

INFORMAL ADVISORY OPINION NO. 94-25

A charge was filed with the State Ethics Commission against a state legislator by a member of the public. The charge arose out of a letter that the legislator wrote to the governor in the midst of an earlier legislative session. It was written on legislative stationery and signed by the legislator with his state title. The substance of the letter concerned a bill that was then before the legislature. The bill was sponsored by the governor. In the letter, the legislator took exception to the proposed legislation and criticized the administration's support of the bill. The letter also referred to the legislator's status as an employee of a private organization.

The charge was based on the letter's repeated references to the private organization. The complainant contended that this letter was written by the legislator in his capacity as an employee of the private organization. The complainant claimed that the legislator's use of state resources to write this letter violated Hawaii Revised Statutes (HRS) section 84-13(3). This section, a part of the Hawaii state ethics code, reads 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, contract, or treatment, for oneself or others; including but not limited to the following:

....

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

....

Nothing herein shall be construed to prohibit a legislator from introducing 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.

The charge stated that the legislator used state time, equipment, and other facilities in writing a letter on behalf of the private organization and for the purposes of the private organization. The private organization was a private business for purposes of HRS chapter 84, the State Ethics Code.

The legislator responded to the charge by stating that his letter to the governor was written in the exercise of his legislative functions. He pointed out that his letter was a part of his deliberations on the bill. He said that this bill was before the legislature and it was his duty and right to comment upon it. He addressed his letter to the governor because the bill was sponsored by the administration.

Both parties and the attorney for the complainant appeared before the Commission to discuss this matter at length. The central issue of this case was whether the legislator was engaged in a legislative function when he wrote the letter to the governor. If so, then, according to the last paragraph of section 84-13, the Ethics Commission could not find him in violation of

section 84-13(3). The Fair Treatment section could not be applied to prohibit a legislator from acting in the exercise of his or her legislative functions.

Section 84-13, HRS, Entitled, "Fair Treatment":

The final provision of the Fair Treatment section was added to the ethics code in 1972. Since 1970, the Ethics Commission had been seeking to amend the ethics code by expanding its jurisdiction over legislators. House Bill 54, introduced in 1971, contained some provisions that increased the Ethics Commission's jurisdiction. House Bill 54 was stalled in a Senate interim committee in 1971. It was taken up again by the 1972 legislature.

The 1972 legislature proposed certain changes to the bill. The Ethics Commission's jurisdiction over legislators was again reduced. Legislators would not be subject to the major conflict of interests provisions. The legislature also proposed adding a final paragraph to the Fair Treatment section that would forbid the Fair Treatment section from being construed to prohibit a legislator from taking action in the course of his or her legislative functions. This final paragraph was derived from Article III Section 8 of the Hawaii Constitution. In relevant part, Article III Section 8 read:

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 his legislative functions.

This provision was later renumbered as Article III Section 7.

Senate Draft 2 of House Bill 54 contained the changes proposed by the legislature. Standing Committee Report No. 670-72 described the addition of the final paragraph to section 84-13:

The section was also amended to provide that the proscription thereunder shall in no way prohibit a legislator from introducing bills and resolutions, serving on committees or from making any statements or taking actions in the exercise of his legislative functions. This amendment was deemed necessary to foreclose any interpretation that the bill could impose restrictions on a legislator in making any statements or taking any actions in the exercise of his legislative functions. This is in keeping with Article III, section 8, of the Hawaii Constitution, which reads in part that "No member of the legislature shall be held to answer before any other tribunal for any statement made or any action taken in the exercise of his legislative functions...."

The bill was then referred to Conference Committee.

On April 12, 1972, immediately after the Standing Committee Report came out, the Ethics Commission issued a press release on the proposed changes. The Commission challenged some of the changes to the bill proposed by Senate Draft 2. The Commission recommended that the final paragraph of section 84-13, as reported out by the Senate Committee, be altered. In its press release, the Commission proposed the following change:

§84-13 Add proviso as follows to 2nd full paragraph:

"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 his legislative functions, provided that the legislator has previously filed a full and complete disclosure of the nature and extent of the interest or transaction affected by legislative action."

