

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

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**ON THE FOLLOWING MEASURE:**  
H.B. NO. 2175, RELATING TO ETHICS.

**BEFORE THE:**  
HOUSE COMMITTEE ON LEGISLATIVE MANAGEMENT

**DATE:** Wednesday, February 15, 2012      **TIME:** 1:30 p.m.

**LOCATION:** State Capitol, Room 423

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

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Chair Yamashita and Members of the Committee:

The Department of the Attorney General supports this bill.

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

Although the exemptions this bill carves out of the Ethics Code apply only to members of task forces established by the Legislature, the objective of this bill is the same as that of H.B. No. 2455, the Administration's proposal for excepting persons tapped to share information and expertise with state officials and agencies on an ad hoc, particularized basis, from the Ethics Code. Like H.B. No. 2455, this bill recognizes two realities: first, that with increasing frequency, state officials and agencies need to deal with issues and situations that require technical or experiential information that government does not have and cannot readily obtain; and second, that individuals capable of providing state decision-makers with this knowledge and expertise often have acquired that information and experience by owning or working for businesses or other undertakings that deal with the very issues or situations with which government needs to deal.

Similarly, this bill responds to the recently raised questions as to whether the Ethics Code's conflict of interest provisions preclude these knowledgeable individuals from serving on these task forces or foreclose them from future associations with the businesses or undertakings through which they gained that knowledge and expertise. Like H.B. No. 2455, this bill resolves any ambiguity as to the Ethics Code's applicability to individuals tapped to serve on task forces and other groups established by the Legislature, by opting in favor of informed decision-making, and exempting members of these ad hoc, particularized groups from the Ethics Code, so that the Legislature may have the benefit of their specialized knowledge, expertise, and advice in the legislation it considers and enacts.

We would prefer that the Legislature pass H.B. No. 2455 because it includes task forces established by the Governor and other state decision-makers, as well as the Legislature. Many task forces or working groups have been convened, pursuant to a legislative request made by resolution, by state officials and not directly "established" by the Legislature. Consequently, the wording in this bill may be too limiting. Nevertheless, we support passage of this bill as well.

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# HAWAII STATE ETHICS COMMISSION

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

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February 15, 2012

The Honorable Kyle T. Yamashita, Chair  
The Honorable James Kunane Tokioka, Vice Chair  
House Committee on Legislative Management  
Hawaii State Capitol, Room 322  
415 South Beretania Street  
Honolulu, Hawaii 96813

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

Hearing: February 15, 2012, 1:30 p.m.  
State Capitol, Conference Room 423

Written Testimony From: Hawaii State Ethics Commission

The Honorable Kyle T. Yamashita, Chair; The Honorable James Kunane Tokioka, Vice Chair; and Honorable Members of the House Committee on Legislative Management:

Thank you for the opportunity to testify on House Bill 2175, Relating to Ethics. This bill amends the definition of “employee” in the State Ethics Code to exclude members of task forces or working groups established by the legislature for the purpose of recommending possible legislation. It also amends the definition of “state agency” to exclude “task forces” and “working groups.” The State Ethics Commission has no position with respect to the intent of the bill but is concerned that the bill does not offer a definition of either “task force” or “working group” and, therefore, may unintentionally result in exempting numerous members of state boards and commissions from the requirements of the State Ethics Code and may otherwise create confusion.

The State Ethics Code applies to all state employees. “Employee” is broadly defined by the State Ethics Code to include all nominated, appointed, or elected officers or employees of the State, including members of state boards, commissions, and committees.<sup>1</sup> The State Ethics Commission is mandated to “liberally construe[]” the statute and, in that light, interprets the term “employee” to include volunteer members of legislatively created task forces and working groups. These individuals are subject to

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<sup>1</sup> Haw. Rev. Stat. section 84-3.

the State Ethics Code, including the conflicts of interest law and the provisions protecting against the misuse of position.

Last year, the State Ethics Commission offered advice to members of the Mortgage Foreclose Task Force, a task force created during the 2010 legislative session by Act 162, about the application of the conflicts of interests law to their ability to lobby the legislature on behalf of a business, for pay, on legislation proposed by the Task Force.<sup>2</sup> 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 be paid to privately lobby on that legislation, either as an employee lobbying on the legislation that was recommended by the task force, or as a lobbyist paid to lobby on behalf of a company, a trade organization, or another group on legislation that was recommended by the task force.

