

**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:

H.B. NO. 2175, H.D. 1, RELATING TO ETHICS.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 21, 2012

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Deputy Attorney General Charleen M. Aina

Chair Keith-Agaran and Members of the Committee:

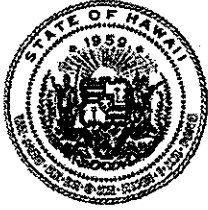
The Department of the Attorney General asks the Committee to hold this bill in favor of passage of H.B. No. 2455, H.D. 1, instead.

This bill exempts persons appointed by the Legislature to serve on task forces or groups for the sole purpose of recommending possible legislation, from the provisions of chapter 84, Hawaii Revised Statutes, the State's Ethics Code. It does this by three means: (1) exempting these persons from the Ethics Code's definition of "employee" in section 84-3, Hawaii Revised Statute; (2) exempting the groups to which these persons are appointed members, from the Ethics Code's definition of "state agency" in section 84-3, Hawaii Revised Statutes; and (3) expressly making section 84-14, Hawaii Revised Statutes, conflicts of interests provisions inapplicable to these individuals.

This bill has the same objective as H.B. No. 2455, which this Committee heard, amended, and passed out with approval. It recognizes that with increasing frequency, government needs to deal with issues and situations that require technical or experiential information that it does not have and cannot readily obtain, and that persons with the needed knowledge and expertise acquired that information and experience from owning or working for businesses or other undertakings that deal with those issues or situations regularly.

Because H.B. No. 2175 only excepts members of task forces established by the Legislature for the sole purpose of recommending possible legislation, from the Ethics Code, the Attorney General respectfully requests that the Committee hold the bill, and rely instead on H.B. No. 2455, as amended, to further the two bills' common objective of assuring that decision-

making is fully informed throughout state government, and not solely when the Legislature is considering legislation.



HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

The Honorable Gilbert S.C. Keith-Agaran, Chair
The Honorable Karl Rhoads, Vice Chair
House Committee on Judiciary
Hawaii State Capitol, Room 302
415 South Beretania Street
Honolulu, Hawaii 96813

Re: **Testimony on HB No. 2175, H.D. 1, Relating to Ethics**

Hearing: February 21, 2012, 2:00 p.m.
State Capitol, Conference Room 325

Written Testimony From: Hawaii State Ethics Commission

The Honorable Gilbert S.C. Keith-Agaran, Chair; The Honorable Karl Rhoads, Vice Chair; and Honorable Members of the House Committee on Judiciary:

Thank you for the opportunity to testify on House Bill 2175, H.D. 1, Relating to Ethics. House Bill 2175, H.D. 1, section 1, reflects that the bill's purpose is to exclude members of groups established by the legislature for the purpose of recommending legislation from the conflicts of interest law in the State Ethics Code. The bill amends the definition of "employee" in the State Ethics Code to exclude members of groups established by the legislature for the purpose of recommending possible legislation and amends the definition of "state agency" to exclude "task forces, working groups, or other similar entities."

Last year, the State Ethics Commission offered advice to members of the Mortgage Foreclose Task Force, a group created during the 2010 legislative session by Act 162, about the application of the conflicts of interest law to their ability to lobby the legislature on behalf of a private business, for pay, on legislation proposed by the Task Force. This advice issued was consistent with and based upon the Commission's past precedent. In years past, members of various task forces have received similar advice from the Commission.

Specifically, the Commission advised that the State Ethics Code prohibits a member of the task force from being paid to represent a non-governmental organization, such as a business, a trade organization, or another group, on matters in which the task force participated or would participate. For example, if the task force recommended legislation, then a member of the task force could not receive compensation to lobby on behalf of a private organization on that legislation. The

applicable portion of the conflicts of interest law is intended to prevent "influence peddling."¹

The Commission also advised that the State Ethics Code did not preclude or prohibit: (1) a member of the task force from testifying on behalf of the task force; (2) any organization or business from lobbying on any matter, including the legislation recommended by the task force, as long as the person lobbying on behalf of the organization was not a member of the task force; (3) a member of the task force from lobbying on other matters, unrelated to the legislation recommended by the task force; or (4) generally, a member of the task force from lobbying on any matter, including the legislation recommended by the task force, once the task force dissolved or the person was no longer a member of the task force.² The Commission advised only that, in certain limited situations, the State Ethics Code prohibits a member of a task force from being paid to lobby on behalf of an organization on legislation proposed by the task force.

The State Ethics Code applies to all state employees. "Employee" is broadly defined by the statute to include all nominated, appointed, or elected officers or employees of the State, including members of state boards, commissions, and committees.³ In light of both the underlying purpose of the ethics laws, i.e., to foster public confidence in government, and the statutory mandate that the laws be "liberally construed" to achieve that purpose, the State Ethics Commission interprets the term "employee" to include volunteer members of legislatively created task forces and working groups. Accordingly, these individuals are subject to the State Ethics Code, including the conflicts of interest law, the provisions protecting against the misuse of position, and the law prohibiting acceptance of gifts under circumstances in which it can be reasonably inferred that the gift is offered to influence or reward official action.

The State Ethics Commission continues to believe that, given the statutory purpose, members of task forces should not be able to profit from the privilege of serving on a state task force or other group. The State Ethics Commission further respectfully suggests that the "justifications" for exempting members of task forces from

¹ Haw. Rev. Stat. section 84-14(d) reads, in part:

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 he has participated or will participate as a legislator or employee[.]

² The post employment restrictions of the State Ethics Code, Haw. Rev. Stat. section 84-18, do apply to members of task forces. However, the post employment law would not apply to members of task forces who served for less than 181 days.

