

INFORMAL ADVISORY OPINION NO. 99-1

The State Ethics Commission received a charge filed by two members of the public against a legislator. The charge alleged a violation of Hawaii Revised Statutes ("HRS") section 84-12, the confidential information section of the State Ethics Code. The legislator filed an answer to the charge with the Commission. After reviewing this matter, the State Ethics Commission issued this informal advisory opinion.

The complainants were members of the public concerned about certain state agencies' relationship with certain private insurers. The state agencies had contracts with these insurers. The payment scheme within these contracts included a particular rate. This rate was used to calculate what the insurers would pay the agencies for services. The complainants were concerned that the rates may have been too low so that insurers were not paying the agencies enough for their services. The complainants wished to have a resolution passed by the legislature during the 1998 legislative session. The resolution would call for the State Auditor to investigate the rates and other aspects of the payment schemes used by an insurer in order to determine their fairness. This resolution was offered to the legislature by the legislator who was the subject of this charge. Ultimately, the resolution did not pass.

As part of his campaign to gather information about the state agencies' contracts with insurers, in the later half of 1997, one of the complainants asked for an opinion from the Office of Information Practices ("OIP") as to whether he could see the rates in contracts between a state agency and four of the insurers. Two of the insurers made no objection to the release of their contracts with the state agency. The agency released those contracts to the complainant. The remaining two insurers objected to the release of the rate information. In April of 1998, the OIP released an opinion stating that the rate information in the agency's contracts with the insurers must be publically disclosed.

During the 1998 legislative session, while the request for an opinion from the OIP was pending, the complainants spoke with the legislator about the resolution. In order for the legislator to better understand the issue, it was felt that he needed to see a copy of the state agency's contract with one of the insurers that was objecting to the release of the rate information. The legislator received a copy of the contract under HRS section 92F-19, which, in relevant part, reads as follows:

§92F-19 Limitation on disclosure of government records to other agencies. (a) No agency may disclose or authorize disclosure of government records to any other agency unless the disclosure is:

....

(6) To the legislature, or a county council, or any committee or subcommittee thereof;

(b) An agency receiving government records pursuant to subsection (a) shall be subject to the same restrictions on disclosure of the records as the originating agency.

The legislator was able to receive a copy of the contract from the state agency by means of HRS section 92F-19(a)(6) because of his status as a member of the legislature. The copy of the contract that he obtained contained the rate information.

The charge filed by the complainants concerned the contract that the legislator received. The charge alleged that, at the legislator's direction, his aide offered the complainants a copy of this contract. The complainants did not accept the contract. This incident occurred prior to the release of the OIP opinion stating that the rate information was public information. The complainants claimed that the legislator's actions in directing his aide to offer the contract to them violated HRS section 84-12.

HRS section 84-12 reads as follows:

§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.

The complainants claimed that the contract that the aide offered to give them was a confidential document because it contained the rate information and that the legislator directed his aide to offer the contract to them as a way of getting them to leave the legislator alone.

In his answer to the charge, the legislator made three points. First, he said that he treats information given to him as a state legislator as public information unless there is a clear basis for keeping the information confidential. Thus, he released the contract because he considered it to be public information. Second, he stated that the information actually was public information. The OIP confirmed that it was public information in the opinion that it later issued to one of the complainants. Third, he said that he shared this information with the complainants because they were assisting him on the resolution. In sharing this information, the legislator claimed that he was exercising a legislative function.

The State Ethics Commission found it necessary to address only the legislator's second point. The legislator's second point was that the contract was not confidential and so it was proper to release it. The legislator based his position on the fact that the OIP stated that the information contained in the contract was public information. The complainants contended that at the time they were offered the contract by the aide, the OIP had not yet rendered an opinion and so the information was, at that time, confidential. However, as stated above, the OIP ultimately concluded that the information in question was public information. The information was not confidential by mere virtue of the fact that the OIP was in the process of reviewing the matter. The OIP never stated that the information was confidential until it concluded otherwise. The OIP stated that the information was in fact public information.

HRS section 84-12 prohibits the release of information that is confidential by law or by practice. The State Ethics Commission believed that it is important to note that this section of the State Ethics Code was enacted approximately twenty years prior to the State's adoption of the Uniform Information Practices Act ("UIPA"), HRS chapter 92F. The UIPA is administered by the OIP. To some extent, the interpretation of HRS section 84-12 is affected by the UIPA. Under the UIPA, all government records are public unless they are made confidential by law.¹ If a law does

¹ HRS 92F-11 reads:

not designate a record as confidential, then it must be made public. An agency may not opt to keep a record confidential "by practice." Confidential government records are only those records made confidential by law. All other government records must be available to the public.

In this situation, the legislator believed that the contract could be shared with the public. His belief was later validated when the OIP released its opinion stating that the rate information contained in the contract was not confidential. The OIP opinion did not convert the information from confidential to public. The opinion only confirmed that the information was public. The Ethics Commission believed that if a person released information that was later deemed not to be confidential, then that person would not be considered to have released "confidential" information.² The Ethics Commission believed that if information is judged to be public information, then the information was always public information, and it is appropriate to release the information. The State Ethics Commission believed that the legislator did not release confidential information when he directed that the contract be offered to the complainants. The information contained in the contract was deemed not to be confidential.

The State Ethics Commission did not find it necessary to address the first and third arguments raised in the answer to the charge. Based on the fact that the OIP stated in its opinion that the information was not confidential, the State Ethics Commission believes that the legislator's actions did not violate HRS section 84-12.

Dated: Honolulu, Hawaii, January 13, 1999.

Hawaii State Ethics Commission
Cassandra J.L. Abdul, Chairperson
Carl T. Sakata, Vice Chairperson
Kirk H. Cashmere, Commissioner
Bernice Pantell, Commissioner

Note: Commissioner Ronald R. Yoshida was not present during the discussion and consideration of this matter.

§92F-11 Affirmative agency disclosure responsibilities. (a) All government records are open to public inspection unless access is restricted or closed by law.

² In a telephone conversation, an OIP staff attorney confirmed with the State Ethics Commission staff that if a person released information and the OIP later determined that the information was public information, the person who released the information would not be considered to have released confidential information.