



HAWAII STATE ETHICS COMMISSION

State of Hawai'i · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawai'i

ADVISORY OPINION NO. 2022-2

February 16, 2022

The Hawai'i State Ethics Commission ("Commission") received a joint written request from two state employees (referred to herein as "Employee A" and "Employee B", and jointly, as "Employees") for an advisory opinion. Both Employees are employed by the same state agency ("Agency"). The Employees asked whether a private business they co-own may procure the services of an Agency research facility. Based on the information provided, the Commission concludes that the State Ethics Code, Hawai'i Revised Statutes ("HRS") Chapter 84, does not prohibit this, provided the Employees abide by certain restrictions.

I. Facts

Having reviewed the information provided, the Commission understands the facts to be as follows.

A. State Employment

The Employees are employed by different sections of the Agency. As part of his state duties, Employee B manages and oversees an Agency research facility ("Facility"). In general, such facilities support and enhance research within the State by offering services with the latest technologies and expertise. The services of such facilities are available internally to Agency employees, as well as externally to the public on a fee-for-service basis.

B. Private Business

In addition to their positions at the Agency, both Employees co-own a private business ("Business"). The Business provides assessments of community-based programs.

The Business provides its services to various clients. As part of a project for one of its clients, the Business would like to engage the services of the Facility to assist in providing certain technical assessments. The Facility is the only provider of these services in the State. The Business would pay the standard list prices for public users for these services.

II. Application of the State Ethics Code

As state employees, both Employees are subject to the requirements of the State Ethics Code.¹ The Ethics Code will not prohibit the Business from engaging the services of the Facility provided both Employees exercise caution to avoid violations of the Conflicts of Interests law (HRS § 84-14), and the Fair Treatment law (HRS § 84-13).

A. HRS § 84-14(a), Conflicts of Interests Law

The Conflicts of Interests Law, HRS § 84-14(a),² prohibits a state employee from taking any state official action directly affecting any business in which he or she has a substantial financial interest. Both Employees have a substantial financial interest in the Business by virtue of their ownership of the Business.³ Accordingly, as state employees, neither may take any official action directly affecting the Business. “Official action” means a decision, recommendation, approval, disapproval, or any other action which involves the exercise of discretionary authority.⁴

As part of his state duties, Employee B oversees and manages the Facility. In this role, he provides guidance and management over Facility projects. HRS § 84-14(a) prohibits Employee B from taking any discretionary action that affects a Business project. Thus, Employee B must recuse himself from managing or overseeing any services performed by the Facility for the Business. Employee B explained he will be able to recuse himself and that his state supervisor will oversee all Facility services for any Business projects. To avoid taking official action, Employee B may not make any recommendations or provide any input to his supervisor (or to anyone else) who oversees these services.

¹ See HRS § 84-2 (“This chapter shall apply to every nominated, appointed, or elected officer, employee, and candidate to elected office of the State and for election to the constitutional convention . . .”).

² HRS § 84-14(a)(1) states: “(a) No employee shall take any official action directly affecting: (1) A business or other undertaking in which the employee has a substantial financial interest”

³ HRS § 84-3 defines a “financial interest” as:

- an interest held by an individual, the individual’s spouse, or dependent children which is:
- (1) An ownership interest in a business.
 - (2) A creditor interest in an insolvent business.
 - (3) An employment, or prospective employment for which negotiations have begun.
 - (4) An ownership interest in real or personal property.
 - (5) A loan or other debtor interest.
 - (6) A directorship or officership in a business.

⁴ HRS § 84-3.

B. HRS § 84-14(d), Conflicts of Interests Law

HRS § 84-14(d), another section of the Conflicts of Interests law, prohibits state employees from being paid to assist or represent another person or business in transactions or proposals before their own state agency.⁵ In Advisory Opinion No. 369, where a state employee wished to provide private consulting services to others involved in matters before the employee's state agency, the Commission explained:

We thought that the rationale for this restriction was clear and reasonable. His representation and assistance of persons before his department would create an appearance of impropriety and an advantage to the persons he assisted. Such an advantage would be unwarranted and would accrue irrespective of any efforts he took to prevent it. The public would not be persuaded that favorable results in his cases did not result from his employment in the department. For this reason, among others, the legislature determined that employees should not be privately involved in matters that came before the agencies that employed them. Advisory Opinion No. 369 (1979). See also, Advisory Opinion Nos. 94-4 (1994), 89-4 (1989)

This provision prohibits both Employees from assisting or representing the Business or its clients in any matters before the Agency or from contacting the Agency on behalf of the Business.

As the Commission understands it, the general trajectory of this project would involve the Business engaging the services of the Facility at the standard terms set by the Facility. The Facility would provide data to the Business for assessment. As the lead Technical Officer for the Business, Employee B would provide advice and consultation to the Business and generally oversee the quality of the work product, including evaluating the quality of the data provided by the Facility. Any concerns would be resolved by communicating with the Facility. The Facility's role would cease once the data has been accepted by the Business. Employee B would then write a report incorporating the data to be submitted by the Business to its client. Employee A would be involved in the general management of the Business but would not take an active part in this project.

⁵ HRS § 84-14(d) provides:

No legislator or employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which the legislator or employee has participated or will participate as a legislator or employee, nor shall the legislator or employee assist any person or business or act in a representative capacity for a fee or other compensation on such bill, contract, claim, or other transaction or proposal before the legislature or agency of which the legislator or employee is an employee or legislator.

HRS § 84-14(d) prohibits both Employees from assisting or representing the Business in its procurement of services from the Facility. HRS § 84-14(d) further prohibits Employee B from overseeing this project for the Business or providing his advice or consultation to the Business on matters regarding the services performed by the Facility. For example, he may not oversee the quality of the data provided by the Facility or otherwise assist the Business in any transactions involving the Facility. In addition, he may not communicate with the Facility on behalf of the Business or any of its clients. Employee B explained that it would be possible to recuse himself from that portion of the project involving the Facility's services. Other employees of the Business may perform this work on behalf of the Business without assistance by Employee B.

Once the Facility's services for the Business have been completed and the Facility is no longer involved in the project, HRS § 84-14(d) will not prohibit Employee B's participation in the preparation of the Business's report to its client about the project.

C. HRS § 84-13(a), Fair Treatment Law

The Fair Treatment Law, HRS § 84-13(a), prohibits state employees from using their state positions to obtain unwarranted advantages or benefits for themselves or others.⁶ In this case, both Employees must avoid using their state positions to grant any special treatment or benefit to the Business or any of its clients. Employee B in particular must ensure that he does not use his state position to influence Facility staff into providing any special treatment to the Business.

III. Conclusion

The Commission concludes that the Business may engage the services of the Facility, provided both Employees abide by the restrictions of HRS §§ 84-14(a), 84-14(d), and 84-13(a), as discussed above. The Commission thanks the Employees for seeking guidance on this issue.

Dated: Honolulu, Hawai'i, March 16, 2022.

HAWAI'I STATE ETHICS COMMISSION
Melinda Wood, Chair
Wesley Fong, Vice Chair
Reynard D. Graulty, Commissioner
Harry McCarthy, Commissioner
Beverley Tobias, Commissioner

⁶ HRS § 84-13(a) states that: "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, contracts, or treatment, for oneself or others"