³ Haw. Rev. Stat. section 84-3.

the State Ethics Code, including the conflicts of interest law, are red-herrings, without factual basis, and are unpersuasive.

That said, if the Legislature believes, after considering the statutory purpose, that it is in the public interest to exempt members of task forces and other similar groups from the conflicts of interest law, the State Ethics Commission respectfully takes no position on the bill's intent; however, the State Ethics Commission believes that the language of the bill is too broad and is too vague and, consequently, will unintentionally exempt members of numerous other types of boards and commissions from the State Ethics Code.

As drafted, House Bill 2175 amends the definition of "employee" to exclude individuals who are members of "task forces, working groups, or other similar entities established by the legislature for the purpose of recommending possible legislation." Arguably, because "task force," "working group," or "other similar entity" are not sufficiently defined, any group formed by the legislature may be exempt from the State Ethics Code if, among other duties, it was to recommend legislation. For example, the Board of Land and Natural Resources, as a function of its statutory duties, may offer proposed legislation, and arguably, under the bill, its members would be exempt from the State Ethics Code.

The Commission suggests that the bill specifically and clearly define the type of groups which the Legislature intends to exempt from the State Ethics Code. If the purpose of this bill is to exempt members of task forces such as the Mortgage Foreclosure Task Force from the State Ethics Code, then the Commission recommends that the language in the bill be amended to specifically include a definition of "task force." Similar to the suggested amendment to House Bill No. 2455 offered by the State Ethics Commission, the Commission recommends that the following language and suggests that the language addresses the purpose of the bill:

"Employee" means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices [and], judges[-], and members of task forces.

"Task force" means a group established by resolution, act or otherwise to study a specific subject or issue, for a specific defined period of time, and to report to, offer

a recommendation to, or advise the legislature.” 4

The State Ethics Commission also suggests that the amendment to the definition of “State agency” to exclude “task forces, working groups, or other similar entities” is unnecessary to achieve the Legislature’s purpose and, in fact, may create substantial confusion. Accordingly, the State Ethics Commission requests that the amendment to the definition of “State agency” be deleted.

Lastly, although the stated purpose of the bill is to exempt members of certain legislatively created groups from the conflicts of interest law, the Committee should be aware that, by amending the definition of “Employee” to exclude members of “task forces,” member of those groups will also be exempt from all other provisions of the State Ethics Code. Specifically, the provisions of the State Ethics Code that prohibit misuse of position⁵ or acceptance of gifts under circumstances in which it can be reasonably inferred that the gift is offered to influence or reward official action will not apply⁶. Arguably, employees of a state department, such as the department director, who may be asked to serve on the “task force” may also be exempt from the State Ethics Code, with respect to their activities as a member of the “task force.”

By amending the definition of “Employee” to exempt members of “task forces,” the State Ethics Commission suggests that section 3 of the bill is unnecessary. That section of the bill amends the conflicts of interest provision, HRS § 84-14(a), to exclude members of “task forces” from the provision. As explained above, by amending the definition of “Employee” to exclude those members, the State Ethics Code, in toto, will not apply to those individuals. However, if the Committee’s intent is to exempt members of “task forces” only from the conflicts of interest law and to require their compliance with the other provisions in the State Ethics Code, the State Ethics Commission suggests that: (1) the statute be amended to define the term “task force” as suggested above; (2) the amendments to the definition of “Employee” be deleted (which will limit the exemption); and (3) language amending HRS § 84-14(a) be replaced with the following:

This section shall not apply to a person serving on a task force.

Thank you for the Committee’s consideration of the Ethics Commission’s testimony on House Bill No. 2175, H.D. 1.

⁴ House Bill 2455, considered by this Committee on February 2, 2012, adopted language similar to the Commission’s suggestion in House Draft 1 of that bill.

⁵ Haw. Rev. Stat. §84-13.

⁶ Haw. Rev. Stat. §84-11.



AMERICANS FOR DEMOCRATIC ACTION

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February 19, 2012

TO: Chair Keith-Agaran, Vice-Chair Rhoads
Members of the House Judiciary Committee

FROM: Americans for Democratic Action/Hawaii
Barbara Polk, Legislative Chair

SUBJECT: OPPOSITION TO HB 2175 HD1 RELATING TO ETHICS

Americans for Democratic Action/Hawaii cannot support this bill. By excluding members of task forces, working groups and others similar groups from the definition of "employee" in the Ethics Code, you would be saying that it is acceptable for those members to: accept or solicit gifts that are intended to influence their recommendations, disclose confidential information to the public or use it for personal gain, seek favors for themselves or others, or seek or accept a contract with a state agency without going through the bid process. We understand that the bill came about because of a concern that a member of a task force could not lobby or testify on behalf of his company on matters relating to the task force's recommendations, not because task force members wanted all the exemptions mentioned above.

Such groups are set up because politicians do not have the time or resources to do the detailed examination of complex issues in certain cases. As a result, they rely quite heavily on the recommendations of the task force even though the task force does not make the final decisions. It is appropriate that members of such groups abide by the provisions of the ethics code in the same way that a paid employee does, and for the same reason—to maintain confidence in government.

We urge you to defeat this measure.



Hawaii Farm Bureau
F E D E R A T I O N

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FEBRUARY 21, 2012

HEARING BEFORE THE
HOUSE COMMITTEE ON JUDICIARY

TESTIMONY ON HB 2175 HD1
RELATING TO ETHICS

Room 325
2:00 PM

Chair Keith-Agaran, Vice Chair Rhoads, and Members of the Committee:

I am Janet Ashman, testifying on behalf of the Hawaii Farm Bureau Federation (HFBF). Organized since 1948, the HFBF is comprised of 1,800 farm family members statewide, and serves as Hawaii's voice of agriculture to protect, advocate and advance the social, economic and educational interests of our diverse agricultural community.

