HAWAII
STATE
ETHICS
COMMISSION
State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

Hawaii State Ethics Commission
Response to Senate Concurrent Resolution No. 32,
Adopted by the Hawaii Legislature on April 28, 2006

I. Introduction

The Hawaii State Ethics Commission ("Commission") issues this Response to Senate Concurrent Resolution (SCR) No. 32, adopted by the Hawaii State Legislature on April 28, 2006. SCR No. 32 is entitled as follows: Requesting the State Ethics Commission to Review Possible Ethics Violations Committed by the Department of Business, Economic Development, and Tourism. As stated in the title, the Resolution requests the Hawaii State Ethics Commission to "review possible ethics violations" that may have been "committed" by the Department of Business, Economic Development, and Tourism ("DBEDT"). The Resolution basically requests the State Ethics Commission to review the actions of DBEDT in connection with an official State "trade mission" to the People's Republic of China and to the Republic of Korea, which took place in 2005. The Resolution asks that the State Ethics Commission review the actions of DBEDT for possible violations of the Hawaii State Ethics Code in regard to the trade mission. The Resolution further requests that the State Ethics Commission report back to the Legislature regarding its "review" of DBEDT no later than September 1, 2006.

II. Attachments

Attached to this Response are the following: (1) copy of S.C.R. No. 32; (2) copy of letter from Daniel J. Mollway to Attorney General Mark Bennett, dated June 29, 2006; (3) copy of letter from Deputy Attorney General Russell A. Suzuki to Daniel J. Mollway, dated July 21, 2006; and (4) copies of Hawaii State Ethics Commission's Advisory Opinion Nos. 45, 316, 504, and 93-3.

III. Summary Response

The statutes and rules that govern the procedures of the Hawaii State Ethics Commission prohibit the Commission from responding to the Legislature in the manner that the Resolution requests. The Commission does, however, submit this Response to explain (1) why the Hawaii State Ethics Commission cannot, by law, respond to the Resolution as the Legislature requests, and (2) the issues that arise under the State Ethics Code when a state agency seeks to solicit contributions from the private sector.

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IV. Brief Statement of Relevant Facts

This statement of the facts relevant to the Resolution is based on media reports. In 2005, DBEDT, along with the Hawaii District Export Council, a non-profit organization, organized the "State of Hawaii Trade Mission to China and Korea." The purpose of the trade mission was to promote Hawaii business interests in Chinese and Korean markets. As part of its planning for the trade mission, DBEDT solicited sponsors from the private sector to contribute money to help defray the costs of the trade mission. In return for donations, sponsors were allegedly offered certain benefits, such as (1) having a company logo displayed in trade mission materials, and (2) allowing company officials to attend certain government functions or meetings.

V. Procedures of the State Ethics Commission

SCR No. 32 requests that the State Ethics Commission review the actions of DBEDT in connection with the trade mission as to whether there were any violations of the State Ethics Code, set forth in chapter 84, Hawaii Revised Statutes ("HRS"). The Resolution asks that the Commission report back to the Legislature by September 1, 2006, as to whether or not any employee of DBEDT may have violated the State Ethics Code with regard to the trade mission. The laws governing the work of the State Ethics Commission (established by the Legislature in 1967), however, do not allow the Commission to respond to the Legislature as requested by the Resolution.

To assure itself of its legal conclusions, the State Ethics Commission sought advice from the Department of the Attorney General. The Commission asked whether or not the Resolution was consonant with the procedural requirements of the State Ethics Code. In a letter dated July 21, 2006, the Department of the Attorney General advised the State Ethics Commission that to the extent that the Resolution conflicts with the State Ethics Code in terms of pursuing issues of wrongdoing, the statutory provisions of the State Ethics Code must control. The Department of the Attorney General thus advised that the Commission could only act in accordance with the statutory procedures set forth in the State Ethics Code.

The State Ethics Code places limits on the powers and actions of the State Ethics Commission. For enforcing the State Ethics Code, the State Ethics Commission has two primary functions. The State Ethics Commission can render "advice" to a person whose <u>future conduct</u> is at issue, at the <u>request of the person</u>. Second, the State Ethics Commission can review a situation as an enforcement matter if it appears that there has been a possible violation of the State Ethics Code. In both cases, the Commission must act in accordance with the statutory procedures

set forth in the State Ethics Code, and within the rules promulgated by the State Ethics Commission, which have the force and effect of law. The Commission's two primary functions are discussed in more detail below.

A. Advisory Opinion Requests

HRS section 84-31 sets forth the duties of the Hawaii State Ethics Commission. HRS section 84-31(a)(2) states, in relevant part, that the State Ethics Commission:

> shall render advisory opinions upon the request of any legislator, employee, or delegate to the constitutional convention, or person formerly holding such office or employment as to whether the facts and circumstances of a particular case constitute, or will constitute a violation of the code of ethics. [Emphasis added.]

In 1981, in response to a request for advice from a state legislator, the Department of the Attorney General advised that HRS section 84-31(a)(2) must be interpreted to authorize the issuance of an advisory opinion:

> only to legislators, employees, delegates, or other persons who have requested the opinions on their own factual circumstances and who could then act [in the future] in reliance on the opinions. [Emphasis added.]

The State Ethics Commission is in accord with this interpretation of HRS section 84-31(a)(2). Thus, the Commission may only issue an advisory opinion to an individual about that individual's own particular situation. It may not issue an "advisory opinion" to an individual as to whether or not the actions of another person would violate the State Ethics Code. For example, the Commission cannot issue an advisory opinion to a state employee as to whether or not the employee's coworker may accept a particular gift.

With regard to SCR No. 32, the State Ethics Commission has no authority to issue an "advisory opinion" to the Legislature as to whether or not the actions of an employee of DBEDT may have violated the State Ethics Code.

In addition, advisory opinions issued by the State Ethics Commission are, by law, confidential to all but the requestor. HRS section 84-31(f) states that the State Ethics Commission may only publish "summaries" of advisory opinions that do not disclose the identity of the person involved in the opinion. Thus, the Commission is not legally able to issue an "advisory opinion" to the Legislature regarding a DBEDT employee.

B. Enforcement: Investigations and Charges

With respect to the State Ethics Commission's second major function, HRS section 84-31(a)(3) provides that the State Ethics Commission may investigate possible violations of the State Ethics Code. HRS section 84-31(b) provides that investigations must be carried out on a confidential basis. In accordance with HRS section 84-31(c), Commission investigations become public only if the Commission (after complying with a number of procedures) makes a finding of "probable cause" and then issues a "notice" for a public, formal, contested-case hearing.

After investigation, the State Ethics Commission may issue a "charge" against an individual. The Commission is then required to notify the person charged (the "respondent") of the charge, and provide the person with an opportunity to respond to the charge. If, after review of the respondent's answer to the initial charge, the Commission believes that the State Ethics Code has been violated, the Commission must then make a "probable cause" determination and issue a "charge and further statement of alleged violation" to the respondent. The "charge and further statement of alleged violation" is a more formal charge. The respondent must be served with a copy of the "charge and further statement of alleged violation," and has twenty days to file a response to the "charge and further statement of alleged violation." After reviewing the response to the "charge and further statement of alleged violation," the State Ethics Commission must make another finding of "probable cause" in order to proceed to a public hearing. Proceedings become public only after the Commission has issued a "notice" of hearing. Hearings are conducted in accordance with HRS chapter 91, the Hawaii Administrative Procedures Act. The Commission renders a decision as to whether or not the State Ethics Code has been violated only at the conclusion of a formal, contested-case hearing. This is required by law. Individuals may also file charges with the Hawaii State Ethics Commission alleging that a person has violated the State Ethics Code.

