



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

ON THE FOLLOWING MEASURE:

H.B. NO. 2455, RELATING TO THE STATE CODE OF ETHICS.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Thursday, February 2, 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 supports this bill.

The bill exempts members of groups convened by statute or resolution, by executive order or proclamation, or by the invitation of the Legislature, the Governor, or another state officer, solely for the purpose of providing advice or comments to, or to formulate recommendations for the Legislature, the Governor, or a state department, agency, or officer, from the requirements and limitations of the State Ethics Code, chapter 84, Hawaii Revised Statutes, by excepting them from the Code's definition of "employee."

With increasing frequency, the Legislature, the Governor, and other state officials and agencies find themselves having to deal with issues and situations that require technical or experiential information that government does not have and cannot readily obtain. In many of these instances, task forces or other informally organized groups of individuals from the community who have and are willing to share information and their expertise to address these kinds of issues or situations, have been formed. In the last year, however, ethics-related concerns have been raised about these informally organized groups because it is unclear whether they are "boards, commissions, or committees" of the State, such that their members would be "employees" under the State's Ethics Code, and precluded from acting on matters a group was formed to address, if they stood to gain financially. See sections 84-13 and 84-14, Hawaii Revised Statutes.

This bill resolves that ambiguity by opting in favor of informed decision-making, and exempting members of groups informally organized to provide government with the benefit of

their members' specialized knowledge, expertise, advice, and recommendations, from the State's Ethics Code.

An almost identically worded bill, S.B. No. 2240, was heard in the Senate Committee on Judiciary and Labor last Friday. At the conclusion of that hearing, we were asked whether for the sake of clarity, the term "task force" should be a defined term. Attached is a copy of S.B. No. 2240, submitted to the Senate Committee for its consideration, revised to refer to the informally organized groups to which the exception applies, by the term "task force." This revision also adds a definition for the term.

We respectfully request that the Committee pass this bill in its original or revised form.

Attachment

____.B. NO.____

A BILL FOR AN ACT

RELATING TO THE STATE CODE OF ETHICS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that the public interest
2 is disserved when experts or person who possess the knowledge
3 that could benefit the State, decline to serve or are foreclosed
4 from serving as members of advisory groups convened solely for
5 the purpose of sharing knowledge or experiences, making
6 recommendations, or commenting on proposed courses of action
7 because they would otherwise stand to gain financially, from the
8 advice or comments they provide, or the recommendations they may
9 make.

10 This Act amends the definition of "employee" in part II of
11 chapter 84, Hawaii Revised Statutes, to exempt from that
12 definition and the provisions of the State's Code of Ethics,
13 persons who serve on [~~advisory or working groups that are~~
14 ~~convened solely for the purpose of commenting, sharing technical~~
15 ~~knowledge or experience, or formulating recommendations] task
16 forces and adds the definition of "task force".~~

17 The purpose of this Act is to allow persons with knowledge
18 and expertise the State needs to serve as members of state

____.B. NO.____

1 advisory or working groups without being foreclosed by the
2 requirements, restrictions, or prohibitions imposed by the
3 State's code of ethics.

4 SECTION 2. Section 84-3, Hawaii Revised Statutes, is
5 amended by amending the definition of "employee" to read as
6 follows:

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

13 SECTION 3. Section 84-3, Hawaii Revised Statutes, is
14 amended by adding the definition of "task force" as follows:

15 "Task force" means a group convened by resolution,
16 statute, executive order or proclamation, or the invitation of
17 the governor, or another state officer, to study a specific
18 subject or issue, for a specific defined period of time, and to
19 report to, offer a recommendation to, or advise the
20 legislature."

21 SECTION 3. Statutory material to be repealed is bracketed
22 and stricken. New statutory material is underscored.

____.B. NO.____

1 SECTION 4. This Act, upon its approval, shall take effect
2
3 [~~upon its approval.~~] retroactive to January 1, 2007.
4
5

6

7

8

BY REQUEST

____.B. NO.____

Report Title:

Ethics Exception; Advisory Group Members Not Employees

Description:

Excepts members of groups convened solely to provide comments, share technical knowledge or expertise, or assist in formulating recommendations to, with or for the Legislature, Governor, or other state departments, agencies, or boards, from chapter 84, Hawaii Revised Statutes, State Ethics Code.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



LEAGUE OF
WOMEN VOTERS*

League of Women Voters of Hawaii

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

www.lwv-hawaii.com | 808.531.7488 | voters@lwvhawaii.com.

House Committee on Judiciary
Chair Rep. Gilbert S.C. Keith-Agaran, Vice Chair Rep. Karl Rhoads

Thursday 2/2/12 at 2:00 PM in Room 325
HB 2455 — RELATING TO THE STATE CODE OF ETHICS

TESTIMONY

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

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

The League of Women Voters of Hawaii cannot support HB 2455 as written, which exempts certain “limited-use” members of groups convened solely to provide comments, share technical knowledge or expertise, or assist in formulating recommendations to, with or for the legislature, governor, or other state departments, agencies, or boards, from the state code of ethics.

