

SUNSHINE LAW MEETING
MINUTES OF THE HAWAII STATE ETHICS COMMISSION

State of Hawaii

Date: Wednesday, November 19, 2014

Time: 10:00 a.m.

Place: Hawaii State Ethics Commission Conference Room
American Savings Bank Tower
1001 Bishop Street, Suite 960
Honolulu, Hawaii 96813

Present: State Ethics Commission Members
Edward L. Broglio, Chair
David O'Neal, Vice Chair
Susan N. DeGuzman, Commissioner
Ruth D. Tschumy, Commissioner
Melinda S. Wood, Commissioner

State Ethics Commission Staff
Leslie H. Kondo, Executive Director
Susan D. Yoza, Associate Director
Nancy C. Neuffer, Staff Attorney
Virginia M. Chock, Staff Attorney
Megan Y.S. Johnson, Staff Attorney
Bonita Y.M. Chang, Staff Attorney

Department of the Attorney General
David M. Louie, Attorney General
Charleen Aina, Deputy Attorney General
Robyn Chun, Deputy Attorney General

CALL TO ORDER

The meeting was called to order at approximately 10:01 a.m. by Chair Broglio.

SUNSHINE LAW SESSION

Agenda Item No. I: Peer News LLC, dba Civil Beat, vs. State Ethics Commission;
Civil No. 14-1-2022-09 RAN; Motion for Preliminary Injunction

Chair Broglio stated that members of the Department of the Attorney General were present to advise the Commission about this matter. Chair Broglio asked for public testimony on this agenda item.

Mr. Dan Purcell, a member of the public, testified that he was pleased with the decision of the Circuit Court in this matter and that he hoped the Commission would not decide to appeal the Circuit Court's decision.

Executive Director Kondo stated that Civil Beat filed a complaint against the Commission for public disclosure of the financial disclosure statements of the members of three State boards included in Act 230. In addition to the complaint, a motion for a preliminary injunction was filed. That motion, which was heard on November 11, 2014, was orally granted from the bench by the Court. Executive Director Kondo stated that Attorney General David Louie, and Deputies Attorney General Charleen Aina and Robyn Chun were present to advise the Commission. Executive Director Kondo suggested that the Commission allow the Attorney General's office to address the Commission and provide their guidance in an executive session.

RECESS OF SUNSHINE LAW MEETING AND CONVENING OF EXECUTIVE SESSION

At approximately 10:04 a.m., Commissioner DeGuzman made and Vice Chair O'Neal seconded a motion to recess the Sunshine Law meeting and to convene an executive session pursuant to Hawaii Revised Statutes section 92-5(a)(4), to consult with the Commission's attorneys on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities. The motion carried unanimously (Broglio, O'Neal, DeGuzman, Tschumy, and Wood voting).

Mr. Purcell stated that he is being denied the opportunity to comment on the executive session being convened to hear testimony from the Attorney General. Chair Broglio stated the Commission is convening an executive session to meet with the Commission's attorneys to receive legal advice. Chair Broglio requested members of the public leave the meeting to allow the Commission to meet in executive session.

EXECUTIVE SESSION

The Commission and its attorneys met in Executive Session with Attorney General David Louie and Deputies Attorney General Charleen Aina and Robyn Chun.

ADJOURNMENT OF EXECUTIVE SESSION AND RETURN TO THE SUNSHINE LAW MEETING

At approximately 10:55 a.m., the Commission returned to the Sunshine Law meeting.

Commissioner DeGuzman moved and Commissioner Tschumy seconded a motion that whereas the Attorney General believes that Act 230 and the complaint present an important legal issue and should have appellate review, the Commission has

no objection to the Attorney General filing an appeal to the preliminary injunction and/or taking necessary steps to seek further proceedings to obtain full and final appellate review on the merits. The motion carried (Broglia, O'Neal, DeGuzman, and Tschumy voting aye; Wood abstaining).

Agenda Item No. II: Minutes: Consideration and Approval of the Minutes of the September 24, 2014, Meeting

Commissioner DeGuzman moved and Commissioner Tschumy seconded a motion to approve the minutes of the September 24, 2014, Sunshine Law meeting. The motion carried unanimously (Broglia, O'Neal, DeGuzman, Tschumy, and Wood voting).

Agenda Item No. III: Executive Session Minutes: Consideration and Approval of the Minutes of the September 24, 2014, Executive Session

Commissioner DeGuzman moved and Vice Chair O'Neal seconded a motion to approve the minutes of the September 24, 2014, Executive Session meeting. The motion carried unanimously (Broglia, O'Neal, DeGuzman, Tschumy, and Wood voting).