These procedures are set forth in HRS section 84-31. They are in place to protect the "due process" rights of those who are alleged to have violated the State Ethics Code. These procedures prohibit the State Ethics Commission from issuing any decision to the effect that a particular state employee or official has violated the State Ethics Code unless or until the Commission has held a formal, contested-case hearing, in accordance with HRS chapter 91. Thus, the State Ethics Commission cannot respond to SCR No. 32 with a statement that an official or employee of DBEDT violated or may have violated the Hawaii State Ethics Code. Such a statement would violate the statutory requirements of HRS chapters 84 and 91, and would raise constitutional due process issues.

VI. Solicitation of the Private Sector

HRS section 84-31(a)(7) provides that the State Ethics Commission does have a duty to educate the citizenry, legislators, delegates to the constitutional convention, and state officials and employees on matters of "ethics in government employment."

In light of this requirement, a discussion in this Response on the issue of government solicitation of the private sector is appropriate. This discussion is not meant to reflect on the conduct of any individual. This is a discussion of the relevant provisions of the State Ethics Code, and how the Commission believes that these provisions should be applied with regard to solicitations of the private sector.

The Commission has frequently, throughout its existence, addressed the situation in which a state agency or state employee seeks to solicit contributions from the private sector. The Commission has stated that, in such a situation, two main issues arise. The first is whether or not the solicitation or receipt of a donation is appropriate under HRS section 84-11, the State Ethics Code's "gifts" law. The second issue pertains to whether or not the solicitation is proper under the HRS section 84-13, the State Ethics Code's "Fair treatment" law.

A. The Gifts Law

The gifts law is set forth in HRS section 84-11. This section reads, in its entirety, as follows:

> §84-11 Gifts. No legislator or employee shall solicit, accept, or receive, directly or indirectly, any gift, whether in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form, under circumstances in which it can reasonably be inferred that the gift is intended to influence the legislator or employee in the performance of the legislator's or employee's official duties or is intended as a reward for any official action on the legislator's or employee's part.

The gifts law prohibits a state employee from soliciting or accepting a gift if, under the circumstances, it is "reasonable to infer" that the gift is intended to influence or reward the employee with respect to the performance of official duties.

In Advisory Opinion No. 45, issued in 1969, the State Ethics Commission for the first time discussed solicitation of the private sector. In Advisory Opinion No. 45, a state employee asked for advice as to whether or not the employee could accept donations to help defray the cost of travel to the mainland. The purpose of

this travel was to promote the economic development of the State. In determining whether the solicitation and acceptance of these donations was permissible under the gifts law, the Commission made a distinction between gifts that appeared to be intended to benefit a state employee in a purely "personal" way (such as a personal gift like a watch or camera), and gifts that, instead, primarily redounded to the benefit of the State. The Commission determined in Advisory Opinion No. 45 that the solicitation furthered a legitimate State (as opposed to personal) purpose and that the solicitation thus did not violate the gifts law. The Commission, however, in Advisory Opinion No. 45, cautioned as follows:

> State government pervades all parts of our business and economical life and controls it in many areas. Because of this power, the solicitation of a gift from a business concern which must operate within the system places that [business] concern in an awkward position. If the business solicited does contribute, there is always the suspicion of favored treatment to the detriment of other members of the industry who do not give equally. And a non-contributing [business] concern will never be sure whether its failure to contribute will be remembered at some later time when it is dealing with the State.
>
> Thus, it appears appropriate that the State should take care not to obligate or create the appearance of obligating itself or others in the conduct of its business. Only if the State in its official actions conducts itself on the very highest ethical level can it inspire confidence in state government and high ethical standards of conduct in its employees.

Advisory Opinion No. 45 held that the solicitation of the private sector for travel costs to defray the expenses of a trip that served a State purpose did not violate the gifts law. The Commission also warned, however, that the State should take care when conducting such solicitations. It should be noted that Advisory Opinion No. 45 was not a "blanket" approval for all solicitations. Each case must be reviewed because of the various factors involved.

The Commission again addressed the issue of the solicitation of the private sector in Advisory Opinion No. 316, issued in 1977. In this case, a member of a state board asked for advice as to whether he could solicit the private sector for funds to finance certain projects of the board. Again, the Commission determined that solicitation of the private sector would not violate the gifts law. In reaching this conclusion, the Commission noted, among other things, that the donations would redound to the benefit of the State, and not to the individual soliciting the donations. The Commission also cited the cautionary language of Advisory Opinion No. 45, and advised the board member that he should take care not to place a solicited business in an awkward position.

In Advisory Opinion No. 504, issued in 1983, an employee of a state department sought advice as to whether or not he could solicit contributions from the private sector to help fund a state conference that would be sponsored by his department. In this case, the Commission examined a number of factors in determining whether the solicitation was permissible under the gifts law. These factors revolved around two main issues. The first issue was whether or not the solicited business had a business relationship with the department. The second issue related to whether or not the gift benefitted the State, as opposed to primarily benefitting a particular employee. The Commission determined, with some caveats, that the solicitation would not violate the gifts law. The Commission's determination was based on the fact that the solicited donations were intended for a State purpose, rather than for the personal benefit of a state employee.

The Commission dealt with a similar situation in Advisory Opinion No. 93-3. In that case, the director of a state agency asked whether or not he could solicit private sector companies for donations to support a state conference. In analyzing the situation under the gifts law, the Commission noted that it had traditionally examined three factors in determining whether or not soliciting or accepting a gift was proper. The first factor was the value of the gift. Gifts of a large value tended to raise more concern. The second factor related to whether or not the recipient of the gift took official action affecting the donor of the gift. This factor was referenced in Advisory Opinion No. 504. A solicitation was more problematic if the state agency or state employee took significant official action (such as regulatory action) affecting a private company. In such a situation, the company might find it difficult to refuse the agency's request for a donation. The third factor was whether the gift appeared to personally benefit a state employee, or whether, instead, it was primarily of benefit to the State.

In the case, the Commission again determined that the solicitation of the private sector would not violate the gifts law. The Commission relied heavily on the third factor in its analysis. The donations were in support of a state conference and this benefitted the State rather than a particular individual. The Commission noted that legislation that had created the state agency that made the solicitations specifically allowed the agency to set up a fund in which to deposit grants or gifts from both the public and private sectors.

Over the years, the Commission's advisory opinions demonstrate that, in determining whether or not a solicitation of the private sector violates the State Ethics Code's gifts law, the Commission in its rulings makes a clear distinction between gifts that are primarily intended to personally benefit a state employee, and gifts that are primarily intended to benefit the State, or that serve a State purpose. The Commission has generally allowed the solicitation of gifts that benefit the State. The Commission has, however, stated that even gifts that benefit the State may raise concerns if they place a private business in an awkward or untenable position.

The Commission has always maintained that each case must be decided on its own merits. The Commission has ruled that some solicitations were inappropriate when it believed that the benefit to the State was more questionable.

B. The Fair Treatment Law

The State Ethics Commission has recognized that solicitation of the private sector also raises issues under the State Ethics Code's "Fair treatment" law. HRS section 84-13, the "Fair treatment" section of the State Ethics Code, prohibits a state employee from using his or her state position to grant himself or herself, or anyone else, an unwarranted advantage. In relevant part, HRS section 84-13 reads as follows:

> §84-13 Fair treatment. No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others....

In some situations, a state employee's request for contributions may amount to a misuse of position in order to gain an unwarranted benefit for the employee or for the employee's agency.