HFBF strongly supports HB 2175 HD1, which recognizes that in order to make well-informed, reasonable decisions, state officials and agencies need and benefit from the technical information and experience of individuals who may serve on task forces. Many of our members voluntarily serve on task forces as a community service and these civic-minded individuals should be allowed to share their knowledge and expertise with State decision-makers. Although we prefer the language of HB 2455 HD1 since it includes a broader range of task forces, we do support HB 2175.

Thank you for the opportunity to testify. Please contact me at (808) 848-2074, if I can assist in any way.

HAWAII YOUTH SERVICES NETWORK

677 Ala Moana Boulevard, Suite 702 Honolulu, Hawaii 96813

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Daryl Selman, President

Judith F. Clark, Executive Director

Aloha House

American Civil Liberties Union of Hawaii

Assistive Technology Resource Ctrs. of HI
Bay Clinic, Inc.

Big Brothers Big Sisters of Honolulu

Big Island Substance Abuse Council

Blueprint for Change

Bobby Benson Center

Catholic Charities Hawaii

Central Oahu Youth Services Assn.

Child and Family Service

Coalition for a Drug Free Hawaii

Domestic Violence Action Center

EPIC, Inc.

Family Support Hawaii

Friends of the Missing Child Center of HI

Hale Kipa, Inc.

Hale 'Opio Kauai, Inc.

Hawaii Behavioral Health

Hawaii Student Television

Healthy Mothers Healthy Babies Coalition

Hina Mauka Teen Care

Hui Malama Learning Center

Kahi Mohala Behavioral Health

Kama'aina Kide, Inc.

KEY (Kualoa-Heeia Ecumenical Youth)
Project

Kids Behavioral Health

Kids Hurt Too

Kokua Kaihi Valley

Kula No Na Poe Hawaii

Lanai Community Health Center

Life Foundation

Marimed Foundation

The Maui Farm, Inc.

Maui Youth and Family Services

Palama Settlement

P.A.R.E.N.T.S., Inc.

Parents and Children Together (PACT)

Planned Parenthood of Hawaii

Queen Liliuokalani Children's Center
Kona Unit

REAL

Salvation Army Family Intervention Svcs.

Salvation Army Family Treatment Svcs.

Sex Abuse Treatment Center

Susannah Wesley Community Center

The Catalyst Group

The Children's Alliance of Hawaii

Waikiki Health Center

Women Helping Women

YouthVision

YWCA of Kauai

February 21, 2012

To: Representative Gilbert Keith-Agaran, Chair
And members of the Committee on Judiciary

TESTIMONY IN SUPPORT OF HB 2175 RELATING TO ETHICS

Hawaii Youth Services Network (HYSN), a statewide coalition of youth-serving organizations, strongly supports HB 2175 Relating to Ethics.

State Legislators must address an incredibly wide range of issues each legislative session. Our legislators are not and cannot be experts on every issue that comes before them. They need and seek reliable, accurate advice from people with training and experience in the field through committees, work groups, or task forces.

The members of these groups assist in conducting needs assessments, identifying effective programs and practices, determining how well they fit Hawaii's unique culture and people, and making recommendations for legislative action. While the organizations that they represent may potentially benefit from the policies or laws that result from the work of these task forces, the primary reason for participation is to benefit the people of Hawaii and to prevent negative health or social consequences.

This bill is needed to ensure that the Legislature and the residents of our state can benefit from the expertise of civic-minded citizens.

I have personally served on many task forces or work groups convened by the Legislature and the work of these groups has benefitted the youth of Hawaii and their families. Some examples include:

Non-school-hours Task Force – Was successful in increasing the safety of children before and after school, by increasing funding and availability of non-school hour programs. Such programs are demonstrated to reduce

juvenile crime, unplanned pregnancy, and drug abuse, while increasing academic performance.

Safe Shelter for Youth Work Group – Established by legislative resolution, this group recommended that young people be given the right to consent for admission to a youth shelter, if parents/guardians could not be reached to provide consent. The law went into effect in July 2011 and increases the safety of runaway and homeless youth by ensuring that they are not forced to stay on the street.

Thank you for this opportunity to testify.

Sincerely,

A handwritten signature in black ink, appearing to read "Judith F. Clark". The signature is written in a cursive style with a large initial "J".

Judith F. Clark
Executive Director

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February 21, 2012

Rep. Gilbert S.C. Keith-Agaran, Chair
and members of the House Committee on Judiciary
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **House Bill 2175, HD 1 (Ethics)**
Hearing Date/Time: Tuesday, February 21, 2012, 2:00 p.m.

I am Marvin S. C. Dang. I strongly support this Bill.

The purposes of this Bill are to (a) exempt a person serving on a task force, working group, or other similar entities established by the legislature for the purpose of recommending possible legislation from the conflict of interest law under the State Ethics Code, and (b) clarify that an employee, as defined in the Ethics Code, does not include such persons.

I am a member of the Mortgage Foreclosure Task Force representing the Hawaii Financial Services Association. I currently serve as Vice Chair of the Task Force. However, this testimony is written in my individual capacity as one of the Mortgage Foreclosure Task Force members. I am not writing as the Vice Chair nor am I writing on behalf of any of the other Task Force members.