Agenda Item No. IV: Executive Director's Report

1. Education Schedule

Executive Director Kondo stated that general ethics training sessions were recently held on the neighbor islands (in Hilo and Kona, and on Kauai, Maui and Molokai), as well as on Oahu in Kapolei and in downtown Honolulu. A continuing legal education (MCPE) ethics training session was also held for state government attorneys at the State Capitol auditorium.

Executive Director Kondo stated that mandatory ethics training will be held in January 2015 for newly elected legislators, as well as newly appointed state department directors and deputy directors. Additional general ethics training sessions will be offered to the staff of the Governor-elect and new legislative staff.

Executive Director Kondo stated that Senate President Donna Mercado Kim suggested that an online mandatory ethics training program be developed and Senate President Kim is willing to consider supporting a request for additional funds for use in the development and implementation of an online mandatory ethics training program.

Chair Broglia requested that Executive Director Kondo obtain information about online ethics training in other states from members of the Council on Governmental Ethics Laws ("COGEL") during the December 2014 COGEL conference.

Vice Chair O'Neal asked whether there were any topics presented during general ethics training sessions that were of special interest to state employees. Executive Director Kondo stated that certain provisions in the Conflicts of Interests Law are not clearly understood by state employees.

2. Lobbyist Forum to Discuss Staff Recommendations Regarding Application of Lobbyists Law

Executive Director Kondo stated that the December 17, 2014, Sunshine Law meeting agenda will include an item regarding the application of the Lobbyists Law. Staff will review with the Commission the types of information lobbyists are being advised to report, as well as how lobbyists are being advised to report such information.

Executive Director Kondo stated that staff will hold a training session for lobbyists in January 2015 to discuss topics such as who must register as a lobbyist, who must report expenditures and contributions for lobbying, the types of activities that constitute lobbying activities, and the types of expenditures that must be reported.

3. Financial Disclosure Statements: Request to Members of 15 Boards and Commissions Included in Act 230 to Voluntarily Allow Public Access to Their 2014 Financial Disclosure Statements

Executive Director Kondo stated that there are 50 individuals who are members of the 15 boards and commissions identified by Act 230 as being required to file public financial disclosure statements who filed their financial disclosure statements before Act 230 took effect on July 8, 2014. Executive Director Kondo stated that based upon the advice of the Attorney General, the Commission has construed Act 230 to only require the public disclosure of financial disclosure statements filed after July 8, 2014.

Executive Director Kondo stated that a memo was sent to each of these 50 individuals requesting them to consider voluntarily consenting to have their 2014 financial disclosure statement become a public record. To date, seven individuals have consented to public disclosure of their 2014 financial disclosure statement.

4. Hawaii State Ethics Commission's Financial Report for Quarter Ending September 30, 2014 (FY 2014-15)

Executive Director Kondo presented the Financial Report for Quarter Ending September 30, 2014, to the Commission for its review.

5. Council on Governmental Ethics Laws ("COGEL") Conference

Executive Director Kondo stated that he will attend the Council on Governmental Ethics Laws ("COGEL") Conference in Pittsburgh, Pennsylvania, on December 7-10, 2014.

6. Office of Information Practices Op. Ltr. No. F15-02

Executive Director Kondo presented a recent opinion published by the Office of Information Practices as a reminder that members of the Ethics Commission are subject to the Sunshine Law and that discussions of Ethics Commission business should only be held during a properly noticed Ethics Commission meeting.

Agenda Item No. V: Hawaii State Library: OverDrive eBook “Buy-It-Now” Option (GUIDE-14-00252)

Chair Broglio asked for public testimony on this agenda item. There was no public testimony offered at this time.

Staff Attorney Chock said that although the Hawaii State Public Library (“Library”) is not offering testimony at today’s meeting, Ann Fujioka, Director of the Library’s Technical Services Section, was present to answer questions the Commission may have regarding this matter.

Staff Attorney Chock said that this matter was being offered for the Commission’s information because it raised issues in a new subject area. The Library requested advice regarding whether the Ethics Code would prohibit the Library from participating in a “Buy-It-Now” program that would enable OverDrive, a Library eBook vendor, to sell eBooks to Library patrons through the Library’s website. Based on facts presented by the Library, staff advised that the State Ethics Code prohibited the Library’s participation in the “Buy-It-Now” program because it raised concerns under the Fair Treatment Law.

