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November 19, 2015

The Honorable Karl Rhoads
Representative, Twenty-Ninth District
Twenty-Eighth Legislature
State of Hawai'i
State Capitol, Room 302
415 South Beretania Street
Honolulu, Hawai'i 96813

Dear Representative Rhoads:

Re: Legislature's Authority to Create an
Exemption from the State Ethics Code

This letter responds to your written request, dated September 11, 2015, and subsequent conversations with your staff, in which you requested an Attorney General opinion regarding the scope of the Legislature's authority to create exemptions from the State Ethics Code.

We understand that the general context prompting this question is the existence of pending bills, which would exempt certain employees of the University of Hawai'i from the State Ethics Code for purposes of "technology transfer" activities.

I. QUESTIONS PRESENTED.

We have rephrased your questions based on our conversations with your staff following the written request.

A. May the Legislature, consistent with article XIV of the Hawai'i Constitution, exempt a state entity or the entity's employees from the State Ethics Code, as codified in chapter 84, Hawaii Revised Statutes?

B. If exempting an employee is not permissible under article XIV, is there another constitutional means to accomplish the apparent objective of exempting certain conduct, such as technology transfer activities?

C. If an exemption is structured as exempting conduct rather than an employee, what are the constitutional limitations on the Legislature's authority to determine the scope of the State Ethics Code?

II. SHORT ANSWER.

A. No. By its plain text, article XIV makes the application of a State Ethics Code mandatory to state employees. Employees of the University of Hawai'i are state employees and subject to this requirement.

B. Yes. Both the text and history of article XIV make clear that the Legislature determines the scope of the ethics code itself. It may therefore be possible to craft an exemption for certain *conduct*, while ensuring that *employees* remain subject to the code.

C. The only limitations are those set by article XIV and the other provisions of the state and federal constitutions. Article XIV requires that the code address certain topics, such as gifts and the use of confidential information. Article XIV does not, however, specify what conduct is permissible under the code for each of these topics. Consequently, the Legislature may constitutionally exercise substantial discretion over what conduct the ethics code prohibits, permits, or otherwise regulates.

In summary, if properly crafted, the Legislature may constitutionally exempt certain conduct related to technology transfers at the University of Hawai'i from the State Ethics Code. It may not, however, create this exemption by excluding certain employees from the code altogether.

III. BACKGROUND.

The Hawai'i Constitution has included a provision addressing ethics codes for government employees since 1968. The first version of this provision was ratified following the 1968 Constitutional Convention. It read, in full:

The legislature and each political subdivision shall adopt a code of ethics, which shall apply to appointed and elected officers and employees of the State or the political subdivision, respectively, including members of the boards, commissions and other bodies.

Haw. Const. art. XIV, § 5 (1968) (emphasis added).¹ An ethics code had already been enacted by statute. 1967 Haw. Sess. L. Act 263; Haw. Rev. Stat. ch. 84 (1968). The intention of this provision was to make such codes mandatory:

Inasmuch as the state legislature and the various counties have provisions and statutes providing for code[s] of ethics, there was some reluctance to insert a provision mandating codes of ethics for the state government and the various counties. The Committee, however, felt that having a provision mandating a code of ethics for each governmental unit would ensure the continuance of said statutes and provision and guarantee the existence of a code of ethics for all public employees and officers.

Stand. Comm. Rep. No. 44, in 1 Proceedings of the Constitutional Convention of Hawaii of 1968, at 210 (1973) (emphasis added). At one point during the debate regarding this provision, one delegate inquired whether "the phrase 'employees of the state' includes teachers and university professors[.]" "Yes, it does[.]" was the answer given. 2 Proceedings of the Constitutional Convention of 1968, at 517 (1972) (question by Delegate Emilios Alcon, answer by Delegate

¹ At the time article XIV was the "general and miscellaneous provisions" article of the state constitution. Those provisions were later renumbered and are now found at article XVI.