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; or (3) a member of the task force from lobbying on other matters, unrelated to the legislation recommended by the task force. 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.

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<sup>2</sup> 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[.]

As drafted, House Bill 2175 amends the definition of "employee" to exclude individuals who are members of "task forces" or "working groups." This bill, however, does not define these terms. Thus, a group or committee formed by the legislature, including, apparently, a statutorily created committee, would be exempt from the State Ethics Code if it is simply labeled a "task force" and if it provided recommendations on legislation. The Commission is concerned that this language sweeps too broadly and is too vague. The Commission believes that if members of task forces and working groups are to be exempt from the State Ethics Code, then those terms should be clearly defined to avoid a situation in which members of a group who take significant state action are exempt from the State Ethics Code simply because the group has been given the title of "task force."

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 define the "groups" which are intended to be captured by and included in the exemption to the definition of "employee". House Bill 2455, Relating to the State Code of Ethics, also seeks to amend the State Ethics Code to exempt members of task forces. This bill was heard by the House Committee on Judiciary on February 2, 2012. The State Ethics Commission submitted testimony and recommended the following language in order to more precisely define the term "task force":

"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."

The Commission recommends that this language also be adopted in House Bill 2175 in order to clarify the term "task force." The Commission also recommends that the term "working group" be deleted from this bill. The Commission believes that if the term "task force" is defined as recommended, then this definition will capture the types of entities that the bill terms "working groups." The Commission believes that this clarity is needed.

The Honorable Kyle T. Yamashita, Chair  
The Honorable James Kunane Tokioka, Vice Chair  
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The Commission also notes that Section One of this bill states that the purpose of the bill is to exempt members of task forces from the conflicts of interests provisions of the State Ethics Code. Section Three of this bill amends a provision of the conflicts of interests law to specifically exempt members of task forces. However, under the current law, members of task forces are subject to all of the sections of the State Ethics Code, including the fair treatment section which prohibits the misuse of position to gain an unwarranted benefit.<sup>3</sup> If the intent of this bill is to exempt members of task forces from the entire State Ethics Code, then Section One of this bill should be amended to reflect that intent. Because this bill amends the definition section of the State Ethics Code to exclude members of task forces from the definition of "employee," it is unnecessary to specifically amend the conflicts of interests law to exclude members of task forces. The conflicts of interests section applies only to state employees. This bill would exclude task force members from the definition of "employee."

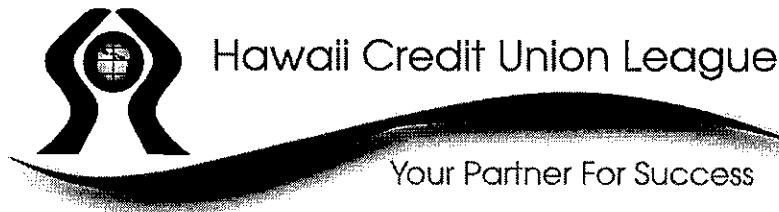
The State Ethics Commission believes that, as currently drafted, this bill is too vague. The Commission strongly recommends that this bill be revised.

Thank you for the Committee's consideration of the Ethics Commission's testimony on HB No. 2175.

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<sup>3</sup> Haw. Rev. Stat. §84-13.

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Testimony to the House Committee on Legislative Management  
Wednesday, February 15, 2012

Testimony in Support of HB 2175, Relating to Ethics

To: The Honorable Kyle Yamashita, Chair  
The Honorable James Kunane Tokioka, Vice-Chair  
Members of the Committee on Legislative Management

My name is Stefanie Sakamoto, and I am testifying on behalf of the Hawaii Credit Union League, the local trade association for 81 Hawaii credit unions, representing approximately 811,000 credit union members across the state.

We are in support of HB 2175, Relating to Ethics, which would provide an exemption for members of task forces or working groups established by the legislature from the conflict of interest law under the state ethics code, and excludes such members from the definition of "employee". As the legislature is aware, an ethics problem arose with respect to the Mortgage Foreclosure Task Force in 2011, of which HCUL was a member. We appreciate the efforts of the legislature to avoid similar problems in the future, so that we may continue to participate in such task forces and/or working groups if asked.

