike state institutions and government agencies, it was a private charitable organization contracted to provide "vital services" to the state agency it supported.

The state official stated in his Answer that Organization C was "technically a separate entity." [Emphasis added.] The Hawaii State Ethics Commission believed, however, that Organization C was certainly more than "technically" a separate entity from the state agency it supported. This view was amply supported by statements made by the Chairman of Organization C.

In 1992, the gifts disclosure law was passed to make known gifts given to state officials and employees when certain criteria were met. The purpose of the gifts disclosure law was clearly set forth in 1992 in Conference Committee Report No. 41, regarding House Bill No. 3726. The Conference Committee Report states, in pertinent part, as follows:

The purpose of this bill is to require that legislators and employees file gifts disclosure statements with the State Ethics Commission on June 30 of each year.

In order to promote public confidence in our government, it is important for the State Ethics Commission to monitor and prevent any abuse that may arise in situations involving election campaigns or the duties and services of a public official. Your Committee on Conference is in agreement that, despite a slight inconvenience, the filing of gifts disclosure statements are necessary to further promote public confidence in our government as well as our public officials.

. . . [Y]our Committee on Conference is also concerned that the public has the right 'to know' as well as a remedy to gain redress against acts of abuse committed by our public officials . . . . [Emphasis added.]

From this legislative history, it is clear that the purpose of the gifts disclosure law is to "promote public confidence" in state government as well as in public officials. The purpose of the gifts disclosure law is to "monitor and prevent any abuse" that might arise with respect to gifts. The Conference Committee Report specifically referred to the public's right "to know" of certain gifts that public officials receive, in order to take action against any potential abuse.

Conference Committee Report No. 41 clearly makes evident the underlying rationale for HRS section 84-11.5. The Hawaii State Ethics Commission is also mindful that HRS section 84-1 provides that the State Ethics Code shall be "liberally construed" to "promote high standards of ethical conduct in state government." [Emphasis added.] The term "liberal construction" is defined in the Sixth Edition of Black's Law Dictionary as follows:

Liberal (or equitable) construction, on the other hand, expands the meaning of the statute to meet cases which are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, provided such an interpretation is not inconsistent with the language used. It resolves all reasonable doubts in favor of the applicability of the statute to the particular case. It means, not that the words should be forced out of their natural meaning, but simply that they should receive a fair and reasonable interpretation with respect to the objects and purposes of the instrument. [Emphasis added.]

Given the plain meaning of HRS section 84-11.5 and the fact that the Hawaii State Ethics Commission is mandated to "liberally construe" the State Ethics Code, the Commission believed that monies received from Organization C must be disclosed, as well as the two trips discussed above.

The Hawaii State Ethics Commission, therefore, requested that the state official amend his gifts disclosure statements filed in June of 2002 and in June of 2003 in accordance with this opinion. The Commission also requested that the state official file the gifts disclosure statement that was due on June 30, 2004, since the state official held his state position beyond that date.

Finally, the Commission noted that other gifts the state official might have received also had to be disclosed if such gifts met the requirements of HRS section 84-11.5.

Dated: Honolulu, Hawaii, November 23, 2004.

HAWAII STATE ETHICS COMMISSION

Ronald R. Yoshida, Chairperson  
Dawn Suyenaga, Vice Chairperson  
Robert R. Bean, Commissioner  
Carl Morton, M.D., Commissioner

Note: Commissioner Nadine Y. Ando voluntarily recused herself from this case on November 10, 2004, and thus did not participate in the issuance of this Informal Advisory Opinion.