The Commission focused on the concerns that arise under the "Fair treatment" law in Advisory Opinion No. 93-3, discussed above. In Advisory Opinion No. 93-3, the Commission again made a distinction between solicitations that are primarily intended to benefit a state employee personally and solicitations that are primarily intended to benefit the State. The Commission stated that a State employee's solicitation of a private company for the state employee's personal benefit would constitute a violation of the "Fair treatment" law. This type of solicitation would amount to the use of the employee's state position to obtain an "unwarranted" personal benefit. Under the "Fair treatment" law, the distinction between a solicitation for an employee's personal benefit and a solicitation for the State's benefit is quite stark. As stated in Advisory Opinion No. 93-3, the Commission believes that the solicitation of the private sector for the personal benefit of a state employee would likely violate the State Ethics Code.

After setting forth this principle in regard to solicitations benefitting a state employee, the Commission, in Advisory Opinion No. 93-3, then turned its attention to solicitations that serve a State purpose. The Commission stated that the "Fair treatment" law would be violated if a solicitation amounted to a misuse of position resulting in an unwarranted benefit to a state agency. The Commission added that any solicitation that appeared to be coercive would amount to a misuse of position, in violation of section 84-13.

In Advisory Opinion No. 93-3, whether or not the solicitation was coercive was discussed. In making this determination, the State Ethics Commission examined several factors. Chief among these factors were (1) the nature of the relationship between the state agency and the companies that were being solicited, (2) the form and content of the solicitation, and (3) whether or not the solicited company received anything of value in return for its donation. In analyzing the final factor, the Commission noted that if a solicited company received a substantial benefit in exchange for a donation, then it was less likely that the donation was coerced from the company. The benefits that were offered to donating companies in this case were in the nature of promotional consideration. They did not include any special access to government officials.

C. Summary of the Commission's Approach to Solicitations of the Private Sector

Prior advisory opinions issued by the State Ethics Commission demonstrate that the Commission has a long history of addressing the issue of solicitations of the private sector. These solicitations raise issues under both HRS section 84-11, the "gifts" law, and HRS section 84-13, the "Fair treatment" law. The Commission has consistently noted a distinction between solicitations for donations that are intended to personally benefit a state employee, and solicitations for donations that are intended to benefit the State. The Commission has generally held that a solicitation of the private sector for the personal benefit of a state employee would likely violate the State Ethics Code. On the other hand, a solicitation that benefits the State, or serves a State purpose, is generally permissible. In its analysis of these types of situations, the Commission also focuses on whether or not the solicitation is coercive. In determining whether or not a solicitation is coercive, the Commission examines a number of factors. Among these factors are the relationship between the soliciting state agency and a private company, the language and form of the solicitation, and whether or not a private company receives any benefit in exchange for the donation.

Despite the fact that, in past opinions and cases, the Commission has generally allowed the solicitation of the private sector, the Commission is still cautious about these situations. The Commission has noted that private companies that are solicited to contribute a donation to the State may be placed in an awkward position. The Commission has maintained that the State should take care to avoid any solicitation that would appear to place a private sector organization in a difficult or untenable position.

VII. Charges Filed with the Commission by Individuals

It should be noted that any individual can file a charge with the Hawaii State Ethics Commission alleging that a state official or employee has violated the State Ethics Code. Such a charge must be signed under oath, in accordance with chapter 84, HRS. The State Ethics Commission's action on charges filed by members of the public is confidential under the State Ethics Code, except that if the Commission decides to proceed to a public hearing, certain documents become public at the time that determination is made. The State Ethics Code has a six-year statute of limitations. For a violation of the State Ethics Code to be found by the State Ethics Commission, the Commission's findings after a public hearing must be supported by "competent and substantial evidence." The State Ethics Commission terminates its action on a case if it believes this evidentiary burden of proof cannot be met. The Commission also has the option of issuing an "informal advisory opinion" to a respondent in a charge case. These opinions are also confidential under the State Ethics Code, but the Commission is required to issue a public version with information removed that identifies the respondent.

VIII. Enforcement Action Initiated by the State Ethics Commission Itself

The State Ethics Commission has the authority to review or investigate any matter that comes to its attention. The Commission need not wait for an outside request. It has been the policy of the Commission to review or investigate matters that come to the attention of the Commission that raise concerns under the State Ethics Code. The Commission will pursue these cases so long as it believes it can meet the State Ethics Code's evidentiary burden of proof, which is "competent and substantial evidence." The Commission is proactive, and may contact a state official, state employee, or state agency about conduct that may appear to be violative of the State Ethics Code.

IX. Conclusion

The State Ethics Commission is not able, under its laws, to respond to SCR No. 32 in the manner requested by the Resolution. In general, the Commission may either issue advice (requested by a person regarding his or her own circumstances) or address a situation as an enforcement matter. Both options require the Commission to proceed as mandated by the Commission's statutes and rules. If the State Ethics Commission were to circumvent these procedures, such action would raise serious statutory and constitutional concerns. Further, the Commission's commissioners and staff could be sued in both their "official" and "individual" capacities for action taken that is not consonant with the laws that dictate how the Commission does its work.

Despite the fact that the Commission is unable to respond to SCR No. 32 in the manner requested, the Commission is able to generally discuss the issue of solicitations of the private sector. In many past Commission opinions, all of which are accessible on the State Ethics Commission's website, the Commission has addressed this issue. Although the Commission has some reservations about these types of solicitations, it has allowed state agencies to solicit the private sector for donations that further a legitimate State purpose. In reviewing these solicitations, the Commission chiefly examines whether or not a solicitation is coercive, or whether only a personal gift is involved. This examination reflects the Commission's consistently stated concern that private companies not be pressured or obligated to make a donation in response to a state agency's solicitation. Further, purely personal gifts would be prohibited.

Finally, it should be noted that each case of solicitation raises its own unique factors as to whether the solicitation is proper or not. Thus, the State Ethics Commission must review each situation on a case-by-case basis. The State Ethics Commission believes that it has interpreted the State Ethics Code correctly with regard to solicitations of the private sector in terms of the laws set forth in chapter 84, HRS. Of course, these laws can be changed if it appears that solicitation of the private sector opens the door for abuse, or creates an appearance of impropriety.

Dated: Honolulu, Hawaii, August 16, 2006.

HAWAII STATE ETHICS COMMISSION

Signature Block

Robert R. Bean, Chairperson

Signature Block

Carl Morton, M.D., Vice Chairperson

Signature Block

Maria J. Sullivan, Commissioner

Signature Block

Jerrold A. Fuller, Commissioner

Signature Block

Boyd T. McCleary, Commissioner

Attachment 1

THE SENATE
TWENTY-THIRD LEGISLATURE, 2006
STATE OF HAWAII

S.C.R. NO. 32 S.D. 1 H.D. 1

SENATE CONCURRENT RESOLUTION

REQUESTING THE STATE ETHICS COMMISSION TO REVIEW POSSIBLE ETHICS VIOLATIONS COMMITTED BY THE DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT, AND TOURISM.

