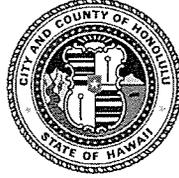


Item #1

ETHICS COMMISSION  
CITY AND COUNTY OF HONOLULU

715 SOUTH KING STREET, SUITE 211, HONOLULU, HAWAII 96813-3091  
Phone: (808) 768-7786 · Fax: (808) 768-7768 · EMAIL: ethics@honolulu.gov  
Internet: www.honolulu.gov/ethics

PETER B. CARLISLE  
MAYOR



CHARLES W. HATO  
EXECUTIVE DIRECTOR LEGAL COUNSEL

RECEIVED  
MAR 29 3 13 PM '11  
CITY CLERK  
HONOLULU, HAWAII

Testimony before the Executive Matters and Legal Affairs Committee

Bill 10(2011)

Monday, March 28, 2011 1:00 p.m.

Good afternoon Chair Cachola, Vice Chair Harimoto and members of the Committee. The Ethics Commission supports Bill 10, which proposes certain changes to the procedural law controlling Commission matters. Here is a summary of the proposed amendments:

- Information obtained by the Commission is kept confidential unless there is an exception allowing disclosure. Without this law there is no general guide for disclosure of information for the Commission and those who come before it.
- Streamlines obtaining Commission subpoenas resulting in shorter investigation time.
- Clarifies that requests for advice and complaints may be submitted by anyone in any form as is intended under the Charter.

**1. Confidentiality and disclosure of information**

People rightfully want to know if they might be subject to retaliation for cooperating with the Commission or if the media will find out about an inquiry. This new ordinance helps to address those concerns.

Section 3 on page 2 describes in one place several laws that affect whether information obtained by the Commission is open to the public or confidential. Currently, disclosure and confidentiality issues are covered by any number of laws, such as whether the information is privileged, whether the information has already been made public, whether a court orders disclosure for purposes of a court case, whether disclosure is allowed under the Uniform Information Practices Act, Chapter

92F, Hawaii Revised Statutes (HRS), and the interpretations of that law by the state Office of Information Practices.

As you can see, this can be a confusing and complex area of the law. Having a general statement of the circumstances under which disclosure of identities and other confidential information may be made will help guide the Commission and those who appear before it to understand their rights and the process for disclosure.

There are good reasons to disclose information and good reasons to keep information confidential. The answer depends on the case facts, such as who is seeking disclosure and the reasons supporting disclosure or confidentiality. For example, generally, those who request and receive advice from the Commission should be able to rely on the Commission to keep their identity and the subject of the request confidential. Otherwise, government personnel would rarely ask for advice and this would undermine the Commission's ability to maintain or improve the ethical conduct of employees. Similarly, witnesses and complainants in complaint cases are concerned about retaliation for initiating or cooperating with investigations. Disclosing their identities under all circumstances would chill the Commission's ability to root out misconduct. Yet, there are times when an employee has a right to confront witnesses and there are times when the public has a right to know the conduct of government employees and how well the Commission does its job.

## **2. Exceptions to confidentiality**

The first exception reflects the right of anyone accused of misconduct to have their hearing open to the public. There would be no reason to convert public information to confidential.

The second exception requires the Commission to disclose information upon the order of a court.

The third exception permits the Commission and its staff to disclose information when doing so is part of investigating a request or complaint. For example, it is often necessary to reveal allegations and facts about a case to a witness in order to corroborate or disprove the allegations. If such information had to be kept confidential, cases would be difficult, if not impossible, to investigate.

As to the fourth exception, there is a constant tension between the public's right to know about the conduct of a government official and the official's right to privacy. HRS Chapter 92F provides the legal basis used to balance these interests and determine whether information should be disclosed.

## **3. Making the Commission's subpoena power useful**

In Section 4 of the bill, ROH Sec. 3-6.3(h) would be changed to permit the Commission chair or vice-chair to sign a subpoena. It would also remove the need

for a formal resolution to issue a subpoena. The major problem with the current law is that it slows down the investigative process by at least one month because staff has to wait for a meeting before we can ask the Commission to subpoena a witness or documents. This is a waste of valuable time for all concerned. Also, the current language does not make sense where it requires that the Commission state the nature and scope of its inquiry before it subpoenas information that will help it define the nature and scope of the inquiry.

#### **4. Requests for advice and complaints**

The changes in Sections 6 and 7 correct the ordinance where it requires that a request for advice or a complaint must be in writing signed by the person making the request or complaint. Although at first blush this may appear to be a reasonable requirement, it is contrary to the Charter and the practice of the Commission and other city agencies that conduct investigations.

As described in Commission Advisory Opinion No. 2001-6, RCH Sec. 11-107 authorizes the Commission to use its investigative powers and render advisory opinions “on its own initiative” -- in other words, without any request or complaint to the Commission. If the Charter authorizes the Commission to render an advisory opinion where no request or complaint has been lodged, logically, then an oral request or complaint to the Commission is a sufficient basis for an investigation and advisory opinion. The current wording of the ordinance is at odds with the proscribed powers under the Charter.

Furthermore, if the written requirement is in place, it would mean that the Commission could no longer process hundreds of oral requests for advice we receive from city personnel and the public every year. Such a restriction would hamstring our ability to promptly respond to advice requests.

Finally, it is common practice for departments and other city agencies when investigating alleged workplace misconduct to accept oral and/or anonymous complaints as long as sufficient information is communicated. The Charter provides for a similar approach for the Commission. Oral and anonymous complaints are important in rooting out misconduct by city personnel. Currently, the ordinance contradicts the Charter and must be amended.

I am happy to answer any questions.