Reason: The removal of a legislator's action from the purview of the Commission should be accompanied by appropriate safeguards to the electorate. In a democracy, freedom of information of action by government and government officials should also include the freedom to know the conflicting financial interests of public servants. It is fundamental that a public trustee disclose financial interests which conflict with the public interest. Therefore, before a legislator takes action in the legislature on such matters, he should be required to publicly disclose the particular interest or transaction being affected by such legislative action.

This press release was issued prior to the release of the Conference Committee Report on House Bill 54.

Conference Committee Report 17 on House Bill 54 attached a copy of the press release and incorporated it as part of the report. The report described the final version of the last paragraph of section 84-13. The report first recited the Commission's version proposed in the press release. It rejected this version:

Your Committee disagreed with the suggested amendment and did not include the proviso. The effect of the proviso would make the filing of a disclosure a condition precedent to any exercise of the legislative functions. Article III, Section 8, of the Hawaii Constitution provides in part that "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 his legislative functions;..." The Ethics Commission, having jurisdiction under the code, and being a separate tribunal would have power to restrict and disqualify the legislator's right to exercise his legislative function if a legislator fails to file a disclosure. To restrain and disqualify a legislator from exercising his legislative functions deprives the constituents of the disqualified legislator from the representation to which they are entitled. The proviso militates against representative government. It is sufficient that failure to disclose is made a violation under the Act and subject to the penalties thereunder. Thus, your Committee had amended the paragraph to read as follows:

"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 his legislative functions. Every legislator shall file a full and complete public disclosure of the nature and extent of the interest or transaction which he believes may be affected by legislative action."

House Bill 54 was signed into law with the proviso proposed by the Conference Committee. This language appears in the current version of section 84-13.

Constitutional Foundation of HRS Section 84-13:

The legislative history of HRS section 84-13 reveals that the final paragraph of that section was essentially intended to restate Article III Section 7 of the State Constitution. This provision of the Constitution provides for a degree of legislative immunity. The Organic Act of 1900 established this immunity in Hawaii. Section 28 of the Organic Act reads:

That no member of the legislature shall be held to answer before any other tribunal for any words uttered in the exercise of his legislative functions in either house.

The 1950 Constitutional Convention redrafted this language to eliminate any confusion as to whether action as well as speech was protected. The delegates originally proposed that the provision read:

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 his legislative functions in either house.¹

Delegate Heen explained:

The immunity from liability of members of the legislature has been enlarged to include "any statement made or action taken" in the exercise of legislative functions, as compared to section 28 of the Organic Act, which limits the immunity to "words uttered." The proposed section is intended to cover written as well as oral statements and any action taken in the exercise of legislative functions, in the broadest sense.²

The delegates then discussed deleting the phrase, "in either house" from the provision:

Shimamura: May I ask the question similar to the one I raised at a previous session Mr. Chairman? In other words, if you delete "in either house," you're making the provision much more expansive than it is now. Isn't that correct?

Heen: That's correct.

....

Shimamura: What would be the situation of a member of the legislature who makes a speech, say at the legislative council meeting, if we have such a council? Would his immunity apply to such a speech if he makes some ordinarily--let's rather say a statement that is ordinarily defamatory, would he still be immune?

Tavares: It is my understanding that it would depend whether he was performing a legislative function or not. I am not prepared to say, without studying that further, that just because it was a legislative council meeting that there wouldn't

¹ 2 Proceedings of the Constitutional Convention of the State of Hawaii 1950, at 146.

² Id., (emphasis added).

be immunity. I believe it wouldn't be as broad possibly, but if it was in the exercise of legislative functions, as the court should find, then I think this would give immunity.

Chairman: I think the correct rule would be that it would stand on the same basis as the testimony before any public body. There is a certain immunity as you know, if you testify before the P.U. Commission, or court.

Shimamura: Well, that's just the point I mean, because if it's in the performance of the legislative function presumably the question would arise whether or not that legislative immunity would cover that situation. that's why I raise the point. The section as it stood prior to the deletion of the words "in each house," would limit it to his deliberations, his speeches, and his actions in the house.