The Mortgage Foreclosure Task Force was created by the legislature by Act 162 (effective on June 3, 2010) to "undertake a study to develop both general and specific policies and procedures necessary to improve the manner in which mortgage foreclosures are conducted in [Hawaii]." The Task Force was directed to submit reports of its findings and recommendations, including any proposed legislation, to the 2011 and 2012 legislatures. The term of the Task Force encompasses 3 calendar years with 2 legislative sessions sandwiched in between. The Task Force began meeting in July, 2010 and it continues in existence until June 30, 2012.

Ten months after the Mortgage Foreclosure Task Force started meeting, the Hawaii State Ethics Commission sent a Memorandum dated May 26, 2011 to the members of the Task Force. The Memorandum stated, among other things,

"The State Ethics Code prohibits a member of the Task Force from being compensated to represent non-governmental organizations, such as businesses, both for-profit and not for-profit, trade organizations, or other groups, on matters in which the Task Force participated or will participate.

"... We strongly advise members of the Task Force against testifying, in the future, as paid representatives of non-governmental organizations on matters in which the Task Force participated or will participate."

On July 18, 2011, I sent a letter to the Ethics Commission. A copy of my letter is attached as Exhibit "A".

In my letter to the Ethics Commission, I wrote:

“I disagree with the conclusions in your Memorandum. A copy of your Memorandum is attached for your reference. I contend that your Memorandum is overly broad and inconsistent with applicable statutes. Accordingly, I am respectfully requesting that you reconsider and retract your Memorandum.” (Emphasis included.)

Also in my letter to the Ethics Commission, I stated:

“For you to make that interpretation, you needed to have determined that a “task force”, such as the Mortgage Foreclosure Task Force, is a board, commission or committee under the definition of “employee” in HRS §84-3. ...

“As you may know, a “task force” is different from a board or commission, and it is not a committee (such as a committee that is part of a department). The Mortgage Foreclosure Task Force has a limited duration: it was created by Act 162 on June 3, 2010 and it sunsets on June 30, 2012. It was established by the Legislature to conduct an analysis of all factors affecting mortgage foreclosures and to recommend appropriate legislation. It is required to submit reports of its findings and recommendations to the Legislature. The Task Force is solely advisory. It does not have regulatory powers. It does not make policy. Its members are not appointed by the Governor nor are they confirmed by the Senate. The Task Force is within the Department of Commerce & Consumer Affairs for administrative purposes.” (Emphasis added.)

The Ethics Commission did not retract its Memorandum dated May 26, 2011.

Unfortunately, as a result of the Memorandum of May 26, 2011, 2 members of the Mortgage Foreclosure Task Force resigned before the Task Force’s August 2, 2011 meeting.

On February 2, 2012, the Ethics Commission sent me a letter about its position on this matter. A copy of the letter is attached as “Exhibit B”. The position of the Ethics Commission continues to be overly broad and inconsistent with applicable statutes including HRS §84-14(d).

I should point out that for 3 years from 2005 through 2007, I was a member and Vice Chair of the legislatively-created Hawaii Identity Theft Task Force (and previously the Anti-Phishing Task Force). The issue raised by the Ethics Commission in its Memorandum last year was never raised by the Ethics Commission regarding the Identity Theft Task Force.


This Bill is important to ensure that advisory task forces created by the legislature, similar to the Mortgage Foreclosure Task Force, are able to include people who have an interest, knowledge, or expertise in the particular issue. People shouldn’t be precluded from providing their input as task force members merely because they will later be testifying or advocating on these issues for compensation.

As stated by the Ethics Commission in its February 2, 2012 letter (see Exhibit “B”, page 2, footnote 2), “if the Legislature’s intent is to exempt you and the other members of the Mortgage Foreclosure Task Force from the State Ethics Code, the Legislature should consider including

language in the bill to make the amendment retroactive to a specific date.”

The suggestion of the Ethics Commission to have a retroactive effective date of this Bill seems worthy of consideration by your Committee. I should note that the effective date of Act 162, which created the Mortgage Foreclosure Task Force, is June 3, 2010.

Thank you for considering my testimony.


MARVIN S.C. DANG

Enclosures

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July 18, 2011

Leslie H. Kondo, Executive Director and General Counsel
Hawaii State Ethics Commission
1001 Bishop Street, ASB Tower, Ste. 970
Bishop Square
Honolulu, Hawaii 96813

Re: Your May 26, 2011 Memorandum to the Mortgage Foreclosure Task Force Members

Dear Mr. Kondo:

You sent a Memorandum dated May 26, 2011 ("Memorandum") to the members of the Mortgage Foreclosure Task Force. I am a member of the Task Force representing the Hawaii Financial Services Association.

This letter is written in my individual capacity as one of the Task Force members. I am not writing as the Vice Chair and Acting Chair of the Task Force, nor am I writing on behalf of any of the other Task Force members.

I disagree with the conclusions in your Memorandum. A copy of your Memorandum is attached for your reference. I contend that your Memorandum is overly broad and inconsistent with applicable statutes. Accordingly, I am respectfully requesting that you reconsider and retract your Memorandum.

My concerns about your Memorandum are detailed below as "issues". Within the "issues" are various questions that I have for you.

RELEVANT STATUTES:

The sections of the Hawaii Revised Statutes ("HRS") referred to in your Memorandum are in HRS Chapter 84 (Standards of Conduct). The sections are:

1. HRS §84-3, which provides in part:

EXHIBIT "A"

“Employee” means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices and judges.

2. HRS §84-14(d), which is part of the Code of Ethics and which reads:

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 he has participated or will participate as a legislator or employee, nor shall he 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 he is an employee or legislator.