Thank you for the opportunity to testify.

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February 15, 2012

Rep. Kyle T. Yamashita, Chair  
and members of the House Committee on Legislative Management  
Hawaii State Capitol  
Honolulu, Hawaii 96813

Re: **House Bill 2175 (Ethics)**  
**Hearing Date/Time: Thursday, February 15, 2012, 1:30 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 or working group 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".

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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

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Testimony of Marvin S. C. Dang  
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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"

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“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

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Leslie H. Kondo, Executive Director and General Counsel  
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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

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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:**

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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?

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

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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  
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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

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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?

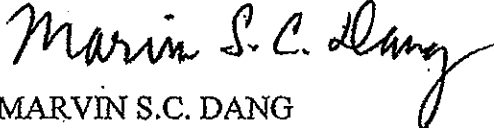
\* \* \* \* \*

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

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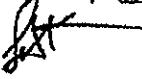
HAWAII  
STATE  
ETHICS  
COMMISSION

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](mailto:dfi@dcca.hawaii.gov))  
Marvin S.C. Dang, Esq. ([dangm@aloha.net](mailto:dangm@aloha.net))  
Jerrold K. Guben, Esq. ([jkq@roplaw.com](mailto:jkq@roplaw.com))  
Steven Guttman, Esq. ([sguttman@kdubm.com](mailto:sguttman@kdubm.com))  
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Stephen H. Levins, Esq. ([slevins@dcca.hawaii.gov](mailto:slevins@dcca.hawaii.gov))  
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Ryker J. Wada ([rywada@lashaw.org](mailto:rywada@lashaw.org))  
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George J. Zweibel, Esq. ([george.zweibel@hawaiiintel.net](mailto:george.zweibel@hawaiiintel.net))

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;<sup>1</sup> 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.<sup>2</sup> Accordingly, as an "employee," Task Force members are subject to and must comply with the State Ethics

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<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup>

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

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<sup>3</sup> 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

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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.<sup>1</sup> 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.

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<sup>1</sup> 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.

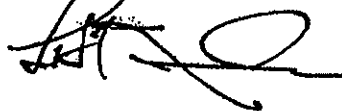
Marvin S. C. Dang, Esq.  
February 2, 2012  
Page 2

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.<sup>2</sup> 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

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<sup>2</sup> 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.

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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  
Lorin Hirano  
John Morris  
Joan Takano  
Steven Tam  
Colin A. Yost  
George J. Zweibel



LEAGUE OF  
WOMEN VOTERS\*

*League of Women Voters of Hawaii*

49 South Hotel Street, Room 314 | Honolulu, HI 96813

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House Committee on Legislative Management  
Chair Rep. Kyle T. Yamashita , Vice Chair Rep. James Kunane Tokioka

Wednesday 2/15/12 at 1:30 PM in Room 423  
HB 2175 — RELATING TO ETHICS

TESTIMONY

JoAnn Maruoka, Legislative Committee Member, League of Women Voters of Hawaii

Chair Yamashita, Vice Chair Tokioka, and Committee Members:

**The League of Women Voters of Hawaii opposes HB 2175**, which exempts from the conflict of interest law under the state ethics code a person serving on a task force or working group established by the legislature for the purpose of recommending possible legislation.

While we understand the need for and certainly encourage participation by citizens in such task forces and working groups, there is no sound reason for such an exemption. We are gravely concerned about the inherent risks of actual or at the least the perception of conflict of interest, including undue influence and use of public office for personal gain. In fact, from a citizen's perspective, this proposed exemption flies in the face of good sense and simply does not pass the smell test. It would not only set a bad tone, it could well start things down a slippery slope. In these times of badly-eroded public trust in government, it does not make sense to build in loopholes that are counter to openness and transparency.

The purpose in having a Code of Ethics is to prevent corruption in government. Every step forward in protecting against corruption helps improve public confidence in government. For government to work people must have faith in the integrity of its elected officials and the culture of honesty. Excluding those who provide the legislature with advice or comments, but especially who formulate recommendations on possible legislation is a step backward. We want all those who participate in the formulation of public policy, laws and rules to be held to a high standard. We urge you to hold the bill in committee.

Thank you for the opportunity to submit testimony.

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