Heen: In the exercise of his legislative functions, it might be in a committees so long as he is exercising his legislative functions, and much of the function of the legislature is performed in committee, so that if a legislative council can be regarded as a committee of the legislature that immunity might extend to the members of that council so long as they are all members of the legislature who are members of that council.

Chairman: The proposed amendment would broaden the immunity in other words.

....

Chairman: The question before the body is the deletion from Section 9, fifth line, after the words "legislative functions," delete the words "in either house," and the purpose of the deletion is to broaden the immunity rather than to restrict it. All those in favor signify by saying "aye." Contrary. Carried.³

This legislative immunity provision has never been altered or amended.

Although the desired breadth of the immunity was discussed by the Committee of the Whole, the need for some degree of immunity was not questioned. The notion of legislative privilege is well established in our form of government. Its taproots extend back to the English Bill of Rights of 1689:

That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.

This provision was the result of a prolonged struggle between the monarchy and parliament in which the monarchy used civil and criminal laws to suppress and intimidate critical legislators.⁴

³ Id., at 180.

⁴ United States v. Johnson, 383 U.S. 169, 178 (1965).

A legislative immunity provision was written into the Articles of Confederation and, later, into the United States Constitution. Article V of the Articles of Confederation was very similar to the English Bill of Rights:

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress.

Article I Section 6 of the United States Constitution reads:

for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other place.

Similar provisions appear in the various state constitutions.

The legislative privilege is a method of ensuring the independence of the legislature. It allows legislators to enjoy the fullest liberty of speech while remaining protected against prosecution by other, possibly hostile, tribunals. The clause forbids courts from enquiring into the motives behind legislative actions. As one court put it:

One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon the conclusion of the pleader, or to the hazard of a judgement against them based upon a jury's speculation as to motives.⁵

The privilege does not exist for the personal indulgence of the legislators, instead it serves to "protect the integrity of the legislative process by insuring the independence of individual legislators."⁶

Hawaii Cases Construing Article III Section 7:

Although the language of the Hawaii provision differs from that of the federal provision, it exists to serve the same purpose. The Hawaii Supreme Court acknowledged this in Abercrombie v. McClung⁷. This case, decided in 1974, was the first case to interpret the language of Article III, Section 7. Senate president David McClung opened the legislature with a speech on education. In the speech, he wondered whether part of the faculty of the University of Hawaii had any commitment to the University. Several hours later, a reporter interviewed Senator McClung in his Senate office and asked him to clarify his remarks. The Senator referred to Neil Abercrombie as being involved in the occupation of the campus ROTC building the year before. These remarks were published in a newspaper article. Senator McClung later realized that Mr. Abercrombie had not been among those who occupied the building. Mr. Abercrombie filed a slander suit against the Senator. Senator McClung moved for summary judgment based on legislative immunity. The trial court denied his motion. On appeal to the Hawaii Supreme Court, the Court reversed the trial court and remanded for entry of the grant of summary judgment.

⁵ Tenney v. Brandhove, 341 U.S. 367, 377 (1950).

⁶ United States v. Brewster, 408 U.S. 501, 507 (1971).

⁷ 55 Haw. 595 (1974).

The Court examined the constitutional history of Article III, Section 7. After reviewing the statements of the delegates to the 1950 Constitutional Convention, the Court stated:

We are of the opinion that the above record of the proceedings of the Constitutional Convention shows that the delegates to the Convention purposefully intended to broaden the scope of legislative immunity and further intended for the courts to finally determine the parameter of the legislative immunity by construing the clause "the exercise of his [legislator's] legislative function" on a case by case basis. The delegates did not place any restrictions premised on time and place of a legislator's exercise of his legislative function.

....

We are of the opinion that when a legislator is asked to clarify a speech or statement made by him in a forum of the legislature on a subject matter of legitimate legislative concern, a subsequent clarifying statement by the legislator, though not made in a forum of the legislature, not only fulfills his duty to keep the public informed, but serves the public interest....We have no doubt that strong, fearless and responsible legislators and an informed public are necessary pillars of a viable democracy.⁸

The court held that Senator McClung's statements to the reporter were made in the exercise of his legislative functions and so were absolutely privileged.

