



HAWAII STATE ETHICS COMMISSION

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

April 2, 2013

The Honorable Karl Rhoads, Chair
The Honorable Sharon E. Har, Vice Chair
Honorable Members
House Committee on Judiciary
Hawaii State Capitol, Room 438
415 South Beretania Street
Honolulu, Hawaii 96813

Re: **Testimony on Senate Bill No. 66, S.D. 1, Proposed H.D. 2,
Relating to the Code of Ethics**

Hearing: Tuesday, April 2, 2013, 2:00 p.m.
State Capitol, Conference Room 325

Testimony From: Hawaii State Ethics Commission

The Honorable Karl Rhoads, Chair; The Honorable Sharon E. Har, Vice Chair;
and Honorable Members of the House Committee on Judiciary:

The Hawaii State Ethics Commission (“Commission”) supports SB No. 66, SD 1, Proposed HD 2, Relating to the Code of Ethics, with respect to the bill’s amendments to Haw. Rev. Stat. section 84-13; however, with respect to the bill’s amendments to section 84-17, the Commission questions the addition of the Commission’s members to the list of employees whose financial disclosure statements are required to be public records. The Commission also strongly urges the Committee to amend section 84-17, as explained below, to clarify the ambiguity caused by Act 208, 2012 Session Laws, as to whether members of task forces must file public financial disclosure statements.

The Proposed HD 2 amends section 84-13 to correct what the Commission understands was an inadvertent expansion of the legislators’ exemption from the fair treatment provision of the State Ethics Code created by Act 208.

Act 208 amended numerous provisions of the State Ethics Code to exempt members of task forces from the statute’s restrictions on: (1) the use or disclosure of confidential information; (2) fair treatment; (3) conflicts of interests; (4) post employment activities; and (5) contracting with the State. In exempting task force members from the

fair treatment provision, Act 208 amended the language in that section referring to what was a partial exemption for legislators, which mirrored the State Constitution's immunity in Article III, Section 7, that protects legislators from being forced to answer for actions taken "in the exercise of their legislative functions." Thus, in its prior form, section 84-13 acknowledged that legislators have immunity for action taken in the exercise of their legislative functions (i.e., such core legislative functions as voting on bills, taking action in committees, drafting legislation, and speaking on the floor), but prohibited legislators from misusing their official positions outside of that limited area (e.g., constituent services are activities generally not considered to be in the exercise of a legislator's "legislative functions."). Stated differently, previously, section 84-13 prohibited the misuse of position by a legislator when engaged in official state action that is not covered by legislative immunity.

Section 84-13, as amended by Act 208, exempts legislators for any official action taken by a legislator. This greatly expands the scope of legislative immunity and, in effect, allows legislators to intentionally misuse their official position to grant themselves or others unwarranted privileges, advantages or treatment. The Commission understands that this was done inadvertently. The Proposed HD 2 corrects this error. The Commission therefore supports the Proposed HD 2 with respect to amending section 84-13 to restore legislators' limited exemption from the fair treatment provision of the State Ethics Code.

Act 208 also created ambiguity and uncertainty regarding the requirement that task force members file financial disclosure statements with the Commission. In light of the Proposed HD 2 and its intent to "fix" Act 208's unintended expansion of the legislative exemption, the Commission strongly requests that the Committee use this bill to clarify and resolve the uncertainty created by Act 208.

Specifically, Act 208 amended the State Ethics Code to exempt members of task forces from the conflicts of interest provision, section 84-14, "if the task force member . . . complies with the disclosure requirements under section 84-17." Haw. Rev. Stat. § 84-14(f). Section 84-17 identifies the types of financial interests that must be disclosed and includes a list of employees whose statements are public records. Task force members are not included in that list.

Section 84-13, however, appears to require task force members to file public disclosure statements with the Commission ("Every legislator, or task force member or designee or representative of a task force member shall file a full and complete public disclosure of the nature and extent of the interest or transaction which the legislator or task force member or task force member's designee or representative believes may be

The Honorable Karl Rhoads, Chair
The Honorable Sharon E. Har, Vice Chair
Honorable Members, House Committee on Judiciary
April 2, 2013
Page 3

affected by the legislator's or task force member's official action." Haw. Rev. Stat. § 84-13.).

The Commission has conservatively construed the seemingly conflicting language to require task force members to file financial disclosure statements but has considered those filings to be confidential. The Commission's position is premised on section 84-17(d), which identifies the specific employees whose disclosure statements are public. As noted above, that list does not include members of task forces.

Notwithstanding its current application of the financial disclosure requirement to task force members, the Commission believes that the legislature's intent was to require that task force members file public disclosure statements to reasonably balance task force members' broad exemption from virtually the entire State Ethics Code. Accordingly, consistent with that belief, the Commission recommends the following amendments to clarify and resolve any ambiguity in the requirement that task force members' disclosures are public:

- (c) The following persons shall file annually with the state ethics commission a disclosure of financial interests:
 - (1) The governor, the lieutenant governor, the members of the legislature, and delegates to the constitutional convention; provided that delegates to the constitutional convention shall only be required to file initial disclosures;
 - (2) The directors and their deputies, the division chiefs, the executive directors and the executive secretaries and their deputies, the purchasing agents and the fiscal officers, regardless of the titles by which the foregoing persons are designated, of every state agency and department;
 - (3) The permanent employees of the legislature and its service agencies, other than persons employed in clerical, secretarial, or similar positions;
 - (4) The administrative director of the State, and the assistants in the office of the governor and the lieutenant governor, other than persons employed in clerical, secretarial, or similar positions;
 - (5) The hearings officers of every state agency and department;