WHEREAS, in 2005, the Department of Business, Economic Development, and Tourism (DBEDT) pursued trade missions to the People's Republic of China and the Republic of Korea to encourage economic and tourism-related partnerships with these two countries; these missions were therefore considered to be state-related business; and

WHEREAS, to support this mission, the sum of $268,637 was raised by DBEDT from private sector sponsors; and

WHEREAS, it has been revealed that this money paid for a variety of costs for the mission, including travel expenses and honorariums to local entertainers who accompanied the China and South Korea delegation; and

WHEREAS, in carrying out these trade missions, an issue of concern arises as to whether it is permissible under ethics law to solicit private funding to finance activities that are essentially a government function; and

WHEREAS, moreover, the method of soliciting private funds, including the possibility of promising special benefits in exchange for large contributions, can be troubling; and

WHEREAS, it is critical that no ethical bounds are crossed in government solicitations of private sponsorships of official government trade missions, and measures need to be taken to ensure that government solicitations are public and aboveboard and that government decisions are not influenced by private contributions to support these missions; and

WHEREAS, the private sponsorship of official government trade missions can raise additional ethical concerns; for example, in the event that private funds received from the sponsors and participants of the trade mission are used to pay for the trip of any state employee, prior approval from the State Ethics Commission may need to be obtained; and

WHEREAS, the State Ethics Commission has the responsibility to initiate, receive, and consider charges concerning alleged violations of the State Ethics Code; now, therefore,

BE IT RESOLVED by the Senate of the Twenty-third Legislature of the State of Hawaii, Regular Session of 2006, the House of Representatives concurring, that the State Ethics Commission is requested pursuant to section 84-31(a)(7), Hawaii Revised Statutes (HRS), to review this matter for possible ethics code violations committed by DBEDT; and

BE IT FURTHER RESOLVED that pursuant to section 84-31(a)(7), HRS, the State Ethics Commission is requested to educate the Legislature and the citizenry regarding the ethical aspects of its review no later than September 1, 2006; and

BE IT FURTHER RESOLVED that certified copies of this Concurrent Resolution be transmitted to the Executive Director of the State Ethics Commission and Director of Business, Economic Development, and Tourism.

I hereby certify that the foregoing is a true and correct copy which was duly adopted by the Senate of the State of Hawaii.

Dated: MAY 09 2006

Signature Block

Assistant Clerk of the Senate

HAWAII
STATE
ETHICS
COMMISSION
State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

Attachment 2

June 29, 2006

Via Facsimile 586-1239 and U.S. Mail

Mark J. Bennett, Esq.
Attorney General
Department of the Attorney General
Hale Auhau
425 Queen Street
Honolulu, Hawaii 96813

Dear Mr. Bennett:

I would like to request an opinion from your office with regard to the appropriateness, under the law, of the Hawaii State Ethics Commission responding to Senate Concurrent Resolution No. 32, S.D.1, H.D.1, "REQUESTING THE STATE ETHICS COMMISSION TO REVIEW POSSIBLE ETHICS VIOLATIONS COMMITTED BY THE DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT, AND TOURISM." (Copy attached).

Senate Concurrent Resolution No. 32 asks the State Ethics Commission to review the Department of Business, Economic Development, and Tourism ("DBEDT") for "possible ethics violations" in regard to prior "trade missions" to the People's Republic of China and to the Republic of Korea. This is clear by the specific language in the title to the Resolution, as well as the language in the ninth paragraph of the Resolution, which states as follows:

> ". . . the State Ethics Commission is requested pursuant to Section 84-31(a)(7), Hawaii Revised Statutes (HRS), to review this matter for possible ethics code violations committed by DBEDT . . . ."

In the tenth paragraph of the Resolution, the Resolution requests that the State Ethics Commission inform the Legislature and the citizenry "regarding the ethical aspects of its review no later than September 1, 2006."

With respect to Senate Concurrent Resolution No. 32, we have two specific concerns, and would like your opinion regarding these concerns.

Our first concern relates to whether responding to this Resolution is consonant with the enforcement provisions set forth in the State Ethics Code. Our second concern is whether responding to this Resolution raises "due process" issues under the Constitution of the State of Hawaii and the Constitution of the United States.

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HRS section 84-31(a)(3) of the State Ethics Code provides that the State Ethics Commission "shall initiate, receive, and consider charges concerning alleged violation of this chapter [Chapter 84, HRS], initiate or make investigation, and hold hearings." Thus, the State Ethics Commission can consider charges that are filed by anyone or respond to requests for investigation, and the State Ethics Commission can initiate its own investigations and issue charges itself. Under the State Ethics Code, investigation of charges and charges themselves are confidential until a point at which the Commission proceeds to a formal, contested-case hearing. Such a hearing cannot be held by the State Ethics Commission without a finding of "probable cause." Only after a formal, contested-case hearing, in accordance with chapter 91, HRS, can the State Ethics Commission make any determination as to whether the State Ethics Laws have in fact been violated or not.

While the State Ethics Commission believes that the Legislature may, like anyone, make a request for an investigation, we believe that the provisions in the State Ethics Code must thereafter be followed. Once the Commission initiates enforcement proceedings, the Commission has no authority to issue any findings except after a formal hearing, after complying with chapter 91, HRS.

We believe that a request to review DBEDT's conduct in terms of compliance with the State's ethics laws with regard to the trade missions and to report findings to the Legislature by September 1, 2006, is contrary to the procedures set forth in the State Ethics Code. We would like to know whether you concur with this view.

Our second concern deals with due process issues. The setting of a particular date, in this case September 1, 2006, to investigate and respond back to the Legislature with respect to possible violations of the State Ethics Code, in our opinion, violates the due process provisions of both the Constitution of the State of Hawaii and the Constitution of the United States. We believe that it is well settled law that administrative agencies cannot make interpretations of the State or the U.S. Constitution in carrying out their work. For this reason, we would like your opinion as to whether setting a specific date for a response with respect to whether our State's ethics laws have been violated or not violates due process.

The State Ethics Commission is open, of course, to requests to initiate an investigation into possible wrongdoing. However, it has been the Commission's practice, as it deems required by its laws, to determine itself, as a quasi-judicial agency, whether an investigation is warranted, and to what extent. The Commission also believes that, under the enforcement provisions set forth in the State Ethics Code, cases may not warrant a formal hearing, or there may not be "probable cause" to warrant a formal hearing. With regard to such cases, confidentiality laws governing our enforcement actions do not allow us to make reports of when or why a case is terminated without a formal hearing.

The State Ethics Commission has every intention of performing its duties as prescribed by law. However, such duties obviously must be performed in accordance with applicable statutory and constitutional requirements. We would appreciate your opinion with respect to the issues we have set forth in this letter.

Very truly yours,

Signature Block

Daniel J. Mollway
Executive Director
and General Counsel

Enclosure

DJM/af

Attachment 3

LINDA LINGLE
GOVERNOR

MARK J. BENNETT
ATTORNEY GENERAL

LISA M. GINOZA
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
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STATE OF HAWAII
STATE ETHICS COMMISSION
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July 21, 2006

Daniel J. Mollway, Esq.
Executive Director and General Counsel
Hawai'i State Ethics Commission
1001 Bishop Street
ASB Tower 970
Honolulu, Hawai'i 96813

Dear Mr. Mollway:

Re: S.C.R. No. 32, S.D.1, H.D.1, "Requesting The State Ethics Commission To Review Possible Ethics Violations Committed By The Department Of Business, Economic Development, And Tourism."

This responds to your request for advice regarding Senate Concurrent Resolution No. 32 ("SCR No. 32").

Questions:

You inquire whether the resolution is consonant with the enforcement provisions set forth in the State Ethics Code and whether responding to the resolution raises "due process" issues under our Federal and State Constitutions.

Short Answers:

We advise that a resolution of the state legislature is not legislation and does not have the force and effect of law. S.C.R. No. 32, therefore, does not amend the procedures for investigation under Hawai'i Rev. Stat. ("HRS") § 84-31. The Hawai'i State Ethics Commission ("HSEC" or "Commission") is not bound by the external timelines imposed by SCR No. 32, or any other provisions of the resolution that would conflict with HRS chapter 84. If you follow the provisions and procedures under HRS chapter 84, provide a response pursuant to HRS § 84-31(a)(7) and do not reveal confidential information, then we do not believe there would be any constitutional concerns that would be implicated.