We understand the need for and certainly encourage participation by citizens in such groups. However, as we testified on the companion SB 2240, our concern is that this exemption not only sets 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 and could hide conflicts of interest, even if unintentionally. The Senate bill is to be amended with language proposed by the Hawaii State Ethics Commission; we believe we will be able to support that amendment. We recommend that the House bill be likewise amended, or else held.

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 advice or comments to, or formulate recommendations for the legislature, the governor, or a state department, agency, or officer sends a mixed message about our laws designed to make ethics a shining principle of an incorruptible government. We want all those who participate in the formulation of public policy, laws and rules to be held to a high standard.

Thank you for the opportunity to submit testimony.



HAWAII STATE ETHICS COMMISSION

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

February 2, 2012

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. 2455, Relating to The State Code of Ethics**

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

Testifying: Leslie H. Kondo, Executive Director and General Counsel
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 2455, Relating to the State Code of Ethics. This bill amends the definition of "employee" in the State Ethics Code to exclude members of groups convened by a statute or resolution, an executive order or proclamation, or by the invitation of the legislature, the governor, or another state officer, solely for the purpose of providing advice or comments to, or formulating recommendations for, the legislature, the governor, or a state department, agency or officer. The State Ethics Commission has no position with respect to the intent of the bill but has concerns that the bill, as drafted, will unintentionally result in exempting numerous members of state boards and commissions from the requirements of the State Ethics Code.

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.¹ The State Ethics Commission is mandated to "liberally construe[]" the statute and, in that light, interprets the term "employee" to include volunteer members of

¹ Haw. Rev. Stat. section 84-3.

legislatively created task forces and working groups. These individuals are subject to 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.² 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.

As drafted, House Bill 2455 amends the definition of "employee" to exclude individuals who are members of groups, such as the Mortgage Foreclosure Task Force. It also excludes from the definition of "employee" individuals who are members of other

² 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[.]

types of groups convened by the legislature, the governor, or any state officer where the groups exist for the purpose of providing advice or comments to, or formulating recommendations for, the legislature, the governor, or any state department or agency. The Commission is concerned that this language sweeps too broadly and exempts a great many members of boards and commissions from the State Ethics Code.

There are approximately two dozen state boards or commissions that exist to provide advice or recommendations. These appear to include, among many others, the Tax Review Commission, The University of Hawaii Regents Candidate Advisory Council, the Correctional Industries Advisory Committee, and the Civil Defense Advisory Council. The recommendations provided by these bodies can have significant weight and impact on the ultimate decision maker. The members of these bodies take significant state action. The Commission is concerned that, as currently written, this bill may arguably exempt members of these boards and commissions 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 define the "groups" which are intended to be captured by and included in the exemption to the definition of "employee".³ More specifically, if the legislature's intent is to exclude members of task forces from the definition of "employee" for purposes of the State Ethics Code, the Commission recommends that bill be amended to read as follows:

"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 State Ethics Commission believes that, as currently drafted, this bill is too broad in exempting members of State boards and commissions from the requirements

³ If this bill is intended to apply to members of the Mortgage Foreclosure Task Force, then this Committee should consider making this bill retroactive.

The Honorable Gilbert S.C. Keith-Agaran, Chair
The Honorable Karl Rhoads, Vice Chair
February 2, 2012
Page 4

of the State Ethics Code. The Commission strongly recommends that this bill be revised.

We appreciate the opportunity to testify on House Bill No. 2455, Relating to the State Code of Ethics. We would like to thank this Committee for its consideration of our testimony.



Hawaii Credit Union League

Your Partner For Success

1654 South King Street
Honolulu, Hawaii 96826-2097
Telephone: (808) 941.0556
Fax: (808) 945.0019
Web site: www.hcul.org
Email: info@hcul.org



Testimony to the House Committee on Judiciary
February 2, 2012 at 2:00 p.m.

Testimony in Support of HB 2455, Relating to the State Code of Ethics

To: The Honorable Gilbert Keith-Agaran, Chair
The Honorable Karl Rhoads, Vice-Chair
Members of the Committee on Judiciary

My name is Stefanie Sakamoto, and I am testifying on behalf of the Hawaii Credit Union League, the local trade association for 82 Hawaii credit unions, representing approximately 811,000 credit union members across the state.

We are in support of HB 2455, Relating to the State Code of Ethics, which would provide an exception for members of advisory groups formed by statute or resolution, from the State Code of Ethics. 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 advisory groups if asked.

Thank you for the opportunity to testify.

HAWAII YOUTH SERVICES NETWORK

677 Ala Moana Boulevard, Suite 702 Honolulu, Hawaii 96813

Phone: (808) 531-2198 Fax: (808) 534-1199

Web site: <http://www.hysn.org> E-mail: info@hysn.org

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 Kids, Inc.

