



HAWAI‘I STATE ETHICS COMMISSION

State of Hawai‘i · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawai‘i 96813

ADVISORY OPINION NO. 2024-3

November 4, 2024

The Hawai‘i State Ethics Commission (“Commission”) received a written request from the University of Hawai‘i (“UH” or “Requester”) for an advisory opinion as to whether two of its employees (“Employees”), on behalf of their private business (“Business”) may negotiate and enter into contracts with the UH. The Commission finds that the agreement between the UH and the Business satisfies the requirements of Hawai‘i Revised Statutes (“HRS”) §§ 84-10¹ and 304A-1961, et. seq., and are therefore exempt from certain sections of HRS chapter 84, including Conflicts of Interest and Fair Treatment issues.

I. Facts

The UH provided documents indicating that the Employees work for the UH, and in that role, they created educational products that could be marketed to multiple institutions. The Employees co-founded the Business and are its key employees. The Business plans to commercialize the products in exchange for a percentage of the profits for the UH. The UH’s mission is to identify innovations and develop them into commercialized products and services. The UH will be credited for the research and creation and receive reputational benefits.

¹ HRS § 84-10 had a sunset date of June 30, 2024. However, Act 115, Session Laws of Hawai‘i (“SLH”) 2024, section 1, amended Act 8, Special Session Laws of Hawai‘i 2021’s (“L Sp 2021, Act 8”) section 5, to remove the sunset clause.

There are substantially similar provisions in HRS §§ 304A-1961, et. seq., which were also enacted with a sunset date that was removed. See Act 116, SLH 2024, section 1, amending L Sp 2021, Act 8’s section 16, to remove the sunset clause.

HRS § 84-10 and HRS § 304A-1968 are substantially similar and the Commission notes they may be construed *in pari materia* with reference to each other. See HRS § 1-16.

II. Application of the State Ethics Code and Other Laws

Both Employees work for the UH and are state employees. State employees are subject to the requirements of the State Ethics Code.²

A. HRS § 84-14(a) & (d), Conflicts of Interest Law

The Conflicts of Interests Law, HRS § 84-14(a),³ prohibits state employees from taking any official action directly affecting any business in which they have a substantial financial interest. The Employees are financially interested in the Business because they are co-founders and co-owners. The Conflicts of Interests law would ordinarily prohibit them from taking official action affecting their Business.

Additionally, the Conflicts of Interests law, HRS § 84-14(d), prohibits state employees from assisting or representing a business before their own state agency. In this case, the Conflicts of Interests law would ordinarily prohibit the Employees from negotiating with the UH on behalf of their Business.

B. HRS § 84-13, 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; this law prevents employees from obtaining special perks or treatment for themselves or others as a result of their state employment.⁴ It also specifically prohibits:

- Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's office or position; or
- Using state time, equipment, or other facilities for private business purposes.

HRS § 84-13(a)(1) & (3). Ordinarily, state employees are prohibited from using state resources to support a private business venture.

² HRS § 84-2 states: "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"

³ 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 . . ."

⁴ HRS § 84-13(a) states: "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 . . ."

C. HRS § 84-10 University of Hawaii; Technology Transfer Activities; Exemption and HRS §§ 304A-1961, et. seq. University of Hawaii System, Innovation and Commercialization Initiative Program

HRS § 84-10 exempts technology transfer activities sponsored by the UH from HRS §§ 84-12, 84-13, 84-14 to 84-16, and 84-18, provided that the activities comply with the regulatory framework and research compliance program approved by the UH. See HRS § 84-10(a). Moreover, the Commission is instructed that state laws, including the code of ethics, shall be construed “on balance in recognition of the public benefits created and state interests advanced by the activities conducted by the UH pursuant to [HRS §§ 304A-1961, et. seq.]”. See HRS § 304A-1968(a).

Specifically, the UH may engage in activities with a private person or business “in which an employee of the University of Hawaii has a conflict of interest” if: (1) The activities promote the timely and efficient commercialization of intellectual property created by basic and applied research at the University of Hawaii;⁵ (2) The State stands to benefit from the activities; (3) The activities comply with the regulatory framework and research compliance program and policies approved by the University of Hawaii; (4) The employees’ conflict of interest is disclosed at the time of the proposal, and the proposals are reviewed by the Commission; (5) Any changes to the terms and conditions of the activities are reported to the Commission; (6) The employees with the conflicts of interest, do not: (A) take official action affecting the activities; or (B) directly or indirectly supervise an employee who takes official action affecting the activities; and (7) During the term of the activities, certain employees (employees with a conflict of interest, employees who take official action affecting the activities, and employees who directly or indirectly supervise an employee who takes official action affecting the activities) file annually with the Commission a disclosure of financial interests. See HRS §§ 84-10(b)(1)-(7) and 304A-1968(b)(1)-(7).

If any activity violates HRS §§ 84-10(b) or 304A-1968(b), it is voidable. See HRS §§ 84-10(c) and 304A-1968(c). Also, the UH shall file annually with the Commission, a disclosure including its conflict of interest management plan for activities conducted pursuant to HRS § 84-10 or HRS chapter 304A. See HRS §§ 84-10(d) and 304A-1968(d).

The Employees have a conflict of interest under HRS § 84-14(d) because they have negotiated with the UH on behalf of their private business. However, the Legislature recognized the value of the UH entering such agreements, and HRS §§ 84-10 and 304A-1968 were explicitly enacted to allow technology transfer activities if the factors in HRS

⁵ The language in HRS § 304A-1968(b)(1) varies slightly; requiring the activities “transform the products of the University of Hawaii’s research and instructional activities into viable economic enterprises”. See HRS § 304A-1968(b)(1). Under either version, the stated purpose satisfies this requirement.

§§ 84-10(b) and 304A-1968(b) were met. Based on the information provided by the UH, it appears that it has satisfied HRS §§ 84-10(b) and 304A-1968(b) because it has:

- indicated that this activity with the Business will benefit the State through both revenue and reputational benefit;
- the conflict of interest has been disclosed;
- the UH has developed a management plan and will register with the Commission; and
- the Employees have agreed to file financial disclosure statements with the Commission, as required by law.

On balance, it appears that the UH has a reasonable basis to enter into the technology transfer activity with the Employees and has satisfied the requirements of HRS §§ 84-10(b) and 304A-1968(b). The UH has agreed to require the Employees to avoid multiple roles or conflicting duties of loyalty.

III. Conclusion

The Commission reviewed the materials received from the UH and finds that, based on the UH's representations and amendments, the proposed agreement with the Business conforms to the requirements of HRS §§ 84-10 and 304A-1961, et. seq.

The Commission additionally notes that the Employees must file a disclosure of financial interests annually with the Commission during the term of the technology transfer activities. See HRS §§ 84-10(b)(7) and 304A-1968(b)(7). Finally, the UH must file annually, with the Commission, a disclosure including any conflict of interest of any employee relating to this technology transfer activity. See HRS §§ 84-10(d) and 304A-1968(d).

This opinion is based on the facts and documents provided by the UH. If they are misunderstood or not as stated, then this decision may be inapplicable. Moreover, this decision is limited to these specific facts. In future, the Commission may employ a different process or analysis for such matters.

Dated: Honolulu, Hawai'i, November 4, 2024.

HAWAI'I STATE ETHICS COMMISSION
Wesley F. Fong, Commissioner
Beverley Tobias, Commissioner
Cynthia Thielen, Commissioner
Roderick Becker, Commissioner

Note: Commissioner Robert Hong was recused from this matter.