

CITY & COUNTY OF HONOLULU
CONFIDENTIAL PERSONNEL INVESTIGATION
INVESTIGATION REPORT

Department: ETHICS COMMISSION – HONOLULU
Complainant: [REDACTED]
Respondent: Charles W. Totto
Date of Report: January 18, 2016
Investigator: Anna Elento-Sneed, Esq.
ES&A, Inc., A Law Corporation

On December 8, 2015, ES&A, Inc. was retained as a neutral, third party investigator by the City & County of Honolulu, to conduct a confidential investigation into the issues and concerns raised by [REDACTED] for the Ethics Commission – Honolulu (the “Commission”), against Charles W. Totto (“Totto”), Executive Director/Legal Counsel for the Commission. The following is my report.

I. SCOPE OF INVESTIGATION

This investigation is the result of an October 20, 2015 email sent by [REDACTED] to Totto. (See Attachment 1.) Although [REDACTED] initially addressed [REDACTED] email to Totto, [REDACTED] subsequently sent a series of emails to Deputy Corporation Counsel [REDACTED] and indicated [REDACTED] wanted [REDACTED] email to be considered a complaint. (See Attachment 2.)

I interviewed [REDACTED] on December 9, 2015. In discussing the issues and concerns raised in [REDACTED] October 20, 2015 email, [REDACTED] did not identify any statutes or regulations (ethics related or otherwise) which [REDACTED] contends were violated by Totto. Rather, [REDACTED] described [REDACTED] concerns as problems with “management” and “personality.”

After interviewing [REDACTED], I sought clarification from the Commission on the scope of this investigation. I pointed out that [REDACTED] was concerned about the overall “management” of the Ethics Commission Office (the “Office”), as well as [REDACTED] particular employment situation. The Commissioners confirmed that they did not want me to conduct a management audit of the Office’s operations. Rather the scope of this investigation was to be confined to [REDACTED] complaints about [REDACTED] employment situation, which [REDACTED] characterized as an “ethics complaint” in [REDACTED] November 7, 2015 email to [REDACTED], Chair Chen, Vice Chair Lilly, and Commissioners Amano, Marks and Suemori. (See Attachment 3.)

With the foregoing clarification in mind, I proceeded to complete the investigation.

II. COMPLAINT ALLEGATIONS

A. Focus of Investigation

It should be noted that this investigation is not, and should not be considered, an investigation into whether Tutto violated the Revised Charter of Honolulu, Article XI, Standards of Conduct. As the Revised Charter indicates, the decision on whether a violation of Standards of Conduct has occurred is for the Commission to decide.¹

Similarly, this investigation is not, and should not be considered, an investigation into whether Tutto violated the Hawai'i Rules of Professional Conduct ("HRPC") when he continued to prosecute ethics complaints against certain Councilmembers (the "Councilmember cases"). Under Section 8.5 of the HRCP, enforcement of the professional rules is the purview of the Hawai'i Supreme Court and the Disciplinary Board.

Rather, this is a human resources ("HR") investigation. As such, the focus of the investigation is to determine whether Tutto violated any rules, codes of conduct, or performance standards applicable to him as the Executive Director of the Commission.

B. [REDACTED] Allegations

Most employee complaints concern alleged violations of federal and/or state labor or employment laws. However, [REDACTED] is not contending that [REDACTED] was subjected to discrimination, harassment, retaliation, wrongful or tortious conduct by Tutto. Rather, [REDACTED] complaint is more in the nature of "whistleblowing." More specifically, [REDACTED] is alleging that:

¹ [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Given these allegations, the issues in this investigation are whether: (a) [REDACTED] reported or threatened to report to the Commission (as an employer) or another public body, verbally or in writing, a violation or a suspected violation of a law, rule, ordinance or regulation, unless [REDACTED] knew the report was false; and (b) Totto has threatened to discharge or has discriminated against [REDACTED] in the terms and conditions of [REDACTED] employment. See HRS §378-62(1)(the Hawai'i Whistleblower Protection Act or "HWPA").