Discussion and Conclusion:

SCR No. 32 requests the HSEC to review the Department of Business, Economic Development and Tourism ("DBEDT") for "possible ethics violations" in regard to prior "trade missions" to the People's Republic of China and to the Republic of Korea. The resolution also asks the HSEC to educate the Legislature and the citizenry regarding the ethical aspects of its review of possible ethics code violations committed by the DBEDT no later than September 1, 2006. You have explained that HRS § 84-31(a)(3) provides the procedures for investigations of violations of the State Ethics Code that include that the investigation of charges and charges themselves to be confidential until the Commission proceeds to a formal contested-case hearing after a finding of "probable cause." Only after the conclusion of a contested-case hearing can the Commission make a determination as to whether the State Ethics Code has been violated.

A resolution of the state legislature is not legislation and does not have the force and effect of law. Grand County v. Emery County and the City of Green River, 2002 UT 57, 52 P.3d 1148 (Utah 2002). Therefore, to the extent that the concurrent resolution conflicts with the State Ethics Code, the provisions of the Code control. We advise that the Commission should proceed according to the procedures specified under the Code, not the resolution, even viewing the resolution as a request for an investigation. To the extent the resolution requests actions not authorized by law, those actions should not be taken. The Commission is not bound by the external timelines imposed by the resolution and should follow the procedures specified under the Code. By following the procedures in the Code your due process and constitutional concerns would be obviated.

Should you have questions, please feel free to call us.

Very truly yours,

Signature Block

Russell A. Suzuki
Deputy Attorney General

APPROVED:

Mark J. Bennett
Attorney General

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Attachment 11

OPINION NO. 45

A state employee requested an opinion regarding the receipt of free transportation by employees in his department and by members of county government.

An unofficial body, composed of members of outside island counties, in cooperation with a state department, has the purpose of increasing economic development in the State. One method of doing this is to publicize portions of the State as developable entities wherever there is potential development and financing.

In pursuit of these purposes, this body planned a mission to the mainland. The persons involved would visit major cities to give speeches, hold meetings and tell the story of the neighbor islands and the State. Because there were insufficient state and county funds to defray the entire expenses of this trip, this employee, as coordinator, wrote to various airlines, outlining the purposes of the trip and asking whether they might be interested in assisting in transportation and other arrangements. Pursuant to the letter, one airlines offered to provide free round-trip transportation to the mainland. He wished to accept this transportation and asked for a Commission opinion as to whether such acceptance would violate the ethics code, chapter 84, HRS.

Section 84-11 of the Hawaii Revised Statutes prohibits any employee from soliciting or receiving any gift, whether in the form of money, travel, etc., under circumstances in which it can reasonably be inferred that the gift is intended to influence him in the performance of his official duties or is intended as a reward for any official action on his part.

It should be noted that it may be advisable for the county personnel to consult the ethics laws of the particular counties involved.

However, the state officer solicited the arrangements for all, and one member of his department will receive this free transportation. This particular solicitation and acceptance is governed by section 84-11.

In determining whether there is a reasonable inference that a gift is intended to influence or to be a reward for official action and thus violates section 84-11, the Commission looks at the following, among other considerations:

Whether the gift is related to the public job of the recipient;

Whether the gift redounds to the benefit of the individual or the State;

Whether the solicitation is of one member of an industry, or of all:

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Whether the employee's department presently has before it, or has had before it, an application affecting the donor; and

What benefit the donor stands to gain from the gift.

In this case, the free transportation is job-related, in that it allows the state employee to travel and publicize Hawaiian development, part of his job. The gift, in effect, redounds to the State, as it relieves the State of an expense it would have had to bear to accomplish this job. As this is a work-filled trip, there is little personal benefit from the gift.

All airlines serving Hawaii were approached for help. And the Commission has been informed that there is no application presently before the employee or his department affecting the donor, nor has any official action affecting it earlier been taken.

The donor here receives no direct benefit other than publicity for providing the transportation. It will probably benefit indirectly from the improvement in the neighbor island and state economy, which is the object of the trip.

Thus, in these circumstances, it cannot "reasonably be inferred that the gift is intended to influence him in the performance of his official duties or is intended as a reward for any official action on his part"; and, thus, we hold that acceptance of this free transportation in this instance does not violate the state ethics code.

While we hold that there is no *per se* violation of the ethics law in this situation, there are additional considerations. State government pervades all parts of our business and economic life and controls it in many areas. Because of this power, the solicitation of a gift from a business concern which must operate within the system places that concern in an awkward position. If the business solicited does contribute, there is always the suspicion of favored treatment to the detriment of other members of the industry who do not give equally. And a non-contributing concern will never be sure whether its failure to contribute will be remembered at some later time when it is dealing with the State.

Thus, it appears appropriate that the State should take care not to obligate or create the appearance of obligating itself or others in the conduct of its business. Only if the State in its official actions conducts itself on the very highest ethical level can it inspire confidence in state government and high ethical standards of conduct in its employees.

Dated: Honolulu, Hawaii, November 18, 1969.

STATE ETHICS COMMISSION
Vernon F.L. Char, Chairman
James F. Morgan, Jr., Vice Chairman
S. Don Shimazu, Commissioner
July Simeona, Commissioner

Note: Commissioner Margaret W. Smalley was excused from the meeting at which this opinion was considered and adopted.

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OPINION NO. 316

A newly created state commission had as one of its responsibilities the education of the public in the subject matter that was its concern. One of the members had suggested that members of the business community and other individuals might be willing to donate money to help finance this commission's projects. The chairman directed the legal counsel of that commission to ask the Ethics Commission to determine if that commission could receive such contributions for its projects.

The donation of money by the business community would constitute a gift for purposes of the ethics code. We noted that the provision dealing with gifts was found in HRS §84-11 (Supp. 1975). The section states:

> No ... employee shall solicit, accept, or receive, directly or indirectly, any gift, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it can reasonably be inferred that the gift is intended to influence him in the performance of his official duties or is intended as a reward for any official action on his part.

We pointed out that this statute applied to specific employees and not to the subject commission as a body. Both the paid staff and the appointed members of this commission were employees for purposes of the ethics code. Therefore, no staff member or commissioner could solicit or accept any money under circumstances in which it could reasonably be inferred that the gift was given with the intent to influence him in the performance of his official duties or was a reward for any official action on his part. However, if a reasonable inference of attempted influence or reward did not exist in the gifts contemplated by this commission, the ethics statute did not specifically prohibit a staff or commission member from soliciting or accepting such gifts. We pointed out that in the past we had identified certain criteria which were helpful in determining the validity of a gift under the gifts section. These included: whether the gift was related to the public job of the recipient; whether the gift would redound to the benefit of the individual or the State; whether the solicitation was of one member of an industry or of all; whether the employee's department presently had before it, or had had before it, an application affecting the donor; and what benefit the donor stood to gain from the gift. (Opinion No. 45.) It appeared that the subject commission was unlikely to take official action directly affecting potential donors; further, the gifts would clearly redound to the benefit of the State rather than to the individuals who might solicit the gifts. Finally, it did not appear that the donors would stand to gain anything from making a donation to the commission. Accordingly, it was our view that the receipt and solicitation of such gifts would not be in violation of the ethics code.

In addition, however, we suggested to the commission as we had to others in the past, that it fully consider the position in which a solicited business would be placed by such solicitations. While the commission might not take action directly affecting a specific business, it did act as a representative of an all-pervasive state government. Some programs were designed to require public as well as private financial assistance, but that fact would be known at the

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outset. In the case of this program, businesses were not expecting to be asked to contribute and if asked might be placed in a rather awkward position. In addition, non-solicited but specific gifts which benefitted the State might raise a question of the advisability of allowing private business or industry to pay for expenses which were within the government's responsibility to bear. The savings to the taxpayers had to be weighed against the loss of credibility and trust by the public that might be occasioned by solicitations of persons and businesses to support government projects. (See Opinions No. 279 and No. 311.)