ISSUES:

Issue No. 1:

On page 2 of your Memorandum, you state:

The State Ethics Commission interprets “employee,” as defined in the State Ethics Code, to include volunteer members of a legislative-created task force such as the Mortgage Foreclosure Task Force.

For you to make that interpretation, you needed to have determined that a “task force”, such as the Mortgage Foreclosure Task Force, is a board, commission or committee under the definition of “employee” in HRS §84-3. HRS §84-3 provides in relevant part:

“Employee” means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, (emphasis added)

As you may know, a “task force” is different from a board or commission, and it is not a committee (such as a committee that is part of a department). The Mortgage Foreclosure Task Force

Leslie H. Kondo, Executive Director and General Counsel
Hawaii State Ethics Commission
July 18, 2011
Page 3

has a limited duration: it was created by Act 162 on June 3, 2010 and it sunsets on June 30, 2012. It was established by the Legislature to conduct an analysis of all factors affecting mortgage foreclosures and to recommend appropriate legislation. It is required to submit reports of its findings and recommendations to the Legislature. The Task Force is solely advisory. It does not have regulatory powers. It does not make policy. Its members are not appointed by the Governor nor are they confirmed by the Senate. The Task Force is within the Department of Commerce & Consumer Affairs for administrative purposes.

HRS §84-3 refers only to “boards, commissions, and committees”. No other entity is mentioned. Compare this to an unrelated statute (HRS §662D-1) which refers to “board, commission, division, office, officer, public body, task force, or any other similar entity” (emphasis added).

There is a principle of statutory interpretation called “expressio unius est exclusio alterius”, which means “the inclusion of the one thing is the exclusion of the other”. In other words, when one or more things of a class are expressly mentioned, others of the same class are excluded.

Questions:

Do you agree that because HRS §84-3 refers only to “boards, commissions, and committees” and not to “task forces” or other entities, you cannot liberally construe a “task force” to be a “board, commission or committee”? If not, why not?

Note: I strongly disagree with your determination that a Task Force member is an “employee” under HRS §84-3, HRS §84-14(d), and the Code of Ethics. However, in this letter, when I refer to a Task Force member as an “employee”, that is only when I raise various issues about your Memorandum. It does not mean I am conceding that a Task Force member is an “employee”.

Issue No. 2:

In your Memorandum, you decided that a member of the Task Force is an “employee” under the definition in HRS §84-3. Once you made that determination, you then subjected the Task Force members to the provisions in HRS §84-14(d) of the Code of Ethics merely because that Section uses the word “employee”.

As you are aware, there are many other sections in the Code of Ethics which also use the word “employee”. Those sections include, but are not limited to:

- a. HRS §84-11 (no employee shall solicit, accept, or receive gifts under certain

Leslie H. Kondo, Executive Director and General Counsel
Hawaii State Ethics Commission
July 18, 2011
Page 4

circumstances),

b. HRS §84-11.5 (employees shall annually file a gift disclosure statement with the Ethics Commission under certain conditions),

c. HRS §84-12 (no employee shall disclose certain confidential information),

d. HRS §84-13 (no employee shall use or attempt to use the employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts or treatment for oneself or others),

e. HRS §84-15 (a state agency shall not enter into certain contracts with an employee or a business in which an employee has a controlling interest unless certain conditions are met), and

f. HRS §84-18 (as part of the restrictions on post-employment, no former employee shall, within 12 months after termination of the former employee's employment, assist any person or business or act in a representative capacity for a fee or other consideration, on matters in which the former employee participated as an employee).

Questions:

Do you agree that a Task Force member is not subject to the above provisions or to any other provisions in the Code of Ethics which use the word "employee"? If you disagree, what is your legal basis?

Issue No. 3:

On page 3 of your Memorandum you claim that:

The State Ethics Code prohibits, among other things, an "employee" from being paid to assist or represent another person or business on a matter in which the employee has participated or in which he will participate. (emphasis added)

At the end of that sentence, you have a footnote which specifically references HRS §84-14(d). The text of that Section is on page 2 of this letter.

Questions:

a. HRS §84-14(d) does not contain the phrase “on a matter”. That Section instead uses the phrase “to secure passage of a bill or to obtain a contract, claim or other transaction or proposal”. Do you agree that by using the phrase “on a matter” in your sentence, you’ve broadened what HRS §84-14(d) actually prohibits? If not, why not?

b. Your same sentence ends with the phrase “in which the employee has participated or in which he will participate.” At the end of your sentence you left out the phrase “as an employee” which is in HRS §84-14(d). Do you agree that the omitted phrase (“as an employee”) would actually limit the scope of what you claim HRS §84-14(d) prohibits? If not, why not?

c. One principle of statutory interpretation is that whenever possible, each word in a statutory provision is to be given meaning and is not to be treated as surplusage. Do you agree that you should not have left out the phrase “as an employee” at the end of your sentence? If not, why not?

Issue No. 4:

In another sentence in your Memorandum on page 3, you assert that:

The State Ethics Code prohibits a member of the Task Force from being compensated to represent non-governmental organizations, such as businesses, both for-profit and not for-profit, trade organizations, or other groups, on matters in which the Task Force participated or will participate. (emphasis added)

Questions:

a. Do you agree that by using the phrase “on matters” in your sentence, you’ve broadened what HRS §84-14(d) actually prohibits? If not, why not?

b. In your sentence, you use the phrase “in which the Task Force participated or will participate” (emphasis added). However, HRS §84-14(d) uses the words “in which the employee has participated or in which he will participate” (emphasis added). Because, you claim that a Task Force member is an “employee”, do you agree that your sentence should have instead stated: “in which the Task Force member participated or will participate”? If not, why not?

c. At the end of your sentence you left out the phrase “as an employee” which is in HRS §84-14(d). Do you agree that you should not have left out the phrase “as an employee” at the end of your sentence? If not, why not?