The Hawaii Supreme Court again interpreted Article III, Section 7 in Mehau v. Gannett Pacific Corporation.⁹ In this case, plaintiffs Larry Mehau and Moses Kealoha sued a number of defendants for defamation. One of the defendants was Kinau Boyd Kamalii, then a member of the State House of Representatives. After a number of press reports concerning alleged criminal activity of Mr. Mehau, Representative Kamalii introduced two resolutions in the House. The resolutions had as their objects a legislative probe into allegations made by a reporter and police protection for the reporter. At the close of session, the resolutions died. Representative Kamalii then spoke at a meeting of the Kailua Chamber of Commerce and referred to Mr. Mehau as the Godfather of organized crime. In the lower court, Representative Kamalii was awarded summary judgment on Mr. Mehau's claim that she had defamed him at the Chamber of Commerce meeting.

The Hawaii Supreme Court reviewed Representative Kamalii's claim that her statements were privileged because they were made in clarification of the resolutions, which were matters of legitimate legislative concern. The Court agreed that the subject matter of the resolutions was of legitimate legislative concern. The Court also agreed that there were no temporal or spatial limitations on the immunity. Where an action took place and when it took place were not determinative in deciding whether the action was privileged. Whether it was privileged depended on whether the action was made in the exercise of legislative functions.

The Court decided that there was not enough information to affirm a judgment in favor of Representative Kamalii. There was an issue as to whether Representative Kamalii was exercising a legislative function in making the speech. At the time of the speech, the resolutions had already

⁸ Id., at 600 (emphasis added).

⁹ 66 Haw. 133 (1983).

died. In addition, the speech was delivered to Kailua businessmen by a representative whose constituency resided in Waikiki and Kapahulu. The Court held that, viewed in a light most favorable to the plaintiffs, the facts did not lead to an inescapable conclusion that Representative Kamalii's remarks were privileged. The Court then remanded the case for further proceedings.

Aside from illustrating the breadth of the privilege, these cases also demonstrated the importance of the concept of an independent legislature. Possibly slanderous statements are allowed if made in the exercise of a legislative function. As indicated in Abercrombie, these statements are allowed not for the benefit of the individual legislator, but to protect the principle of a strong and fearless legislature, unfettered in their discussions by any threat of sanctions.

Application of the Last Paragraph of HRS Section 84-13 to this Charge:

The legislator in this case was charged with violating HRS section 84-13(3) by using state resources to write and send a letter to the governor. The letter was written on legislative stationery. The legislator used his state title in signing the letter. The letter expressed the legislator's concern with a bill then before the legislature. This bill was sponsored by the administration. The letter discussed the legislator's reservations about the bill. It also discussed the private employer of the legislator. When discussing the private organization, the legislator referred to himself as a part of the private organization and used the pronoun, "we." The letter ended with the legislator discussing the position of his political party.

If in writing and sending this letter the legislator was engaged in legislative functions, then, under both the last paragraph of HRS section 84-13, and Article III, Section 7, of the Hawaii Constitution, his actions were not subject to inquiry by the Ethics Commission. In order to determine whether the letter was an exercise of his legislative functions, the Ethics Commission first addressed whether it could examine the language of the letter. The complainant contended that some of the statements in the letter indicated that the legislator wrote the letter as an employee of the private organization and so was not exercising his legislative functions. The Commission did not reach this conclusion because it did not believe it had the authority to pass judgment on the legislator's choice of language in the letter.

The language of the last paragraph of HRS section 84-13, and the reasons for its existence, persuaded the Commission that when the circumstances surrounding the writing of a document clearly indicated that it was written in the exercise of a legislator's legislative functions, then the Commission was not justified in dissecting the language of that document. In this case, the legislator wrote to the sponsor of a bill then before the legislature about the merits of that bill. The Commission believed that this was clearly part of the deliberative process and an exercise of the legislator's legislative functions.