III. INVESTIGATION PROCEDURE

At the outset of this investigation, I checked the Commission's website and the Honolulu Department of Human Resources' website for procedures that would govern an HR investigation involving the Commission Staff. I could find no regulations or procedures that specifically pertain to HR investigations involving the Ethics Commission. Indeed, when I asked [REDACTED] (in [REDACTED] capacity as Counsel for the Ethics Commission) if there were any investigation standards, [REDACTED] indicated that [REDACTED] was not aware of any rules or procedures that would be applicable. I reconfirmed this fact during [REDACTED] interview. (See Statement of Interviewee [REDACTED] ¶¶18-20.³)

Given the absence of specific HR investigation procedures for the Commission, I followed the generally accepted procedures for "full and fair investigations" followed by investigators in employment situations. These procedures involve: (1) an interview of the complainant; (2) an interview of the respondent; (3) interviews of key witnesses⁴ identified by

² [REDACTED] from the Commission on the scope of the investigation, and a copy of the November 7, 2015 email from [REDACTED]. I contacted [REDACTED] by [REDACTED]

³ [REDACTED] to by the witness's last name and the pertinent paragraph numbers in the statement (e.g. [REDACTED]).

⁴ Parties often identify numerous witnesses who they believe may provide information favorable to their position. In most cases it is not practical, or necessary, to interview every witness identified. In this case, I

the parties; and (4) a review of any documents identified by the parties or the witnesses that may be relevant to the issues in question.

A. Interview Process

Face-to-face, one-on-one interviews were conducted with the following individuals⁵:

- Complainant [REDACTED] on December 9, 2015;
- [REDACTED] on December 11, 2015;
- [REDACTED] on December 11, 2015;
- Respondent Tutto on December 12, 2015;
- [REDACTED] on December 15, 2015; and
- [REDACTED] on December 29, 2015.⁶

Each of the interviewees was informed that I was a neutral, third party investigator retained by the City & County of Honolulu to investigate the issues and concerns raised by [REDACTED] in [REDACTED] October 20, 2015 email.⁷ I told each of them that the interviews were confidential and that retaliation was prohibited by federal and state laws. I then explained the interview process, including the fact that they would be able to review and make corrections to their statements. I specifically told each of them that, after he/she reviewed his/her statement, I wanted them to sign and return a PDF to me so that I could include their statement with my report to the Commission.

After listening to the instructions, each of them agreed to proceed.⁸ Because [REDACTED] allegations (particularly of management practices, workloads and work-related stress) were so general and broad, I asked each of the interviewees to describe their understanding of the Office's operations, tell me what they knew of the issues and concerns in [REDACTED] October 20,

interviewed the witnesses who were employed by the Commission during the relevant time period, and who [REDACTED] and/or Tutto indicated were present when certain events occurred or participated in certain activities.

⁵ During his interview and in his Statement, Tutto stated or implied that I should interview [REDACTED] because [REDACTED]

[REDACTED]

⁶

⁷

⁸

Tutto did not refuse to answer any questions during the interview.

2015 email, and provide personal observations of the work environment. I interjected to request copies of any documents they had, the names of people or documents they were referring to, the dates or approximate dates of any events or conversations, and the circumstances surrounding a particular event or conversation (to ensure that I understood the context of the event or conversation).

B. Written Statements

During the interviews, I took detailed type-written notes of what each witness said. After the interview, I "cleaned up" the notes by: formatting their statements into numbered paragraphs; correcting spelling, punctuation and grammatical errors (provided they did not detract from the meaning of the interviewee's statement); adding headings for ease of reference; and moved paragraphs on the same topic under the same headings, again for ease of reading. I then transmitted Word versions to the interviewees and reminded each of them that he/she was free to amend the statement as he/she deemed appropriate.

The interviewees who reviewed and corrected their statements sent back redlined versions. I accepted all the changes, checked the spelling and paragraph numbering, and then sent the FINAL version back to the interviewee for review and signature, along with any documents provided as part of his/her statement. As of the date of this Report, final written statements were signed and returned by [REDACTED] and [REDACTED].

As of the date of this Report, Tutto has not returned a signed copy of his written statement. Accordingly, I have attached the latest "unsigned" draft of his written statements to this Report.⁹ The testimony and citations referenced in this Report are from his latest draft statement.