We suggested to the chairman that he was in the best position to weigh these various considerations in each individual case. We pointed out that should the commissioners decide to solicit gifts, however, HRS §84-13 would prohibit them from using their positions to secure unwarranted advantages. This meant that the staff and commission members should be careful not to place any undue pressure on a business or individual while seeking funds.

We understood that the enabling statute for this commission contained no provision for the acceptance of gifts or of matching funds. We pointed out that whether this commission as a body had the legal authority to accept the gifts the staff and members might solicit was a question which was not within our authority to determine.

Dated: Honolulu, Hawaii, October 14, 1977.

STATE ETHICS COMMISSION
Paul C.T. Loo, Chairman
I.B. Peterson, Vice Chairman
Audrey P. Bliss, Commissioner

Note: Commissioners Dorothy K. Ching and Gary B.K.T. Lee were excused from the meeting at which this opinion was considered.

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OPINION NO. 504

The Commission received a request for an advisory opinion from a department official who asked for advice on the propriety of his department soliciting private companies for contributions for a conference his department intended to host. The official informed the Commission that about seventy officials from various states were making plans to attend the conference. The official stated that unless his department could solicit private companies for donations, his department would not be able to host the conference.

The ethics code provision relevant to the question the official asked was HRS §84-11, the gifts section of the code, which states that

> [n]o legislator or employee shall solicit, accept, or receive, directly or indirectly, any gift, whether in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form, under circumstances in which it can reasonably be inferred that the gift is intended to influence him in the performance of his official duties or is intended as a reward for any official action on his part.

Official action is defined in HRS §84-3(7) as "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority."

The Commission explained to the official that the solicitation of private companies divides itself into two distinct areas: (1) the solicitation of companies that have a business relationship with the soliciting state agency and (2) the solicitation of companies that do not have a business relationship with the soliciting agency. The Commission pointed out to the official that it does not favor any form of solicitation by a state agency. The Commission stated that, obviously, the solicitation of a private company that had a business relationship with the soliciting state agency would always raise a question of ethics: Was the gift given to influence or reward official action? The Commission informed the official that in Advisory Opinion No. 45 the Commission had stated:

> State government pervades all parts of our business and economical life and controls it in many areas. Because of this power, the solicitation of a gift from a business concern which must operate within the system places that concern in an awkward position. If the business solicited does not contribute, there is always the suspicion of favored treatment to the detriment of other members of the industry who do not give equally. And a non-contributing concern will never be sure whether its failure to contribute will be remembered at some later time when it is dealing with the State.

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> Thus, it appears appropriate that the State should take care not to obligate or create the appearance of obligating itself or others in the conduct of its business. Only if the State in its official actions conducts itself on the very highest ethical level can it inspire confidence in state government and high ethical standards of conduct in its employees.

Even though the solicitation of a private company with no business relationship to the soliciting state agency would most likely not create an ethical issue under HRS §84-11, the Commission informed the official that it had stated, in Advisory Opinion No. 316, that such solicitations were still disfavored:

> In addition, however, we suggested to the [agency] as we had to others in the past, that it fully consider the position in which the solicited business would be placed by such solicitations. While the [agency] *might* not take action directly affecting a specific business, it did act as a representative of an all-pervasive state government. Some programs were designed to require public as well as private financial assistance, but that fact would be known at the outset. In the case of this program, businesses were not expecting to be asked to contribute and if asked might be placed in a rather awkward position.... The savings to the taxpayers had to be weighed against the loss of credibility and trust by the public that might be occasioned by solicitations of persons and businesses to support government projects. (Emphasis added.)

The Commission stated to the official that although, for the reasons mentioned above, it disfavors the solicitation even of companies that have no business relationship with the soliciting agency, the safest course for the official's department to take if it decided to engage in soliciting was to avoid soliciting those companies that had a business relationship with his department.

The Commission pointed out that if the official's department decided to solicit companies that it did do business with, whether a violation of HRS §84-11 would occur depended upon the circumstances surrounding each solicited gift. The Commission explained that, first of all, the solicitation of a donation even from a company that had a business relationship with the official's department would not be per se a violation of the code, since a violation of HRS §84-11 arises only when "it can reasonably be inferred that the gift is intended to influence ... or ... reward ... official action." However, the Commission told the official that, as stated above, the solicitation of a company that an agency did business with would always raise an ethical question. The Commission informed the official that in determining whether there has been a violation of HRS §84-11, the Commission considers the following factors:

(1) Does the state employee who solicits the gift stand to gain a personal benefit from the gift?

(2) Was only one member of an industry solicited--as opposed to all members--by the employee?

(3) Does the employee's department presently have before it, or has the department recently had before it, an application or request affecting the potential donor?

(4) Does the donor stand to gain a benefit from giving the gift?

(5) Does the gift redound to the benefit of the State?

(6) Does the gift help the employee in the performance of his state responsibilities?

(7) The size of the gift.

(8) The custom and practice in the community with regard to the giving of gifts.

In considering these factors, the Commission noted that the official had stated that there was a substantial benefit to the State if his department was able to host the conference. Secondly, the official had stated that solicited gifts would not redound substantially to the personal benefit of an official or employee of his department. The Commission informed the official that these two factors diminished the inference of a gift given to influence or reward. However, the Commission advised that if the official intended to solicit companies that did business with his department, he should solicit those companies that were not soon to be subject to, or that had not recently been subject to, official action on the part of his department. The Commission also informed the official that, of course, he could contact this Commission again with regard to specific situations that he believed might raise serious questions. Finally, the Commission told the official that for further information on the subject of gifts he might wish to consult the Commission's brochure on gifts, a copy of which was enclosed with the opinion.

The Commission told the official that it appreciated his sensitivity to the ethical considerations raised in this situation and also appreciated his bringing this matter to the Commission's attention at an early time.

Dated: Honolulu, Hawaii, August 15, 1983.

STATE ETHICS COMMISSION
Edith K. Kleinjans, Chairperson
Allen K. Hoe, Vice Chairperson
Gary B.K.T. Lee, Commissioner
Rabbi Arnold J. Magid, Commissioner

Note: Commissioner Mildred D. Kosaki was excused from the meeting at which this opinion was considered.

25th ANNIVERSARY 1968-1993

HAWAII STATE ETHICS COMMISSION

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

ADVISORY OPINION NO. 93-3

The director of a state agency asked the Ethics Commission (Commission) for an advisory opinion on whether her agency had properly solicited donations from private businesses. The role of the director's agency was to promote a certain industry in the State. The director said that her agency was sponsoring a conference that would soon take place. The conference would focus on the industry and would assist in promoting the industry. The director said that she had solicited a number of organizations for contributions to help sponsor this conference. She asked for advice as to whether these solicitations were appropriate.

The conference that the agency was sponsoring was an annual event. In past years, the agency had been a co-sponsor of this conference. However, for the past several years, the agency had been the only sponsor of this event. The director explained that the agency allocated money from within its own budget to sponsor the conference. The director said however, that, although the agency was spending quite a bit of its own money, it still needed outside support in order to fund the conference.

The director provided a list of all the organizations that the agency had approached for sponsorship money. The agency approached approximately 20 organizations, all of which were part of the industry. The industry contained many more organizations that were not approached for sponsorship money.

The director explained that a sponsor could either donate any amount of money that it wished, or it could donate a specific amount of money in order to sponsor a particular conference event. For example, the conference contained two breakfasts. A sponsor could opt to pay a certain sum of money and sponsor one of these breakfasts. The director said that the agency had received nearly $10,000 in sponsorship money. The money was donated from five different organizations.