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Hiroshi Kato). See also Haw. Rev. Stat. § 84-3 (2012) (definitions provision of State Ethics Code, defining "state agency" to include the University of Hawai'i).

Both the plain text and the history of the 1968 constitutional provision indicate that it applied to all public employees. Though the current article XIV is longer, the operative language from the 1968 version still appears within it. Compare Haw. Const. art. XIV § 5 (1968) with Haw. Const. art. XIV (1978) (first paragraph).

Following the 1978 Constitutional Convention, a new, more detailed ethics provision was ratified. This provision, which is designated as article XIV, reads in full:

The people of Hawaii believe that public officers and employees must exhibit the highest standards of ethical conduct and that these standards come from the personal integrity of each individual in government. To keep faith with this belief, the legislature, each political subdivision and the constitutional convention shall adopt a code of ethics which shall apply to appointed and elected officers and employees of the State or the political subdivision, respectively, including members of the boards, commissions and other bodies.

Each code of ethics shall be administered by a separate ethics commission, except the code of ethics adopted by the constitutional convention which shall be administered by the state ethics commission. The members of ethics commissions shall be prohibited from taking an active part in political management or in political campaigns. Ethics commissioners shall be selected in a manner which assures their independence and impartiality.

Each code of ethics shall include, but not be limited to, provisions on gifts, confidential information, use of position, contracts with government agencies, post-employment, financial disclosure and lobbyist registration and restriction. The financial disclosure provisions shall require all elected officers, all candidates for elective office and such appointed officers and employees as provided by law to make public

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financial disclosures. Other public officials having significant discretionary or fiscal powers as provided by law shall make confidential financial disclosures. All financial disclosure statements shall include, but not be limited to, sources and amounts of income, business ownership, officer and director positions, ownership of real property, debts, creditor interests in insolvent businesses and the names of persons represented before government agencies.

(Emphasis added). This provision was intended to be a general provision setting out the minimum areas that an ethics code must address. The specifics of how an ethics code applies in practice was left to the legislative bodies:

In acting upon this issue, your Committee has sought to strike a balance between the need for further constitutional guidelines in this area and the need to maintain nonspecificity, flexibility and brevity in constitutional language. . . . [The third paragraph in article XIV] specifies important guidelines or boundaries that must be maintained in Hawaii's statutory ethics codes. At the same time, it is general enough so that it does not mandate exactly how the respective legislative bodies should meet the responsibility that the section will place upon them.

Stand. Comm. Rep. No. 26, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 567 (1980) (emphasis added). See also Comm. of the Whole Rep. No. 1, id. at 1000 ("this proposal sets forth only minimum standards and areas of concern for each legislative body. It is intended that each legislative body be able to interpret these provisions and expand them if necessary."); 2 Proceedings of the Constitutional Convention of 1978, at 19 (1980) ("Each county as well as the State of Hawaii has the opportunity to define . . . the specific kinds of things it would require of its public employees and its elected officials That type of specificity should be left to the governing body") (statement of Delegate John D. Waihee III during the Committee of the Whole debate).

Article XIV has not been changed since its ratification in 1978.

IV. ANALYSIS.

A. The State Ethics Code is mandatory.

Article XIV states that "the legislature . . . shall adopt a code of ethics which shall apply to appointed and elected officers and employees of the State" (emphasis added). This provision is unambiguous: it indicates that the code of ethics, itself mandatory, "shall apply" to state employees.

No Hawai'i case law answers the specific questions you have posed. Under Hawai'i law, however, when a constitutional provision is unambiguous, courts must construe it as written. See County of Hawaii v. Ala Loop Homeowners, 123 Haw. 391, 404, 235 P.3d 1103, 1116 (2010) ("the general rule is that, if the words used in a constitutional provision are clear and unambiguous, they are to be construed as they are written.") (brackets, citation, and ellipses omitted). "When the text of a constitutional provision is not ambiguous, the court, in construing it, is not at liberty to search for its meaning beyond the instrument." State v. Kahlbaun, 64 Haw. 197, 201, 638 P.2d 309, 314 (1981) (citations omitted).