Issue No. 5:

You state in your Memorandum on page 2 that the Mortgage Foreclosure Task Force

. . . adopted several recommendations and submitted proposed legislation as part of its preliminary report to the 2011 Legislature; that the proposed legislation primarily involved the non-judicial foreclosure process (emphasis added)

The recommendations of the Task Force were in a December, 2010 report to the 2011 Legislature. The Task Force last met in December, 2010.

When describing prohibited activities, HRS §84-14(d) is very specific and uses the following words: “to secure passage of a bill ... in which he has participated or will participate as ... [an] employee” (emphasis added).

Various bills based on the Task Force’s proposed legislation were formally introduced in the 2011 Legislature by legislators in January, 2011. Those bills include Senate Bill 652 and House Bill 879.

a. Do you agree that a “proposed legislation” is not a “bill” because a “bill” needs to be formally introduced by a legislator when the Legislature is in session? If not, why not?

b. There is a principle of statutory interpretation that the words of a statute should be given their ordinary meaning, absent clear and express legislative intention to the contrary. Do you agree that “proposed legislation” is not the same as a “bill” for the purpose of HRS §84-14(d) of the Ethics Code? If not, why not?

c. Do you agree that the Mortgage Foreclosure Task Force members in 2010 only participated with “proposed legislation” and did not participate with “bills”? If not, why not?

Issue No. 6:

In your Memorandum on page 3, when you describe the types of restrictions on the activities of an “employee”, you use the phrases “lobby ... on legislation that was recommended by the Task Force” and “testified on bills that were drafted or recommended by the Task Force”.

However, when describing prohibited activities, HRS §84-14(d) uses the following specific phrase: “to secure passage of a bill ... in which he has participated or will participate as ... [an] employee” (emphasis added).

Questions:

a. Do you agree that if a Task Force member testifies against a bill or lobbies against a bill, that activity would not be considered as an action to “secure passage of a bill”? If not, why not?

b. Do you also agree that an activity referred to in Question (a), above, would not violate HRS §84-14(d) and the Ethics Code? If not, why not?

c. Do you agree that if a Task Force member testifies against a bill or lobbies against a bill which contains a recommendation of the Task Force, that activity would not be considered as an action to “secure passage of a bill”? If not, why not?

d. Do you also agree that an activity referred to in Question (e), above, would not violate HRS §84-14(d) and the Ethics Code? If not, why not?

e. Do you agree that when you used the phrases “lobby on legislation” and “testified on bills” to describe prohibited activities, you broadened what HRS §84-14(d) and the Ethics Code actually prohibit? If not, why not?

Issue No. 7:

One of the recommendations of the Mortgage Foreclosure Task Force to the 2011 Legislature was that the Legislature should “defer action” on revisions to Part II of HRS Chapter 667 relating to the alternate non-judicial foreclosure process because “the task force will address this item as part of its report to the 2012 Legislature.” Various bills in the 2011 Legislature contained revisions to Part II of HRS Chapter 667. On behalf of the Hawaii Financial Services Association, I submitted testimony opposing Senate Bill 651, H.D. 1 which contained revisions to Part II of HRS Chapter 667.

Questions:

a. Do you agree that if a bill has provisions that are contrary to a recommendation of the Task Force, and if a Task Force member testifies against that bill or lobbies against that bill, that activity would not be considered as an action to “secure passage of a bill”? If not, why not?

Leslie H. Kondo, Executive Director and General Counsel
Hawaii State Ethics Commission
July 18, 2011
Page 8

b. Do you agree that such an activity would not violate HRS §84-14(d) and the Ethics Code? If not, why not?

Issue No. 8:

Some of the bills in the 2011 Legislature contained concepts which were not discussed or considered by the Mortgage Foreclosure Task Force. One example is a moratorium on certain types of non-judicial foreclosures.

Questions:

a. Do you agree that if a Task Force member testifies against a bill or lobbies against a bill which contains concepts not discussed or considered by the Task Force members, that activity would not be considered as an action to "secure passage of a bill"? If not, why not?

b. Do you agree that such an activity would not violate HRS §84-14(d) and the Ethics Code? If not, why not?

Issue No. 9:

HRS §84-14(d) prohibits an employee from assisting any person or business or acting in a representative capacity "for a fee or other compensation to secure passage of a bill" in which the employee has participated or will participate as a legislator or employee.

Questions:

If a Mortgage Foreclosure Task Force member is not receiving a "fee or other compensation" to secure passage of a bill in which he or she participated as a Task Force member, do you agree that the member can testify and/or lobby on the bill without violating HRS §84-14(d) and the Ethics Code? If not, why not?

Issue No. 10:

On page 3 in the next to the last paragraph of your Memorandum, you state:

We strongly advise members of the Task Force against testifying, in the future, as paid representatives of non-governmental organizations

Leslie H. Kondo, Executive Director and General Counsel
Hawaii State Ethics Commission
July 18, 2011
Page 9

on matters in which the Task Force participated or will participate.
(emphasis added)

Question:

Based on the issues which I have raised in this letter, do you agree that your above advice to the members of the Mortgage Foreclosure Task Force is overly broad and inconsistent with what HRS §84-14(d) and the Ethics Code prohibit?


