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

February 25, 2015

The Honorable Gilbert S. C. Keith-Agaran, Chair
The Honorable Maile S. L. Shimabukuro, Vice Chair
Honorable Members
Senate Committee on Judiciary and Labor
Hawaii State Capitol, Room 016
415 South Beretania Street
Honolulu, Hawaii 96813

Re: **Testimony on SB No. 626, Relating to Ethics**

Hearing: Wednesday, February 25, 2015, 9:15 a.m.
State Capitol, Conference Room 016

Testifying: Susan D. Yoza, Associate Director
Hawaii State Ethics Commission

The State Ethics Commission ("Commission") supports the purpose of S.B. No. 626, Relating to Ethics, to amend the exemption for legislators from the State Ethics Code's fair treatment law, HRS section 84-13. The Commission has concerns, however, about the awkward language of this bill, which could be interpreted as granting task force members an even broader exemption from the fair treatment law than currently exists. The Commission recommends that this language be amended and clarified.

In 2012, the Legislature amended the State Ethics Code to exempt members of task forces from many of the laws contained therein. More specifically, task force members were given exemptions to ethics laws pertaining to fair treatment, conflicts of interests, contracts, confidential information, and post-employment restrictions.

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."

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Prior to 2012, legislators were exempt from the fair treatment law when exercising their "legislative functions." This 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 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 service.

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 is defined as any action which involves the exercise of discretionary authority,[2] including 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 for legislators is inconsistent with, and directly contrary to, the purpose of the State Ethics Code: to preserve the public's confidence in public servants.[3] The Commission respectfully

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

[2] HRS section 84-3.

[3] HRS chapter 84, Preamble.

suggests that the Committee should be mindful of the State Constitutional mandate that public officers exhibit the highest standards of ethical conduct.[4] In the Commission's view, the purpose of the State Ethics Code dictates that exemptions to the law be narrow and, absent extraordinary circumstances, should not be expanded.

S.B. No. 626 restores the exemption from the fair treatment law afforded legislators when exercising their "legislative functions." This exemption is consistent with the constitutional privilege afforded legislators. The Commission supports this amendment to the current law.

Unfortunately, however, the S.B. No. 626 is awkwardly worded and as a result, could be interpreted to expand the exemption from the fair treatment law for task force members. Currently, task force members are exempt from the fair treatment law when exercising "official action." The bill deletes the word, "official" on page 3, line 2, and the remaining language of the bill appears to provide that task force members are exempt from the fair treatment law when exercising any action. The Commission believes that this is an inadvertent drafting error and is not what the bill intended.

To correct this error, the Commission recommends that the language of S.B. No. 626 be amended by separating and clarifying the fair treatment exemptions for legislators and for task force members, respectively, as currently provided in a similar bill, H.B. No. 813, H.D.2, Relating to the Code of Ethics.

The Commission also recommends clarification of the language in the fair treatment law requiring task force members to file public disclosures of interests or transactions affected by their official action. If the intent of this provision is for task force members to file public financial disclosure statements pursuant to HRS section 84-17(d) (the section of the State Ethics Code identifying the persons whose disclosures are public) the Commission recommends that HRS section 84-17(d) be amended to include, "members of task forces."

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

[4] State Constitution, Art. XIV.