C. Relevance, Credibility of Witnesses, Weight and Sufficiency of the Evidence

As you can see, the witnesses provided a good deal of information. However, in evaluating the evidence, I only considered statements and documents relevant to a HWPA claim. If there was a direct conflict in the statements provided by two or more witnesses, I evaluated the credibility of each witness by taking into account: the demeanor of the witness during the interview; whether he/she was biased or had a motive to falsify; the inherent plausibility of their statement; and whether their account of the facts was corroborated by documentation or testimony from other witnesses.

After evaluating the relevance of the evidence and the credibility of the witnesses, I made the following findings based on the weight and sufficiency of the evidence.

IV. DISCUSSION

⁹ [REDACTED] was sent to him on January 6, 2016 for review. I reminded him to attach [REDACTED]

A. Pertinent Background Facts

1. The Office Staff

[REDACTED]

[REDACTED]

[REDACTED]

Finding: In summary, Totto has spent the majority of his years with the Commission working by himself.

2. The Office Procedures and Decision-Making

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

10

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finding: Based on the few documents that were provided, and the descriptions provided by the Staff, it appears that Totto manages the office primarily through verbal instructions.

3. The Workload

[REDACTED]

11 [REDACTED]

12 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finding: Regardless of the cause, the Staff perceive the workload as “out of control” and they are all stressed.

4. **Totto’s Concerns Regarding the Commissioners, the Corporation Counsel’s Office (“COR”) and the Administration**

[REDACTED]

[REDACTED]

[REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

[REDACTED]

Findings: Clearly, Tutto makes his views and concerns about the Commissioners, COR and the Administration known to the Office Staff. This fact is, more likely than not, the cause of Staff anxiety about the future of the Office and the outcome of this investigation. (See [REDACTED] 35; [REDACTED] 22; [REDACTED] 10, 14; [REDACTED] 44.a-f)

B. The Events In Question

[REDACTED] allegations are centered on three events: (1) Tutto's 2015 performance evaluation; (2) [REDACTED] handling of the Councilmember cases; and (3) [REDACTED] October 20, 2015 email to Tutto. The facts pertinent to each of these events are as follows.

1. Tutto's 2015 Performance Evaluation

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

16

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Findings. There are conflicting statements on whether Tutto asked [REDACTED] and [REDACTED] to provide him the transcript of the Commissioner's executive session discussion on his

¹⁸ I asked [REDACTED] in [REDACTED] capacity as Deputy Corporation Counsel assigned to the Commission, for assistance in determining whether I could review the emails between the interviewees on this issue. [REDACTED] did not know whether the City has the right to review employee emails, or the procedure for requesting access. However, as noted *infra*, resolution of this point is not required for [REDACTED] whistleblower complaint.

¹⁹ Apparently, [REDACTED] normally prepares the minutes for open and executive sessions, and then sends them to [REDACTED] for review. ([REDACTED] 2.a) Tutto commented that [REDACTED] has difficulty on minutes. (Totto 96)

performance evaluation. However, there is no dispute on the following: (a) [REDACTED] told [REDACTED] that Totto asked [REDACTED] for the transcript of the Commissioner's executive session discussion; (b) Totto told [REDACTED] that [REDACTED] was confused about his request; (c) [REDACTED] believes that Totto asked for the executive session transcript and that [REDACTED] said did not feel right about it; and (d) [REDACTED] believes [REDACTED] is now changing [REDACTED] story out of "fear of retaliation." ([REDACTED] 30.f) In short, [REDACTED] believes Totto made an inappropriate request for the executive session transcript which [REDACTED] also believes violates 11-104 of the Ethics Code. ([REDACTED] 34)

2. The Councilmember Cases

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

20 [REDACTED]

21 [REDACTED]

[REDACTED]

[REDACTED]

Findings. Tutto's explanation that his question ("What do you expect us to do – fold?") was only a request for [REDACTED] to assess the Councilmember cases is not credible given Tutto's previous statement that [REDACTED] could not make critical decisions on [REDACTED] own and had to get his approval for a dismissal. (Tutto 65) Moreover, Tutto's characterization of this situation as a "communication breakdown" is not plausible since he acknowledged that [REDACTED] spoke to him on several occasions about [REDACTED] concerns, and he conceded that [REDACTED] interpreted his remarks as a statement not to dismiss the cases. (Tutto 53, 56)