* * * * *

If you agree with me on the various issues I have raised in this letter, I respectfully ask that you reconsider and retract your May 26, 2011 Memorandum. Because of the far-reaching ramifications of your Memorandum and the issues raised in this letter regarding HRS §84-14(d) and the Code of Ethics, perhaps these matters can be best resolved during the 2012 Legislative Session.

For your information, the Mortgage Foreclosure Task Force plans to meet on Tuesday, August 2, 2011. A written retraction by you before that time would be welcome.

Thank you.

Sincerely,


MARVIN S.C. DANG

(MSCD/af)

Enclosure



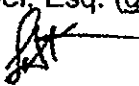
HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

MEMORANDUM

Via Email

TO: Members of the Mortgage Foreclosure Task Force
Iris Catalani (dfi@dcca.hawaii.gov)
Marvin S.C. Dang, Esq. (dangm@aloha.net)
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FROM: Leslie H. Kondo 
Executive Director and General Counsel

SUBJECT: Mortgage Foreclosure Task Force

DATE: May 26, 2011

It has come to our attention that some members of the Mortgage Foreclosure Task Force ("Task Force") may have testified and/or otherwise lobbied on mortgage foreclosure issues before the Hawaii State Legislature during the 2011 session on behalf of non-governmental entities, either as a paid lobbyist or as an employee of the entity. If true, such conduct raises concerns under the State Ethics Code.

We understand that the Task Force was created by Act 162, Session Laws of Hawaii, 2010, to study and recommend policies and procedures to improve the manner in which mortgage foreclosures are conducted in the State; that the Task Force is comprised of seventeen members, representing a number of government agencies and

non-governmental organizations;¹ that the Task Force is within the Department of Commerce and Consumer Affairs for administrative purposes; that the Task Force adopted several recommendations and submitted proposed legislation as part of its preliminary report to the 2011 Legislature; that the proposed legislation primarily involved the non-judicial foreclosure process; and that the Task Force will sunset on June 30, 2012.

We are also aware of a number of bills that the 2011 Legislature considered relating to foreclosure issues, such as H.B. 879 (Relating to Mortgage Foreclosures), H.B. 1411 (Relating to Mortgage Foreclosures), S.B. 651 (Relating to Mortgage Foreclosures), and S.B. 1519 (Relating to Mortgage Loan Originators).

The State Ethics Code, Hawaii Revised Statutes Chapter 84, applies to state legislators and state employees. The State Ethics Commission interprets "employee," as defined in the State Ethics Code, to include volunteer members of a legislative-created task force such as the Mortgage Foreclosure Task Force.² Accordingly, as an "employee," Task Force members are subject to and must comply with the State Ethics

¹ We understand the members of the Task Force to be:

- (1) Stephen H. Levins, Department of Commerce and Consumer Affairs, Office of Consumer Protection;
- (2) Marvin S.C. Dang, Hawaii Financial Services Association;
- (3) Michelle Kauhane, Hawaii Community Assets;
- (4) Ryker J. Wada, Legal Aid Society of Hawaii;
- (5) Neal Okabayashi, Hawaii Bankers Association of Hawaii;
- (6) Linda Nakamura, Mortgage Bankers Association of Hawaii;
- (7) Stefanie Sakamoto and Francis Hogan, Hawaii Credit Union League;
- (8) Jane Sugimura, Hawaii Council of Associations of Apartment Owners;
- (9) Steven Guttman, Hawaii State Bar Association Collection Law Section;
- (10) Jerrold K. Guben, Hawaii State Bar Association Bankruptcy Law Section;
- (11) Julia H. Berbrugge, State of Hawaii Judiciary;
- (12) D.B. Griffin, Department of Commerce and Consumer Affairs, Division of Financial Institutions;
- (13) Lorrin Hirano, Title Guaranty of Hawaii, Inc.;
- (14) Joan Takano, Hawaii Government Employees Association;
- (15) Steven Tam, AARP Hawaii Volunteer;
- (16) Colin Yost, attorney; and
- (17) George J. Zweibel, attorney.

We note that a number of the members of the Task Force are also registered lobbyists.

² Section 84-3, HRS, provides in relevant part:

"Employee" means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices and judges.

(Emphasis added); see also HRS § 84-1 (requiring that the State Ethics Code be "liberally construed").

Code. The State Ethics Code prohibits, among other things, an "employee" from being paid to assist or represent another person or business on a matter in which the employee has participated or in which he will participate.³

The State Ethics Code prohibits a member of the Task Force from being compensated to represent non-governmental organizations, such as businesses, both for-profit and not for-profit, trade organizations, or other groups, on matters in which the Task Force participated or will participate. For example, a member of the Task Force who is an employee of a company may not receive a salary to lobby on behalf of the company on legislation that was recommended by the Task Force. Similarly, a member of the Task Force may not otherwise be paid to privately lobby on behalf of a company, trade organization, or other group on legislation that was recommended by the Task Force.

We emphasize that the State Ethics Code does not prohibit a member of the Task Force from testifying on behalf of the Task Force. We also note that private, non-governmental organizations are not prohibited from lobbying on any matter. As explained above, in certain situations, the State Ethics Code prohibits a member of the Task Force from being compensated to lobby on behalf of an organization. Individuals other than the members of the Task Force may testify on behalf of the organization.

We are providing you with this letter to alert members of the Task Force of our concerns that members who are paid lobbyists or employees of non-governmental organizations may have testified on bills that were drafted or recommended by the Task Force. As noted above, such action appears to be in violation of the State Ethics Code. Staff, however, does not intend to recommend any further action by the State Ethics Commission relating to any lobbying by Task Force members on Task Force-related matters this past legislative session. We strongly advise members of the Task Force against testifying, in the future, as paid representatives of non-governmental organizations on matters in which the Task Force participated or will participate.