Staff Attorney Chock explained that the Library has a large collection of eBooks that patrons can borrow through the Library’s website. The Library purchases most of the eBooks in its collection from OverDrive. OverDrive is also under contract with the Library to manage the Library’s eBook collection through the Library’s website.

Staff Attorney Chock stated that the Library sought to participate in the “Buy-It-Now” program in order to expand its eBook collection by offering Simon & Schuster eBooks to Library patrons. The Library said that, for years, Simon & Schuster has refused to sell its eBooks to libraries, but is now willing to sell its eBooks through OverDrive, only if the libraries offer a “Buy-It-Now” program to their patrons. The “Buy-It-Now” program would allow Library patrons who use the website to search for books to borrow the option to purchase eBooks from OverDrive through the Library’s website. The Library said that the “Buy-It-Now” program would not be limited to only Simon & Schuster titles, but would include all of the eBooks in OverDrive’s inventory, including eBooks that are not in the Library’s current eBook collection. The Library also said that it would receive credit for purchases made by the Library’s patrons through the “Buy-It-Now” program and that the Library could use these credits to purchase additional eBooks from OverDrive to add to the Library’s collection. Staff Attorney Chock stated that it is staff’s understanding that this credit would be a very small percentage of the purchase price of the eBook.

Staff Attorney Chock said that staff believed that the Library's participation in the "Buy-It-Now" program raised concerns under the Fair Treatment Law. Staff Attorney Chock said that by allowing OverDrive to offer eBooks for purchase through the Library's website, the Library would be giving OverDrive and the publishing houses that sell books through OverDrive an unwarranted advantage over other businesses whose products are not available for purchase through the Library's website. Staff Attorney Chock stated that while it is recognized that Library's intent is to provide patrons with access to Simon & Schuster eBooks, the "Buy-It-Now" program appears to be a commercial activity that primarily benefits OverDrive. Staff Attorney Chock said the Library's website is a state resource and, therefore, cannot be used to support any type of commercial activity of a private business. For the foregoing reasons, staff advised Library that the Ethics Code does not allow the Library to participate in the "Buy-It-Now" program.

Commissioner Wood asked if there are other companies like OverDrive that the Library could add to its list of options for vendors. Ms. Fujioka said there are several other companies similar to OverDrive. However, additional platform fees would need to be paid for each additional contracted company. The Library started contracting with OverDrive in 2004, and has developed a working relationship with them.

Ms. Fujioka stated that the Library's collection of over 40,000 volumes is contracted with OverDrive. eBooks, unlike print material, are licenses to files that are purchased and lent out by the Library. Should the Library stop contracting with OverDrive, the Library will lose its eBook collection. Ms. Fujioka stated that as long as the Library maintains its platform fee with OverDrive, the Library's accessibility to those files will be maintained. The Library is free to add (and it has added) recorded books with Audiobook and Zinio magazines. However, the Library's resources do not allow it to add and support platforms for additional eBook/audio book vendors. Additionally, Simon & Schuster is very selective regarding the eBook vendor they deal with and they currently work with OverDrive.

Vice Chair O'Neal asked whether staff would have concerns under the Fair Treatment Law if there were multiple vendors offering the "Buy-It-Now" program or if the vendor paid a fee to the Library to be able to offer their eBooks for sale. Staff Attorney Chock stated that she believed that both scenarios would raise concerns because they both would involve state resources being used to support a private business activity. Executive Director Kondo provided analogies of state resources being used to support a specific business.

Commissioner Tschumy asked if the Library will lose its entire OverDrive eBook collection if the OverDrive "Buy-It-Now" program is not allowed. Ms. Fujioka stated that the Library would not lose its current collection, but it would not be able to pursue the acquisition of Simon & Schuster eBooks.

Commissioner Wood asked how many eBooks are contained in the Simon & Schuster collection. Ms. Fujioka said Simon & Schuster is one of five major publishing houses and their eBook collection contains popular bestselling authors. Executive

Director Kondo stated that staff did not feel it was appropriate for the Library to allow a commercial entity to market its products on the state website.

Commissioner Tschumy asked what percentage of the Library's patrons use eBooks. Ms. Fujioka said that eBooks is a growth market and the Library's eBook circulation has increased 30% each month since 2012.

Commissioner Wood asked if there was any way that the "Buy-It-Now" program could be secured under the Friends of the Library organization. Executive Director Kondo stated that the concern with the "Buy-It-Now" program was that it required the Library to place a link to a commercial site on the Library's website for the purchase of eBooks.

Chair Broglio thanked Ms. Fujioka for the information regarding the Library's eBook program.