The solicitation and the acceptance of these contributions raised two major questions under the ethics code. The first question was whether these contributions were properly solicited. If these gifts were properly solicited, then the second question was whether the offered gifts were acceptable.

1. <u>Were the contributions properly solicited?</u>

The Ethics Commission has long recognized that the act of requesting a contribution may in itself be improper. HRS section 84-13, the fair treatment section of the ethics code, forbids employees from using their state positions to grant anyone an unwarranted advantage. In relevant part, this section reads:

> §84-13 <u>Fair treatment.</u> No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant

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> unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others....

In some situations, an employee's request for contributions may amount to a misuse of position in order to gain an unwarranted benefit for the employee or his agency.

As an initial matter, the Commission stated its belief that a state agency's solicitation of a private company for a state employee's personal benefit would be a violation of the fair treatment law. This type of solicitation would amount to the use of one's state position for an unwarranted personal benefit. Similarly, the Commission believed that a solicitation of a donation for an employee social event would also be a violation of this section.

In this instance, the purpose of the solicitations was to fund a state conference. The Commission, however, has traditionally discouraged solicitations for any purpose. In Advisory Opinion No. 45, issued in 1969, the Commission first discussed its opinion of solicitations. The Commission said:

> State government pervades all parts of our business and economical life and controls it in many areas. Because of this power, the solicitation of a gift from a business concern which must operate within the system places that concern in an awkward position. If the business solicited does contribute, there is always the suspicion of favored treatment to the detriment of other members of the industry who do not give equally. And a non-contributing concern will never be sure whether its failure to contribute will be remembered at some later time when it is dealing with the State.
>
> Thus, it appears appropriate that the State should take care not to obligate or create the appearance of obligating itself or others in the conduct of its business. Only if the State in its official actions conducts itself on the very highest ethical level can it inspire confidence in state government and high ethical standards of conduct in its employees.

The Commission restated its basic opposition to solicitations in Advisory Opinion No. 316. In that opinion, the Commission said:

> In addition, however, we suggested to the [agency] as we had to others in the past, that it fully consider the position in which the solicited business would be placed by such solicitations. While the [agency] might not take action directly affecting a specific business, it did act as a representative of an all-pervasive state government. Some programs were designed to require public as well as private financial assistance, but that fact would be known at the outset. In the case of this program, businesses were not expecting to be asked to contribute and if asked might be placed in a rather awkward position.... The savings to the taxpayers had to weighed against the loss of credibility and trust by the public that might be occasioned by solicitations of persons and business to support government projects.

These opinions clearly illustrate the Commission's basic position that solicitations of any sort are not favored.

Despite this basic position, however, the Commission has held that solicitations of private companies for state purposes are not per se violations of the ethics code. The fair treatment law is violated only if the solicitation amounts to a misuse of position resulting in an unwarranted benefit to the agency or the soliciting employee. Any solicitation that reasonably appears to be coercive would amount to a misuse of position in violation of section 84-13.

In Advisory Opinion No. 504 the Commission discussed the appropriateness of a solicitation. The Commission listed a number of factors that should be considered in determining whether a solicitation was in violation of the ethics code. Among these factors were whether the gift benefitted the State or whether it benefitted a particular employee, the size of the gift, whether the employee's department had before it an application or a request affecting the donor of the gift, and the custom and practice of the community.

In determining whether or not the director's requests for contributions were coercive in violation of section 84-13, the Commission examined several factors similar to those expounded in Advisory Opinion No. 504. First, the Commission examined whether or not the agency did business with the organizations that it had solicited, and, if so, whether the agency had recently done business with the organizations, or would soon do business with the organizations. The Commission believed that the closer the business relationship between a soliciting agency and a solicited organization, the more likely it would be that an element of coercion would be present. The Commission was concerned that it could appear that if the company did not contribute, then the agency would cease doing business with the company.

The director solicited some organizations with which her agency had a business relationship. The agency had some business ties to four of the five donating organizations. The director explained that one of the organization's developed and maintained a piece of equipment used by the agency. However, this organization's contract to maintain the equipment was with another state agency rather than with the director's agency. The agency also subscribed to a service provided by a second donating organization. In addition, the agency had bought some equipment from this second organization. These pieces of equipment were on the state price list. The director said that the agency had bought equipment that was manufactured by a third donating agency. This equipment was purchased approximately two and one half years ago. The director did not foresee the need to purchase anything manufactured by this third organization in the near future.

The director said that the company with which her agency had the most direct relationship was the fourth company. In the last fiscal year, this company bid on several contracts issued from the agency. The director said that the company had worked on less than five contracts for the agency in the past year. These contracts were for amounts in the 18-25 thousand dollar range. They were all bid contracts. The Commission thought that the bidding process somewhat reduced the contracting agency's discretion in choosing the company to perform work under a contract.

The second factor that was considered in determining whether the solicitation was coercive was the nature of the relationship between the agency and the organization being solicited. State agencies have wide ranging duties. Some agencies are required to inspect or regulate private businesses. An employee of an agency that inspects or regulates the companies that the employee solicits is much more likely to run afoul of section 84-13 than an employee of an agency that does not regulate or inspect these companies.

The director's agency was not a regulatory agency. The mission of the agency was to promote a particular industry. The legislation that established the agency indicated that it was to work closely and cooperatively with members of the industry. In many cases, the interests of the agency were parallel to those of the businesses in the industry. The agency appeared to be viewed by the industry as a resource rather than as a regulator.

The third factor the Commission examined was whether all members of the particular industry were solicited or just a few. When seeking donations to an event, it would be reasonable for an agency to approach members of the industry that would likely be interested in the event. However, if an agency approached only select members of the industry, then the Commission believed that it would be possible to infer that the agency was targeting certain members and seeking to influence those over which it had some power or control.

In this situation, the agency had solicited certain members of the industry. Members of this industry were solicited because they would naturally be interested in this conference. The industry was a large one and not all members of the industry were solicited. The director explained that only certain members were solicited not because the agency had any special power over these companies, but because the agency was short of time and so sought sponsorship money only from companies that were likely to contribute. The director explained that the agency had approached companies that had sponsored the conference in past years, or that had participated in similar conferences.

The fourth factor that the Commission examined in determining whether or not any coercion was present was the form that the solicitation took. The Commission believed that it was possible that the language of a solicitation could create the impression that an agency was requiring a donation, or that the agency would retaliate against a company that refused to donate. Language of this sort would appear coercive.

The director solicited sponsorship money by letter. Two different types of solicitation letters were used. The first type was sent to the organization that had no business ties to the agency. The director sent a letter to this organization to determine whether an officer of that organization would be interested in speaking at the conference. Towards the end of this letter, the director noted that the agency was seeking sponsors for the conference and stated that perhaps the organization would like to support the event. There was no other mention of sponsorship in this letter. Representatives from this organization then called the agency and told the director that they were interested and asked for further information on sponsorships. The sponsorship options were described over the phone. It was explained that a sponsor could sponsor a particular conference event, such as a breakfast, and pay the cost of that event. Otherwise, a sponsor could donate any amount to the conference. A second follow-up letter was then sent to the organization. The second letter again described the conference and also provided a list of conference events and their estimated costs.

The second type of solicitation letter was sent to other potential sponsors. The Commission found that this version was much more direct. The letter explained the conference and then invited the organization to participate in the conference as a presenter, as an exhibitor, and as a sponsor. If the company had contributed to the conference the previous year, then the letter went on to say that the company's previous donation was appreciated and that the company's continued support was needed this year. The letter then described the sponsorship options and provided a list of events along with estimated costs for sponsoring the events. It was explained that the organization could opt to donate any amount of money rather than sponsor an event.