- (6) The president, the vice presidents, assistant vice presidents, the chancellors, and the provosts of the University of Hawaii and its community colleges;
 - (7) The superintendent, the deputy superintendent, the assistant superintendents, the complex area superintendents, the state librarian, and the deputy state librarian of the department of education;
 - (8) The administrative director and the deputy director of the courts;
 - (9) The members of every state board or commission whose original terms of office are for periods exceeding one year and whose functions are not solely advisory;
 - (10) Candidates for state elective offices, including candidates for election to the constitutional convention, provided that candidates shall only be required to file initial disclosures; ~~and~~
 - (11) The administrator and assistant administrator of the office of Hawaiian affairs~~[-]; and~~
 - (12) The members of task forces.
- (d) The financial disclosure statements of the following persons shall be public records and available for inspection and duplication:
- (1) The governor, the lieutenant governor, the members of the legislature, candidates for and delegates to the constitutional convention, the trustees of the office of Hawaiian affairs, and candidates for state elective offices;
 - (2) The directors of the state departments and their deputies, regardless of the titles by which the foregoing persons are designated; provided that with respect to the department of the attorney general, the foregoing shall apply only to the attorney general and the first deputy attorney general;
 - (3) The administrative director of the State;

- (4) The president, the vice presidents, the assistant vice presidents, the chancellors, and the provosts of the University of Hawaii;
- (5) The members of the board of education and the superintendent, the deputy superintendent, the state librarian, and the deputy state librarian of the department of education;
- (6) The administrative director and the deputy director of the courts;
[and]
- (7) The administrator and the assistant administrator of the office of Hawaiian affairs[-]; and
- (8) The members of task forces.

In addition to amending section 84-13, the Proposed HD 2 incorporates the amendments to section 84-17 contained in the HD 1 by requiring, among other things, that the financial disclosure statements of members of the State Ethics Commission are public records. The reason for this proposed amendment to the law is unclear and somewhat puzzling. Under the current law, the financial disclosure statements filed by members of the majority of state boards and commissions, including the State Ethics Commission, are considered confidential.

The Commission believes that requiring that the financial disclosure statements filed by members of certain state boards and commissions be accessible by the public promotes public confidence in state government by providing an effective means for the public to confirm that members of those boards and commissions have no conflicts of interests. For that reason, the Commission believes that the financial disclosure statements of members of a state board that functions as the “executive board” of a department in the executive branch (e.g., the University of Hawaii Board of Regents, the Board of Land and Natural Resources, and the Board of Agriculture) should be a public record because such a board functions in a capacity akin to a department director, and, under chapter 84, a single executive (i.e., department director) who heads a department is required to file a public financial disclosure statement.¹

¹ With regard to the University of Hawaii Board of Regents, currently, the president, the vice presidents, the assistant vice presidents, the chancellors, and the provosts--all of whom are subordinate to the Board of Regents--are required to file public financial disclosure statements, whereas the financial disclosure statements filed by members of the Board of regents are confidential and not available for public inspection.

The Honorable Karl Rhoads, Chair
The Honorable Sharon E. Har, Vice Chair
Honorable Members, House Committee on Judiciary
April 2, 2013
Page 6

The Commission believes that the members of certain other boards, even if their boards do not function as an “executive board,” should be required to file public financial disclosure statements as well. These are boards that are state agencies, such as the Public Utilities Commission, the Hawaii Labor Relations Board, and the Labor and Industrial Relations Appeals Board, which are vested with significant adjudicatory and/or regulatory authority and whose members are full-time, paid, state employees.

In addition, the Commission supports the bill’s intent to provide greater transparency into the financial interests of state board and commission members holding official authority over permitting or licensing of land use related matters or water use related matters, to help identify potential conflicts of interests, by requiring that the financial disclosure statements of the members of those boards are public records. Those boards oversee matters of significant and broad community interest.

While the Commission believes that requiring disclosure statements to be public will provide more meaningful information regarding possible conflicts of interests, the Commission believes that it is appropriate and necessary to balance the public’s right to know with the board or commission members’ privacy. For the boards and commissions identified above, the Commission suggests that those boards’ and commissions’ responsibilities are of such significance that their members’ privacy interest is outweighed by the public’s interest in being able to examine whether the member has a potential conflict of interest.

However, with respect to the members of the State Ethics Commission, it is unclear as to the basis for the legislature’s apparent belief that the balance requires public disclosure of the statements filed by State Ethics Commissioners. While the State Ethics Commission serves an important role in state government, the State Ethics Commission is not an executive board of a department in the executive branch, nor are the Commission’s members full-time paid state employees. Moreover, there are a multitude of other state boards that function similarly to the State Ethics Commission, such as the Campaign Spending Commission, the Elections Commission, the Real Estate Commission, and numerous regulatory boards and commissions within the Department of Commerce and Consumer Affairs (e.g., the Board of Public Accountancy; the Contractors License Board; and the Board of Professional Engineers, Architects, Surveyors and Landscape Architects) whose members file confidential financial disclosure statements.

The Commission suggests that, absent a compelling difference between the State Ethics Commission and other similar boards and commissions that supports requiring public disclosure of statements filed by members of the State Ethics Commission, the bill be amended to either expand the list of public filers to include members of boards and

The Honorable Karl Rhoads, Chair
The Honorable Sharon E. Har, Vice Chair
Honorable Members, House Committee on Judiciary
April 2, 2013
Page 7

commissions performing functions and duties that are similar in scope to the Hawaii State Ethics Commission or delete the Hawaii State Ethics Commission from the list of public filers in the Proposed HD 2.

Thank you for considering the Commission's testimony.