However, whether or not Tutto actually ordered [REDACTED] to litigate the Councilmember cases without sufficient legal or evidentiary basis is irrelevant in a HWPA case. The key issue is whether [REDACTED] believed [REDACTED] was being ordered to so. The overwhelming evidence shows that [REDACTED] believed [REDACTED] was being forced to litigate the case in violation of the HRPC. (See Attachment 1, [REDACTED] October 20, 2015 email to Tutto at p. 2-3; [REDACTED]; [REDACTED]; [REDACTED])

3. [REDACTED] October 20, 2015 Email

[REDACTED]

[REDACTED]

22 [REDACTED]

23 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

24

25

[REDACTED]

[REDACTED]

Findings. Totto directed [REDACTED] to write her October 20, 2015 email listing all of [REDACTED] concerns, including [REDACTED] belief that Totto may have violated 11-104 of the Ethics Code and the HRPC. [REDACTED] sent copies to [REDACTED] and certain Commissioners. Although [REDACTED] has not been terminated, [REDACTED] is concerned that [REDACTED] may be retaliated against. Totto's comments, particularly those in his Interview Statement, suggest [REDACTED] fears are not unreasonable. (Totto 85)

V. OVERALL IMPRESSIONS AND FINDINGS

As noted above, the issues in this investigation are whether: (a) [REDACTED] reported or threatened to report to the Commission (as an employer) or another public body, verbally or in writing, a violation or a suspected violation of a law, rule, ordinance or regulation, unless [REDACTED] knew the report was false; and (b) Totto has threatened to discharge or has discriminated against [REDACTED] in the terms and conditions of [REDACTED] employment. See HRS Section 378-62(1).

[REDACTED] has alleged four areas of violations or suspected violations:

- Totto is focused on investigations, filing complaints and prosecutions, but he lacks litigation and organization skills which is causing stress for everyone;
- Totto's ego and emotions cloud his professional judgment, puts everyone under stress;
- Totto instructed [REDACTED] and [REDACTED] to provide him the Executive Session Transcript; and
- Totto may be trying to terminate [REDACTED] employment because [REDACTED] dismissed the Councilmember cases despite Totto's wishes to the contrary.

My overall impressions and findings for each of these areas is as follows.

A. Totto's Lack Of Litigation And Organizational Skills

[REDACTED] alleges Totto's lack of litigation and organizational skills is causing stress for the Staff. The investigation revealed that Totto does, in fact, manage the office primarily through verbal instructions. This approach has become increasingly problematic as the Office's workload increased.

However, I could not find, and [REDACTED] did not identify, any particular management procedures required for the Commission. Furthermore, [REDACTED] has not alleged that Totto's approach to management violated any law, rule, ordinance or regulation. Therefore, I find no HWP violation in this area.

B. Totto's Ego And Emotions Cloud His Professional Judgment

[REDACTED] also alleges Totto allows his ego and emotions to cloud his professional judgment in cases. There is substantial evidence that Totto has had difficult working relationships with a number of individuals, and that his temper sometimes clouds his judgment. The evidence also

shows that Tutto shares his views and concerns about the Commissioners, COR and the Administration with the Office Staff which, more likely than not, caused anxiety.

However, once again, [REDACTED] has not alleged that Tutto's poor judgment violates any law, rule, ordinance or regulation. Therefore, I find no HWPB violation in this area.

C. The Executive Session Transcript

On October 21, 2015, [REDACTED] sent [REDACTED] and the Commission a copy of [REDACTED] October 20, 2015 email that stated Tutto directed [REDACTED] and [REDACTED] to provide him with the Executive Session Transcript. The evidence shows that at the time of this "report," [REDACTED] believed Tutto's request was inappropriate and violated 11-104 of the Ethics Code.²⁷ The real question is whether Tutto, after learning that [REDACTED] made [REDACTED] report, attempted to discriminate against or discharge [REDACTED]

The evidence shows that Tutto was aware [REDACTED] included [REDACTED] concerns about the Executive Session Transcript in [REDACTED] October 20, 2015 email to him, and he was upset by it. The evidence also shows that Tutto soon learned that [REDACTED] shared [REDACTED] email with others.

