

## RECONSIDERATION OF INFORMAL ADVISORY OPINION NO. 99-1

On November 24, 1999, the State Ethics Commission reconsidered Informal Advisory Opinion No. 99-1, issued to a legislator on January 13, 1999. The reconsideration was requested by the complainants involved in Informal Advisory Opinion No. 99-1. By way of background, on June 5, 1998, the State Ethics Commission received a charge filed against the legislator by two complainants. The charge alleged a violation of Hawaii Revised Statutes ("HRS") section 84-12, the "confidential information" section of the State Ethics Code. The complainants contended that the legislator had violated HRS section 84-12 by attempting to give them a certain state contract. The complainants contended that part of the contract was confidential at the time the legislator attempted to give them the contract. The legislator attempted to give the complainants the contract by having his aide offer the contract to the complainants.

In Informal Advisory Opinion No. 99-1, the State Ethics Commission found that the legislator had not violated HRS section 84-12 by offering to the complainants a copy of the contract. In Informal Advisory Opinion No. 99-1, the State Ethics Commission ruled that there had been no violation of HRS section 84-12 because the Office of Information Practices ("OIP") had later ruled that the contract in question was, in its entirety, a public document.

After the issuance of Informal Advisory Opinion No. 99-1, the complainants pursued a reconsideration of this case. The basis for the reconsideration requested by the complainants was contained in a three-page letter from them dated October 18, 1999. In their letter of October 18, 1999, the complainants contended that three particular documents showed that at the time the legislator offered the contract to them, the contract was confidential in part. The complainants alleged that one document, a letter from an Office of Information Practices staff attorney, established the confidentiality of part of the contract at the time the legislator offered it to the complainants. The complainants also alleged that a second document, a memorandum from a state official dated May 5, 1997, also established that the contract was confidential in part at the time that the legislator offered it to the complainants. Finally, the complainants contended that a third document, a memorandum from the legislator's aide, also established that the contract was confidential in part at the time that the legislator offered it to the complainants. The complainants contended that the legislator offered the contract to them on March 31, 1998, when at the time, to their minds, the contract was in part confidential. The OIP issued a formal opinion on April 24, 1998, stating that the contract was a public record subject to public inspection. No part of the contract was deemed confidential at any time by the Office of Information Practices.

With respect to the OIP staff attorney's letter, the complainants contended that the staff attorney "explained" in her letter why the OIP considered part of the contract confidential until the OIP issued its opinion on April 24, 1998.

The State Ethics Commission however, believed that this was a totally erroneous reading of the staff attorney's letter. In her letter, the staff attorney stated as follows: "To date, I have not had the opportunity to complete the analysis regarding whether . . . [certain] information . . . is actually confidential . . . . However, because I understand that you [the complainants] are anxious to obtain the Contract as soon as possible, I have recommended that [a state agency] release to you those parts of the Contract which [the contractor] is not asserting to be confidential business information." It is obvious from this quote from the staff attorney's letter that she had formed no opinion as to whether the part of the contract that the contractor deemed to be confidential was indeed confidential.

With respect to the state official's memorandum, the State Ethics Commission determined that the official never asserted that any portion of the contract was confidential. Rather, the official felt that the matter should be resolved by the Office of Information Practices. In his memorandum, the official stated as follows: "In short, I do not believe that you [the recipient of the memorandum] need to make a phone call to OIP to hasten the review of this matter. I will send a copy of this letter to OIP and assume that they will handle this matter expeditiously." It is obvious from this portion of the official's memorandum that with respect to the issue of confidentiality, he believed the matter should be decided by the Office of Information Practices.

The memorandum from the legislator's aide to the legislator merely summarized a conversation between the aide and the above-mentioned official. In the aide's memorandum, the aide wrote as follows: "[The official] said he has a copy of the . . . contract which he can make available to you. However he assumes the only reason you would want it is to determine whether it could be made available to [one of the complainants]. He feels this should be decided by the Office of Information Practices. He also faxed a copy of a letter he was about to send to [a state official] on this matter."

It was obvious from this quote from the legislator's aide's memorandum to the legislator that the aide was not presenting any view of his own regarding the confidentiality of the contract. Rather, he was informing the legislator that the state official felt that whether the contract was confidential or not should be determined by the Office of Information Practices. The state official made no determination himself regarding the confidentiality of the contract. He deferred the matter to the Office of Information Practices, no doubt in accordance with state law that accords the Office of Information Practices the primary authority to determine whether state documents are available to the public or not.

The State Ethics Commission, in reconsidering this matter, determined that the complainants had presented no evidence that established that the contract--or any portion of it--was confidential at the time that the legislator offered it to the complainants. Thus, the conclusions reached by the State Ethics Commission in Informal Advisory Opinion No. 99-1 still stand.

The State Ethics Commission also noted that the Office of Information Practices issued a formal Opinion Letter to the complainants in October of 1999. In this letter, the Office of Information Practices confirmed that while it is researching a matter, the document under consideration is not made "confidential" by that fact alone.

The State Ethics Commission also noted that chapter 92F of the Hawaii Revised Statutes provides that the Office of Information Practices has been given the authority by the Legislature to determine whether state documents are public or not. Thus, it is the proper role of the State Ethics Commission to defer to the judgment of the Office of Information Practices in the same manner that courts defer to the judgment of administrative agencies that have been given special jurisdiction by the Legislature with regard to specific areas of law. In any event, the OIP staff attorney, the legislator's aide, and the state official referred to above never stated that the document in question was confidential. During this entire case, the matter was properly referred to the Office of Information Practices for resolution.

Finally, the State Ethics Commission noted that the complainants persistently pursued a reconsideration of this case and persistently requested that they be allowed to appear before the State Ethics Commission with respect to the reconsideration. However, the complainants did not

appear before the State Ethics Commission in regard to the reconsideration. The complainants did not contact the State Ethics Commission beforehand to inform the State Ethics Commission that they would not be appearing in regard to the reconsideration. Further, two days after the date of the reconsideration by the State Ethics Commission, the complainants faxed correspondence to the State Ethics Commission about a related matter, but made no reference to the reconsideration or their not appearing before the State Ethics Commission in regard to the reconsideration. The complainants were informed long in advance by the State Ethics Commission of the time and date of the reconsideration, and were afforded the opportunity to appear in person or by conference call.

HAWAII STATE ETHICS COMMISSION  
Cassandra J.L. Abdul, Chairperson  
Ronald R. Yoshida, Vice Chairperson  
Carl Morton, M.D., Commissioner  
Dawn A. Suyenaga, Commissioner

Note: There was a vacancy on the Commission when this matter was reconsidered.