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

February 19, 2015

The Honorable Karl Rhoads, Chair
The Honorable Joy A. San Buenaventura, Vice Chair
Honorable Members
House Committee on Judiciary
Hawaii State Capitol, Room 305
415 South Beretania Street
Honolulu, Hawaii 96813

Re: **HB No. 813, HD 1, Relating to the Code of Ethics**

Hearing: Thursday, February 19, 2015, 2:00 p.m.
State Capitol, Conference Room 325

The State Ethics Commission supports HB No. 813, HD 1, Relating to the Code of Ethics, which amends exemption from the State Ethics Code's fair treatment law, HRS section 84-13, applicable to legislators.

In 2012, the legislature amended the State Ethics Code to exempt members of task forces from many of the sections contained therein. More specifically, because of the exemptions, task force members may misuse their positions on the task force to give themselves or their private employer an unwarranted advantage or preferential treatment; task force members can take action in their official capacities that affect their own private businesses; task force members can use confidential state information that they obtain through their service on the task force and which is not available to the public to benefit themselves or their private employer.

In addition to exempting task force members from the fair treatment law, HRS section 84-13, the legislature also greatly expanded the exemption applicable to legislators. The fair treatment law, generally, prohibits a legislator or a state employee from using or attempting to use his official position "to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others."

Prior to the amendment, legislators were exempt from the fair treatment law when exercising their "legislative function." The exemption was consistent with and intended to mirror the privilege afforded legislators in the State Constitution, which protects legislators from liability "for any statement made or action taken in the exercise of the member's legislative functions."[1] Generally, the phrase "legislative function" has been construed to

[1] State Constitution, Art. III, Sec. 7.

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relate to the enactment of laws and includes activities such as voting on bills and speeches made on the floor of the body or during committee hearings. The phrase does not include all of the activities that a legislator may deem to be part of his duties, such as constituent services.

In 2012, the fair treatment law was amended to exempt legislators from its provisions when taking "official action." The phrase "official action" is much broader than "legislative function" and includes activities that are well-beyond those relating to the making of laws.

Under the current exemption, a legislator, for example, may be able to "coerce" a private business to take certain action on behalf of a constituent, claiming that such "coercion" was taken in his capacity as a legislator and therefore was "official action." Similarly, a legislator may be able to demand "preferential treatment" for himself (e.g., first class seating or free meals) when meeting with constituents or engaged in some other activity in his "official" capacity.

In both examples, the Commission very likely would closely examine whether such activities were and reasonably should be construed to be "official action;" however, the expanded exemption may allow a legislator to assert that his actions are exempt from the Commission's authority. Under the earlier, narrower exemption, such conduct most likely violates the State Ethics Code, and the legislator would be subject to the Commission's jurisdiction.

The Commission believes that the expanded exemption is inconsistent with and directly contrary to the purpose of the State Ethics Code: to preserve the public's confidence in public servants.[2] The Commission respectfully suggests that the Committee should be mindful of the express statutory purpose (and the State Constitutional mandate).[3] In the Commission's view, the statute's purpose dictates that the exemption be narrow and, absent extraordinary circumstances, should not be expanded.

The Commission urges the Committee to restore the exemption afforded legislators to be consistent with the Constitutional privilege which is limited to when a legislator is exercising his "legislative function." The Commission further suggests that the Committee consider amending the bill to reverse the exemptions given to members of task forces. In the Commission's opinion, the exemptions for task force members similarly are contrary to the clear statutory purpose and erode -- not preserve -- the public's confidence that state business is being done for the "right" reasons.

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[2] HRS chapter 84, Preamble.

[3] State Constitution, Art. XIV.

If the Committee decides to maintain the status quo for members of task forces, i.e., to preserve the multiple exemptions from the State Ethics Code described above, the Commission requests that the requirement that task force members "file a full and complete public disclosure of the nature and extent of the interest or transaction which the task force member or task force member's designee or representative believes may be affected by the task force member's official action" be clarified. If the intent is for task force members to file the financial disclosure statement pursuant to section 84-17, the section of the State Ethics Code identifying the persons whose disclosures are public, i.e., section 84-17(d), should be amended to include "members of task forces."

Thank you for considering the State Ethics Commission's testimony.