Although [REDACTED] is still currently employed by the Commission, Tutto has made several comments to [REDACTED] which have caused [REDACTED] to be concerned about retaliation. Tutto's comments include: remarks about whether they [Tutto and [REDACTED]] can still work together; questions about whether [REDACTED] is looking for another job; and statements that [REDACTED] exercised poor judgment in discussing [REDACTED] concerns with [REDACTED] coworkers.

This sequence of events, combined with Tutto's comments, suggest [REDACTED] fears about retaliation are not unreasonable. If steps are not taken to intervene, [REDACTED] may have a viable claim under the HWPB based on his request for the Executive Session Transcript.

D. Dismissal Of The Councilmember Cases

As noted above, whether or not Tutto actually ordered [REDACTED] to litigate the Councilmember cases without sufficient legal or evidentiary basis is irrelevant in a HWPB case. The issues are: whether [REDACTED] believed [REDACTED] was being ordered to so; whether [REDACTED] reported the violation; and whether [REDACTED] was discharged and/or discriminated against for making the report.

There is overwhelming evidence that [REDACTED] believed [REDACTED] was being forced to litigate the case in violation of the HRPC. After Tutto directed [REDACTED] to write [REDACTED] concerns down, [REDACTED] sent him the October 20, 2015 email (the same email containing the report about the Executive Session Transcript), and then shared the email with others.

²⁶ The evidence shows [REDACTED] may have reported Tutto's directive to [REDACTED] on an earlier date, when [REDACTED] and [REDACTED] had lunch together soon after the hearing on the Councilmember cases. ([REDACTED] 25)

²⁷ As previously stated, whether this request actually violated 11-104 of the Ethics Code is for the Commission to decide. For purposes of a HWPB investigation, all that is required is that the employee believe, in good faith, that a violation has occurred.

Needless to say, Tutto's post-email remarks to [REDACTED] about working together, [REDACTED] job search efforts and [REDACTED] "poor judgment" could also be used to support a viable claim under the HWPAs based on the Councilmember cases.

VI. CONCLUSION

Although there are two potentially viable HWPAs claims, the problems have been caught early. Intervention is called for.

If you have any questions or need further elaboration, please let me know.

Anne Elita-Saad

**ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU**

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KIRK CALDWELL
MAYOR



CHARLES W. TOTTO
EXECUTIVE DIRECTOR
AND LEGAL COUNSEL

February 29, 2016

HAND DELIVERED

Charles W. Totto, Esq.
Executive Director and
Legal Counsel
Honolulu Ethics Commission
715 S. King Street, Suite 211
Honolulu, HI 96813

RE: Employment Discipline

Dear Mr. Totto,

As you are aware, the Honolulu Ethics Commission ("Commission") received an internal complaint regarding the management, supervision, and workplace conditions under your leadership as the Executive Director and Legal Counsel of the Honolulu Ethics Commission. Given the nature of the complaint, the seriousness of the allegations as they impacted pending cases before the Commission, and the persons and positions involved, the Commission believed that it was in its best interest for all parties to retain an outside investigator to investigate the allegations and to provide the Commissioners with his/her findings.

As you also know, the Commission retained Anna Elento-Sneed, Esq. to conduct the investigation regarding the internal complaint. The internal complaint was raised by [REDACTED] for the Honolulu Ethics Commission. Ms. Elento-Sneed interviewed several persons, including you and [REDACTED]. Ms. Elento-Sneed prepared written statements and provided each interviewee, including you, with an opportunity to review and revise his/her statements.

Based on Ms. Elento-Sneed's investigation and findings, and after deliberating and discussing the past and current management, supervision, and workplace conditions under your leadership, the Commission, upon the unanimous vote of the Commissioners, has come to the following conclusions regarding your employment as the Commission's Executive Director and Legal Counsel:

Exposure of the Commission to a Whistleblower Protection Act Claim

- Based on the actions taken by you as Executive Director of the Commission, you may have exposed the Commission to liability for a violation of the Hawaii Whistleblower Protection Act.
- Ms. Elento-Sneed's investigation and findings suggest that your conduct related to the "Executive Session Transcript" and "Dismissal of the Councilmembers Cases" as summarized below may have exposed the Commission to a viable Hawaii Whistleblower Protection Act claim.