KEY (Kualoa-Heeia Ecumenical Youth) Project

Kids Behavioral Health

Kids Hurt Too

Kokua Kalih 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

January 31, 2012

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

TESTIMONY IN SUPPORT OF HB 2455 RELATING TO THE STATE CODE OF ETHICS

Hawaii Youth Services Network (HYSN), a statewide coalition of youth-serving organizations, strongly supports HB2455 Relating to the State Code of 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 by setting up 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 that reads "Judith F. Clark". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Judith F. Clark
Executive Director



LEAGUE OF
WOMEN VOTERS®

League of Women Voters of Hawaii

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

www.lwv-hawaii.com | 808.531.7488 | voters@lwvhawaii.com

House Committee on Judiciary
Chair Rep. Gilbert S.C. Keith-Agaran, Vice Chair Rep. Karl Rhoads

Thursday 2/2/12 at 2:00 PM in Room 325
SB 2455 — RELATING TO THE STATE CODE OF ETHICS

TESTIMONY

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

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

The League of Women Voters of Hawaii cannot support HB 2455 as written, which exempts certain “limited-use” members of groups convened solely to provide comments, share technical knowledge or expertise, or assist in formulating recommendations to, with or for the legislature, governor, or other state departments, agencies, or boards, from the state code of ethics.

We understand the need for and certainly encourage participation by citizens in such groups. However, as we testified on the companion SB 2240, our concern is that this exemption not only sets 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 and could hide conflicts of interest, even if unintentionally. The Senate bill is to be amended with language proposed by the Hawaii State Ethics Commission; we believe we will be able to support that amendment. We recommend that the House bill be likewise amended, or else held.

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 advice or comments to, or formulate recommendations for the legislature, the governor, or a state department, agency, or officer sends a mixed message about our laws designed to make ethics a shining principle of an incorruptible government. We want all those who participate in the formulation of public policy, laws and rules to be held to a high standard.

Thank you for the opportunity to submit testimony.

LAW OFFICES
OF
MARVIN S. C. DANG
A Limited Liability Law Company

MARVIN S. C. DANG
JASON M. OLIVER
SUMMER OKADA
PAUL T. HOLTROP
RENEE M. FURUTA

MAILING ADDRESS:
P.O. BOX 4109
HONOLULU, HAWAII 96812-4109

TELEPHONE: (808) 521-8521
FAX: (808) 521-8522
E-MAIL: dangm@aloha.net
INTERNET: www.marvindanglaw.com

February 2, 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 2455 (State Code of Ethics)**
Hearing Date/Time: Thursday, February 2, 2012, 2:00 p.m.

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

The purpose of this Bill is to exempt members of groups convened solely to provide comments, share technical knowledge or expertise, or assist in formulating recommendations to, with or for the Legislature, Governor, or other state departments, agencies, or boards, from HRS Chapter 84, the State Ethics Code.

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 in 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 Task Force began meeting in July, 2010.

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.

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.

I should point out that 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.

Thank you for considering my testimony.


MARVIN S.C. DANG

Enclosure

LAW OFFICES
OF
MARVIN S. C. DANG
A Limited Liability Law Company

**MARVIN S. C. DANG
JASON M. OLIVER
SUMMER OKADA
PAUL T. HOLTROP
RENEE M. FURUTA**

MAILING ADDRESS:
P.O. BOX 4109
HONOLULU, HAWAII 96812-4109

TELEPHONE: (808) 521-8521
FAX: (808) 521-8522
E-MAIL: dangm@aloha.net
INTERNET: www.marvindanglaw.com

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"

Leslie H. Kondo, Executive Director and General Counsel
Hawaii State Ethics Commission
July 18, 2011
Page 2

“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?

Leslie H. Kondo, Executive Director and General Counsel
Hawaii State Ethics Commission
July 18, 2011
Page 6

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 (c), 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?

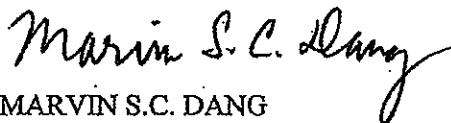
* * * * *

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



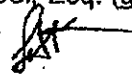
HAWAII STATE ETHICS COMMISSION

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)
Jerrold K. Guben, Esq. (ikg@roplaw.com)
Steven Guttman, Esq. (sguttman@kdubm.com)
Lorrin Hirano, Esq. (lhirano@tghawaii.com)
Francis P. Hogan, Esq. (fhogan@awlaw.com)
Michelle Kauhane (mkauhane@hclending.com)
Stephen H. Levins, Esq. (slevins@dcca.hawaii.gov)
Linda Nakamura (lnakamura@fhb.com)
Neal Okabayashi (nokabayashi@fhb.com)
Stefanie Sakamoto (info@hcul.org)
Jane Sugimura, Esq. (jsugimura@bendetfidell.com)
Joan Takano (jtakano@hgea.org)
Steve Tam (stam@aarp.org)
Julia H. Verbrugge (julia.h.verbrugge@courts.state.hi.us)
Ryker J. Wada (rywada@lashaw.org)
Colin Yost, Esq. (colin@cruisevost.com)
George J. Zweibel, Esq. (george.zweibel@hawaiiantel.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;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[.]