In our view, article XIV is not ambiguous. Even if it were ambiguous, the history of this provision supports this conclusion. See Stand. Comm. Rep. No. 44, in 1 Proceedings of the Constitutional Convention of Hawaii of 1968, at 210 (1973) ("guarantee[ing] . . . a code of ethics for all public employees and officers."). We conclude, therefore, that the State Ethics Code must apply to all state employees. We therefore answer the first question in the negative, that is, individual employees may not, consistent with article XIV, be exempted from the State Ethics Code.

We note that the current ethics code defines "employee" to include all state employees but excludes "legislators, delegates to the constitutional convention, justices and

judges." Haw. Rev. Stat. § 84-3 (2012). Despite this statutory definition, these three groups of people are subject to ethics codes, albeit in a different manner. Legislators are governed by the statutory ethics code, but it applies differently to them than to most employees. Compare Haw. Rev. Stat. § 84-11 (2012) (gift provision applying to both legislators and employees) with Haw. Rev. Stat. § 84-14 (2012) (conflicts of interests provision applying differently to legislators). Delegates to a constitutional convention are governed by an ethics code adopted by the convention itself. See Haw. Const. art. XIV (requiring the constitutional convention to adopt its own ethics code). Finally, judges and justices are governed by the Revised Code of Judicial Conduct, which was adopted by the Hawai'i Supreme Court.² See Rules of the Supreme Court, Ex. B.³ In practice, therefore, even those state employees who are outside the statutory definition of "employee" are also subject to ethics codes by law. This is consistent with our reading of article XIV.

² The delegates at the constitutional convention discussed whether to explicitly exempt judges and justices from article XIV, fearing that including them would be "an unnecessary restriction on the independence of the judiciary." Stand. Comm. Rep. No. 26, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 566 (1980). In the end, the convention opted not to include a specific exemption in the constitutional provision but acknowledged that the Legislature could recognize the existing judicial canons of ethics. Id. For this reason, the State Ethics Code does not apply to judges and justices. Haw. Rev. Stat. § 84-2 (2012). The need to exclude judges and justices from the statutory ethics codes exists because of the principle of separation of powers. We do not view this exemption as justifying an exemption for other state employees where (1) the history of article XIV is clear, and (2) there is no similar separation-of-powers concern.

³ Available at http://www.courts.state.hi.us/legal_references/rules/rulesOfCourt.html (last visited Nov. 19, 2015).

B. Article XIV does not specify what conduct is permissible under the code.

The plain language of article XIV supports another important conclusion, one that answers your second question. The details of what conduct is permitted, prohibited, or otherwise regulated by the ethics code is left to each legislative body to determine. The third paragraph of article XIV lists the topics each ethics code must address:

Each code of ethics shall include, but not be limited to, provisions on gifts, confidential information, use of position, contracts with government agencies, post-employment, financial disclosure and lobbyist registration and restriction.

(Emphasis added). Importantly, the constitution does not direct how each of these topics should be addressed, only that they must be. In our view, this provision is unambiguous and should therefore be interpreted to grant each legislative body substantial discretion on how each ethics code will be constructed, including what precise conduct is prohibited. As above, even if the provision were ambiguous, the history behind this provision supports the same result. See Stand. Comm. Rep. No. 26, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 567 (1980) ("[The third paragraph in article XIV] specifies important guidelines or boundaries that must be maintained in Hawaii's statutory ethics codes. At the same time, it is general enough so that it does not mandate exactly how the respective legislative bodies should meet the responsibility that the section will place upon them.").