Agenda Item No. VI: 2015 Legislative Session

Chair Broglio asked for public testimony on this agenda item. There was no public testimony offered at this time.

Executive Director Kondo reviewed sixteen bills that were sponsored by the Commission in the 2013 legislative session. Executive Director Kondo noted that a bill similar to the Commission-sponsored House Bill. No. 207/Senate Bill No. 432, Relating to Public Financial Disclosure Statements, passed the legislature becoming Act 230. Executive Director Kondo stated that many of the bills introduced by the Commission during 2013 legislative session did not receive a hearing, and the Commission sponsored bills that did receive a hearing but did not progress very far through the legislative committee hearing process.

HB 203/SB 436: Relating to Advisory Opinions

Authorizes the Commission, for good cause, to extend period within which advisory opinion must be issued for an additional 30 days.

HB 204/SB 435: Relating to Conflicts of Interest

Expands HRS § 84-14(a) to prohibit official action involving substantial financial interest of employee's parent, emancipated child, brother and sister.

H.B. No. 205/S.B. No. 434: Relating to Nepotism

Prohibits legislators and employees from naming, appointing or hiring a relative.

H.B. No. 206/S.B. No. 433: Relating to Mandatory Ethics Training

Requires employees whose financial disclosure filings are public to complete mandatory ethics training.

H.B. No. 207/S.B. No. 432: Relating to Public Financial Disclosure Statements
Requires the financial disclosure statement filed by members of certain boards/commissions be public.

H.B. No. 208/S.B. No. 431: Relating to Lobbyists
Eliminates “wilful” requirement for administrative fines in HRS § 97-7.

H.B. No. 209/S.B. No. 430: Relating to the Ethics Code
Clarifies that task force members must file public financial disclosure statements; restores legislators’ exemption in HRS § 84-13.

H.B. No. 210/S.B. No. 430: Relating to the Ethics Code
Repeals task force members’ exemption to certain conflicts of interest and disclosure prohibitions.

Executive Director Kondo stated that Act 224 requires lobbyists to file expenditure reports 30 days after a special session. Executive Director Kondo said there is a defect in Act 224 in that it requires all lobbyists and organizations that have to report expenditures to file reports 30 days after a special session, even if they did not lobby on an issue that was considered during a special session. Executive Director Kondo stated that staff will send a memo to lobbyists advising them that the Commission does not believe that it is the intent of Act 224 that lobbyists who did not lobby during the special session are required to report expenditures within 30 days after the special session.

Executive Director Kondo stated that Act 224 should be amended to make clear that only organizations and lobbyists who lobby on issues considered during a special session need to file expenditure reports 30 days after the special session.

Executive Director Kondo asked whether Commissioners had any issues they thought should be addressed through legislation during the 2015 legislative session.

Chair Broglio expressed concerns regarding advising lobbyists not to file expenditure reports if they did not lobby during a special session. Chair Broglio said the Commission should not countermand the requirements of Act 224, but that the Commission should take the steps necessary to have Act 224 amended during the 2015 legislative session.

Executive Director Kondo stated that over ninety percent of registered lobbyists did not file an expenditure report within 30 days of the past special session and they are, therefore, in violation of Act 224. Executive Director Kondo stated that he believed it would not be a good use of Commission resources to take action against the organizations and lobbyists who are in violation of Act 224.

Chair Broglio stated that the Commission needs to be consistent and to follow the law as written. Chair Broglio said if the lobbyists support a change in the law, the legislature may amend it.

Vice Chair O'Neal asked how staff would know who lobbied during the past special session. Vice Chair O'Neal said that if all lobbyists are required to file reports following a special session, staff would then know if all registered lobbyists had filed the required reports. Executive Director Kondo said the Lobbyists Law is a self-reporting statute and staff depends on the lobbyists and organizations to comply with the law.

Staff Attorney Chang noted that out-of-state lobbyists may not have known that a special session occurred because they do not monitor the holding of special sessions, particularly if they are not involved in the special session. Staff Attorney Chang explained that the 2014 special session was held for confirmation of judges and only involved the Senate.

Executive Director Kondo stated that staff will hold off on sending out a memo to lobbyists and will bring this issue to the Commission for further discussion during their December 2014 meeting.

ADJOURNMENT

At approximately 12:04 p.m., Vice Chair O'Neal made and Commissioner DeGuzman seconded a motion to adjourn the Sunshine Law meeting. The motion carried unanimously (Broglia, O'Neal, DeGuzman, Tschumy, and Wood voting).

The meeting was adjourned at approximately 12:04 p.m.

Minutes approved on _____.