The Commission believed that Article III Section 7 of the State Constitution, the basis for the language in HRS section 84-13, did not merely prohibit the prosecution of a legislator who was exercising his or her legislative functions. It also prohibited other tribunals from even questioning a legislator's statements if those statements were made in the exercise of the legislator's legislative functions. The Commission believed that this forbade it from questioning the legislator about his choice of language in the letter. This reasoning was consonant with the purpose behind the legislative privilege. The Commission felt that legislators could not effectively function if another tribunal stood poised to evaluate their remarks and suggest language that it believed was more fitting. Such an environment would foster self-censorship by legislators. The Commission did not

believe that this scheme was envisioned by our Constitution. The Commission believed that the Hawaii Supreme Court had removed any doubt as to the purpose behind the legislative privilege. It was in place to foster a fearless and independent legislature. This could not be done if the statements of a legislator were subject to the review of another tribunal.

The complainant argued that past precedent of the Commission dictated that it examine the language of the letter in order to determine whether the legislator was acting in the exercise of his legislative functions. The complainant pointed to Advisory Opinion No. 88-3 to support his contention. In that opinion, a legislator sent a letter to a number of residents of an area that included his constituency. The letter was written on legislative stationery and included the state seal and the legislator's title. The letter was essentially an endorsement of a private company with which the legislator was associated. The Commission advised the legislator that his conduct appeared to violate HRS section 84-13.

In Advisory Opinion No. 88-3, the Commission considered and rejected the legislator's contention that he was exercising his legislative functions in writing the letter. In reaching this conclusion, the Commission did examine the language of the letter and determined that it was essentially a sales pitch. Such an examination was justified in that case. It was extremely unclear whether a legislator's communication to the public about a subject not specifically before the legislator was an exercise of the legislator's legislative functions. The Mehau case indicated that such communication may not be a legislative function. In the face of such uncertainty, the Commission felt justified in examining the language of the letter in order to reach a decision as to whether or not the legislator was actually exercising his legislative functions.

This situation was considerably different from the one in Advisory Opinion No. 88-3. In that opinion, it was not at all apparent that a communication from a legislator to the public was an exercise of legislative functions. There was no such confusion in this situation. The Commission believed that the constitutional history of Article III Section 7, and its subsequent interpretation by the Hawaii Supreme Court clearly indicated that it was to be interpreted as granting broad protection to legislators. The outer parameters of this protection were not clear. Whatever they were, however, the Commission was confident that the legislator's actions in this matter fell within them. In writing this letter the legislator was engaged in a deliberative process and was exercising his legislative functions. HRS section 84-13(3) could not be construed to prohibit his actions.

The Commission believed that in our scheme of government, a legislator is given great freedom to make statements and take action as part of his legislative duties. This freedom is, of course, subject to abuse. A legislator could stand up on the floor and make a speech slandering an individual. The legislator would not be answerable for this before any other tribunal. The legislature itself has the sole power to discipline its members for statements made and action taken in the exercise of their legislative functions. As sole arbiter of their behavior, the legislature has the duty and responsibility to take this role seriously. The Commission believed that legislators should keep in mind that, even though their actions may not violate the ethics code, they may nonetheless create an appearance of impropriety.

The Commission found no violation of HRS section 84-13(3) in this case. The Commission did believe, however, that it was important that legislators realized that the use of official stationery was not without its limits. Legislators should be cognizant of the ethics code and should know that their actions may raise concerns. Use of official stationery when no legislative function existed could certainly run afoul of section 84-13(3).

The Ethics Commission appreciated the patience and cooperation shown by both parties in this matter. This case raised legitimate and complex issues for the Commission. The Commission thus believed it was necessary to carefully consider the issues raised in this case. The Commission sincerely appreciated hearing the well thought out views of both the respondent and the complainant.

Dated: Honolulu, Hawaii, September 21, 1994.

STATE ETHICS COMMISSION
Sharon "Shay" Bintliff, Vice Chairperson
Cassandra J.L. Abdul, Commissioner
Don J. Daley, Commissioner
Carl T. Sakata, Commissioner

Note: Chairperson K. Koki Akamine was not present during the discussion and consideration of this opinion.