The four sponsors that did business with the agency were among the organizations that received this second type of solicitation letter. These companies, along with others that ultimately did not choose to donate any money, were then called by the agency's staff and the sponsorship options were explained again. The director informed the Commission that no one was asked to sponsor a particular event and no one was asked to give a particular amount of money.

The Commission believed that the language of the director's request to the organization with which the agency had no business ties was clearly not coercive. The language in the initial solicitation letter was quite mild. It was left up to the company whether or not to respond to the request. Once the company did respond, it was given a number of choices for contributing to the conference. The company was told that it could sponsor a specific event for a certain price, or that it could contribute any amount that it wished. It appeared that the decision to become a sponsor was left to the company's initiative and that the amount of the donation was left to the company's discretion. For these reasons, the Commission did not believe that the form of this solicitation was coercive.

The solicitation of the other companies was a bit more troubling to the Commission. The letter said that support was needed and went on to list events and their estimated costs. The Commission has generally frowned upon requests for donations that mention specific dollar amounts. On the other hand, it appeared that the agency did not pressure any company into donating a specific amount or into sponsoring a specific event. The agency essentially laid out all of the sponsorship options and then allowed the company to choose one.

The final factor the Commission considered in determining whether the solicitation was coercive was whether the solicited company would receive a legitimate benefit in return for its donation. If the company received a substantial benefit from the donation, then it was less likely that the donation was forced from the company. For example, a conference may greatly benefit a company in that it serves as a forum for an exchange of information or as a platform for new ideas or technology. In addition, sponsors may improve their public relations or gain advertisement for their companies. In some cases, the benefit to the company may be so great that the company and the State may treat the conference as something akin to a joint venture.

The conference in question was one of the biggest conferences in the State for this particular industry. It was attended by many members of the private sector as well as by state employees. Presenters this year included members of the private sector as well as state employees and officials. The information presented at the conference was valuable to the

sponsors. The conference also featured vendors who exhibited their products. The director explained, however, that none of the sponsors had exhibits this year. The director explained that the sponsors were periodically acknowledged during the conference. The director said that they were thanked during the actual sessions, and also during the events such as breakfasts and receptions. One page of the conference program was an acknowledgement of the sponsors. The names of the sponsors and their logos appeared in large type on this page.

The sponsors of the conference did receive some benefit in exchange for their donations. They received information that was important to them. They also improved their public relations and got some advertising. The Commission thought that a benefit to a solicited company did not remove a solicitation from scrutiny, but it did diminish the likelihood of coercion.

It was clear to the Commission that the solicitation of the organization that did not do business with the agency was not coercive in violation of section 84-13. The agency had no business relationship with the organization. The organization was solicited because of its extensive interest in the industry. The form of the solicitation was mild. Finally, the organization received some benefit in the form of shared information and public relations.

It was a closer question whether the other solicitations were in violation of the fair treatment law. The agency had some sort of business relationship with all of the other sponsors. This relationship, however, was not that of a regulator and a regulated company. The agency was expected to work in a cooperative manner with the private sector. In addition, not all members of the industry were solicited. However, those solicited were chosen because they had sponsored these kinds of conferences in the past. Further, although the form of the solicitation was very direct, the companies were not specifically asked to donate a certain amount of money. Finally, it appeared that the companies did receive some benefit from the conference. They were able to share information and improve their public relations.

The most troubling aspect of these solicitations was the fact that the agency had engaged in a forthright request for contributions from companies with which it did business. The ultimate question, however, was whether the solicitations were coercive. The Commission believed that they were not. These companies were solicited because of their past interest in participating in these types of conferences. They had a history of a willingness to participate. The agency's goal was to promote the industry so that this conference did benefit the sponsors. The director assured the Commission that in making the actual request no one was pressured into donating. Instead, the sponsors were simply presented with all of the sponsorship options. It was also noteworthy that none of the companies complained to the Commission about the solicitations. In light of these facts, the Commission believed that these contributions were not improperly solicited.

2. <u>Were the offered gifts acceptable?</u>

The second question that the Commission answered was whether the offered contributions were acceptable gifts. Section 84-11, the gifts section, reads as follows:

§84-11 Gifts. No legislator or employee shall solicit, accept, or receive, directly or indirectly, any gift, whether in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form, under circumstances in which it can reasonably be inferred that the gift is intended to influence the legislator or employee in the performance of the legislator's or employee's official duties or is intended as a reward for any official action on the legislator's or employee's part.

The gifts law forbids a state employee from accepting a gift if, under the circumstances, it is reasonable to infer that the gift is intended to influence or reward the employee.

In determining whether or not a gift was given for an improper purpose, the Commission has traditionally examined at least three factors. The first of these is the value of the gift. Gifts of large value tend to raise more of an inference of an improper purpose. In this case, the gifts were of substantial value. The gifts ranged in value from $500 to $5000 from five different sources.

The second factor that the Commission examines is whether the recipient of the gift takes action affecting the donor of the gift. The director explained that the agency took no action affecting one of the sponsors and had no relationship to that company. The agency did have a relationship to the other companies. The first of these other companies maintained some equipment that the agency used. However, the company's contract was with another agency and not with the director's agency. This same company was also in the midst of publishing a brochure that would advertise its equipment and would refer heavily to the agency. The brochure would provide desired publicity for the agency. The agency also subscribed to a service offered by the second sponsoring company. The agency had bought some equipment from this same company. About two and one half years ago, the agency purchased equipment from the third sponsoring company. The director did not foresee that the agency would purchase anything else directly from this third company. The fourth company performed work on several substantial contracts with the agency in the past year. All of these contracts had gone out to bid. The director anticipated that the agency would have contracts with this company in the future.

The third factor that is significant in determining whether a gift is appropriate is whether a state employee receives the benefit of the gift, or whether the gift benefits the State. In this case, the sponsorship money was used to help fund in which a state conference. The conference featured state and national speakers. The director estimated that between 200 to 300 people attended this conference. The conference aided in promoting the industry. Thus, it appeared that the donations benefitted the State rather than a particular employee.

The Commission noted that the legislature had provided a mechanism for the agency to accept gifts. A section in the HRS allowed this agency to set up a fund in which to deposit money received from public or private contracts, public or private grants, awards, or gifts. This provision indicated that the legislature clearly intended that the agency be allowed to accept gifts of money intended to be used for a state purpose.

The gifts offered to the agency were of substantial value. In addition, except for one organization, the agency took action affecting the donors of these gifts. However, these gifts were specifically intended to help fund a conference that served a state purpose. The conference promoted the industry in Hawaii. Thus, these gifts were not intended to benefit a particular state employee, but were instead intended to benefit the State of Hawaii. The legislation that established the agency specifically allowed it to accept gifts of money for a state purpose. For these reasons, the Commission believed that these gifts were not prohibited by section 84-11.

The Commission believed that the director did not act improperly in soliciting these contributions and allowing her agency to accept them. In requesting the contributions, there was no misuse of position in violation of section 84-13. Because the donations were used for a state purpose, there was no violation of section 84-11.

The Commission appreciated the candor and cooperation that the director exhibited during the Commission's review of this matter. The Commission also appreciated the sensitivity that the director exhibited by seeking advice on this matter.

Dated: Honolulu, Hawaii, July 21, 1993.

STATE ETHICS COMMISSION

K. Koki Akamine, Vice Chairperson
Cynthia T. Alm, Commissioner
Laurie A. Loomis, Commissioner

Note: Commissioner David K. Kaupu participated in the Commission's decision but was unable to be present at the signing of this opinion. There was also a vacancy on the Commission when this opinion was signed.