We note that the State Ethics Code has had this same general structure since the first provision was ratified in 1968. In other words, under Hawai'i law, the ethics code was made mandatory by the constitution but the details regarding the regulated conduct have always been spelled out by the pertinent legislative body. See 1967 Haw. Sess. L. Act 263; Haw. Rev. Stat. ch. 84 (1968). See also Haw. Rev. Stat. § 84-14(a)(2) (2012) (persons sitting on boards or commissions with "particular qualifications" show a conflict of interest only

if they have a "substantial financial interest" in the official action; this would permit a member of the regulated industry to sit on that board or commission, as occurs frequently).

For these reasons, we answer your second question in the affirmative. Under article XIV, as long as the mandatory topics listed in the third paragraph are addressed, the Legislature exercises discretion over what specific conduct is prohibited, permitted, or otherwise regulated under the ethics code. Assuming no other state or federal constitutional provision is brought into play, the Legislature may exempt certain conduct from the ethics code or otherwise subject it to related regulation, such as disclosure requirements.

C. The Legislature may exercise reasonable discretion over what conduct is permissible under the code.

You had initially inquired whether there were conditions or limitations on exempting an employee from the ethics code, such as the exempted individual must be performing work that benefits the State or the public. Subsequent conversations focused this concern on the requirements of article XIV instead, based on the premise that employees must be covered by the State Ethics Code but the regulated conduct was, to some substantial degree, subject to legislative discretion.

You informed us that this inquiry was based in part on the Ethics Commission's Advisory Opinion No. 92-2.⁴ Opinion No. 92-2 concludes that public-private partnerships to develop innovative technology were permissible under chapter 84, Hawaii Revised Statutes, even where the state employee had a financial interest in the private company. This conclusion depends heavily on the benefits to the State from the public-private partnerships.

Opinion No. 92-2 conducts a statutory analysis of several provisions of chapter 84. Though certainly relevant to the larger context of technology transfer activities at the

⁴ Available at <http://files.hawaii.gov/ethics/advice/A01992-2.pdf> (last visited Nov. 19, 2015).

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University, the opinion does not address the constitutional questions posed here. Opinion No. 92-2 establishes that, in the circumstances outlined, employees do not violate chapter 84 when they engage in public-private partnerships that encourage the development of innovative technology. In the circumstances outlined in the opinion, both the employee and the relevant conduct were subject to the code, but were found not to violate it.

Here, in contrast, your second question asks whether certain conduct may constitutionally be exempted from the ethics code. We have answered that question in the affirmative, provided that the mandatory topics listed in article XIV are addressed. We do not see the benefit to the State, as outlined in Opinion No. 92-2, as relevant here. Instead it is the requirements of the constitution that restrict the Legislature's exercise of discretion. Under article XIV, the Legislature defines the scope of the State Ethics Code.

Within those limitations, the Legislature may constitutionally exercise substantial discretion over how the ethics code works in practice. See, e.g., Haw. Rev. Stat. §§ 84-11.5(d) (2012) (exemptions from gifts reporting requirements) and 84-14(a) (2012) (conflict of interest provision designed to permit members of the regulated industry to sit on boards or commissions; official action prohibited only if the individual has a substantial financial interest). To minimize any concern about the exercise of this discretion, we recommend, as a general matter, that any exemption for conduct be narrowly drawn and specifically tied to the public policy that prompted its enactment. In addition, it would be advisable to specify that the exemption of one particular kind of conduct does not exempt the employee from the other provisions of the code (for example, the provisions governing gifts or fair treatment).


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V. CONCLUSION.

For the reasons stated above, we conclude that article XIV of the Hawai'i Constitution requires that state employees be subject to the State Ethics Code. Provided that the mandatory topics listed in article XIV are addressed, the Legislature possesses substantial discretion to determine what conduct is permissible or impermissible under the ethics code. Properly exercised, this discretion permits the Legislature to exempt certain conduct associated with technology transfers from the code, while still requiring that the employees remain generally subject to the code as required by article XIV.


If you have any question regarding this opinion, please feel free to contact us.

Sincerely,



Deirdre Marie-Iha
Deputy Attorney General

APPROVED:



Douglas S. Chin
Attorney General