If you would like to discuss this matter further or have other concerns relating to the State Ethics Code, you are welcome to contact us. Thank you for your attention to this matter.

LHK/pms

³ Specifically, section 84-14(d), HRS, reads in relevant part:

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 he has participated or will participate as a legislator or employee[.]



HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

February 2, 2012

Via Email

Marvin S. C. Dang
P.O. Box 4109
Honolulu, Hawaii 96812-4109

Re: Mortgage Foreclosure Task Force

Dear Mr. Dang:

At last Friday's hearing before the Senate's Committee on Judiciary and Labor, you testified that the State Ethics Commission's guidance to you and the other members of the Mortgage Foreclosure Task Force was confusing and unclear. Frankly, your comments were surprising, given that I spoke with you as well as with many other members of the Task Force about the Commission's interpretation of the statute on a number of occasions and, at your request, participated in a Task Force meeting on August 2, 2011, to further explain that interpretation. Although you and others may disagree with the State Ethics Commission's interpretation, I was never aware that you did not understand the State Ethics Commission's position.

In the event that you and the other members of the Task Force truly are unclear about the Commission's position, I am writing to make that position clear: Members of the Mortgage Foreclosure Task Force cannot, for pay or other compensation, lobby the legislature on behalf of a non-governmental organization on bills relating to the matters that the members worked on as part of the Task Force.¹ More specifically, that means, among other things, Task Force members cannot be paid to testify on behalf of a non-governmental organization on a bill implementing the Task Force's recommendations. To be clear, the Commission's position is not dependent on whether you are testifying in support of the bill, testifying in opposition to the bill or seeking an amendment to the bill. You simply cannot testify on behalf of a non-governmental entity on the bill if you are paid to do so.

¹ I again emphasize that the State Ethics Commission's position does not prohibit members of the Task Force from testifying on behalf of the Task Force; it does not restrict Task Force members from lobbying, for pay, on matters that are unrelated to those considered by the Task Force; it does not prohibit the member's employer or the association which the member represents from lobbying on the specific matters proposed by the Task Force. The State Ethics Code simply prohibits the member of the Task Force from lobbying the legislature, for pay, on proposed legislation recommended by or relating to the Task Force's work.

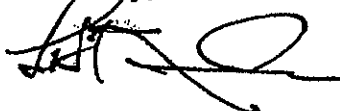
Marvin S. C. Dang, Esq.
February 2, 2012
Page 2

I am aware that you have been offering testimony on behalf of the Hawaii Financial Services Association ("HFSA") on House Bill No. 1875, which I understand implements the Mortgage Foreclosure Task Force's recommendations. If you are being paid by HFSA to testify on its behalf, unless there are factors to which I am unaware that might otherwise allow you to do so, your conduct appears to be contrary to the State Ethics Commission's guidance to you and appears to be a violation of the State Ethics Code.

Although Senate Bill No. 2240 and other similar measures, if enacted, will likely cause the State Ethics Commission to re-consider its position, at present, the State Ethics Commission's interpretation of the statute is unchanged: as a member of the Task Force, you cannot, for pay, lobby on behalf of a non-governmental organization on the bills which will implement the Task Force's recommendation or which relate to the issues you worked on as a Task Force member.² If you continue acting in a manner that is inconsistent with the State Ethics Commission's guidance to you, the Commission may be forced to consider more formal action against you.

By copy of this letter to the other members of the Mortgage Foreclosure Task Force, I am reminding them of the State Ethics Commission's position and invite them to contact me if they are uncertain about that position or have any questions. You are also welcome to contact me if the above is unclear or if you have questions about the State Ethics Commission's position.

Sincerely,



Leslie H. Kondo
Executive Director and
General Counsel

LHK/ps

² For your information, after the Committee hearing, I informed Senator Clayton Hee that the bill, as passed by the Committee, does not appear to apply retroactively. I suggested to Senator Hee that, if the Legislature's intent is to exempt you and the other members of the Mortgage Foreclosure Task Force from the State Ethics Code, the Legislature should consider including language in the bill to make the amendment retroactive to a specific date.

Marvin S. C. Dang, Esq.
February 2, 2012
Page 3

c: Via Email:
Everett S. Kaneshige, Chair
Bruce B. Kim
Jeff Gilbreath
Ryker J. Wada
Kevin Oda
Gary Y. Kawamoto
Francis P. Hogan
Jane Sugimura
Steven Guttman
Julia H. Verbrugge
Iris K.I. Catalani
Lorrin Hirano
John Morris
Joan Takano
Steven Tam
Colin A. Yost
George J. Zweibel



Testimony for HB2175 on 2/21/2012 2:00:00 PM

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, February 21, 2012 8:07 AM

To: JUDtestimony

Cc: ChoonJamesHawaii@gmail.com

Testimony for JUD 2/21/2012 2:00:00 PM HB2175

Conference room: 325
Testifier position: Oppose
Testifier will be present: No
Submitted by: Choon James
Organization: Country Talk Story
E-mail: ChoonJamesHawaii@gmail.com
Submitted on: 2/21/2012

Comments:
OPPOSED to BILL HB 2175

Aloha.

This is a very problematic bill.

From the public view, this exemption from ethics for task forces and committee makes absolutely no sense.

It does not serve the public interest.

HB 2175 flings the door wide open for corruption, cronyism and with no accountability to the public they are to serve