Litigation and Organizational Skills

- You have no specific procedures for processing investigations, prioritization of cases or preparation of cases.
- Decision-making practices and procedures are not written.
- This lack of written procedures and practices causes uncertainty and unnecessary and undue workplace stress in the office.
- [REDACTED] took sick leave and vacation leave because [REDACTED].
- You have not provided the Commissioners with any instruction on how to run a meeting in accordance with Roberts Rules of Order.

Professional Judgment

- In a demonstration of lack of professional and managerial judgment, you shared your personal views and opinions about individual Commissioners, the Corporation Counsel for the City and County of Honolulu, and the City administration with your staff. This has caused unnecessary anxiety in the office.

Preparation of Transcript of Discussion of Your Performance Evaluation That Took Place During Executive Session

- Initially you asked [REDACTED] to listen to the Executive Session recording; then you asked that either [REDACTED] or [REDACTED] to transcribe the Executive Session. This occurred on or about September 24, 2015. This was unauthorized and invaded the confidentiality of the Commissioners' executive session deliberation.

Complaints Against Councilmembers

- ██████████ discussed ██████ concerns about the factual and legal basis for the Councilmember cases, and believed that you were ordering ██████ to go forward with litigating these cases in violation of the Hawaii Rules of Professional Conduct.
- ██████████ thought that you were going to terminate ██████ because ██████ dismissed these cases.
- You asked ██████████ if ██████ was looking for employment elsewhere and asked ██████ to give you two (2) weeks notice as soon as possible.
- Based on your actions, ██████████ reported that ██████ was very upset, ██████████, felt that ██████ was being retaliated against, and was afraid of being terminated.

Notwithstanding your long tenure with the Commission and past record, we all believe that you as the Executive Director and Legal Counsel should have set an example and provided sound leadership and guidance for all of your subordinates, not foment stress, anxiety and discontent at the workplace.

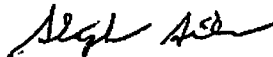
Based on the foregoing, the Commissioners unanimously have decided on the following course of action:

1. You will be placed on suspension without pay from March 1, 2016, to April 1, 2016. You will report to work on Monday, April 4, 2016.
2. Effective March 1, 2016, the Commissioners ██████████ will return to the Commission's offices. Upon your return to work, you will continue to serve as Executive Director and Legal Counsel. ██████ will remain in the Commission's offices after your return to the workplace.
3. Effective March 1, 2016, all attorneys and investigators of the Commission shall complete daily timesheets that detail by tenth of an hour increments legal and administrative tasks performed during the day. Timesheets shall be turned in monthly to the Chair of the Commission by close of business on the last day of each month via electronic mail.

4. By April 15, 2016, you will provide the Commissioners with an office flow chart that details the process for intake of cases "for information" or "for action" and for assignment of cases (1) RFA "for advice only," indicating who is responsible for providing the response/advice; and (2) "CRI needs more investigation," indicating who is assigned the case for more investigation for probable cause. This office flow chart should detail the process for reviewing "probable cause" cases.
5. Commissioner and Vice Chair Lilly and Commissioner Silva will meet with you and [REDACTED] separately prior to your suspension to discuss the Commission's expectations that it has for you and [REDACTED] to organize and manage all Commission case files. The Commissioners expect that all open cases and files shall be organized and updated on a timely and consistent basis.
6. Upon your return to work, you will provide the Commissioners with a status report on all open cases on a monthly basis as part of your Executive Director report to the Commissioners.
7. You are advised that any retaliation against any individual who complained of or participated in the workplace investigation shall not be tolerated. If we learn that you retaliated in any way against any person who complained or participated in the workplace investigation, you will be disciplined further, including immediate termination.

We trust that on a going forward basis, you and your team will establish, develop and maintain a workplace that is productive, proactive, and positive. The Commissioners will continue to look to you to set a sound, professional, and positive example for the Honolulu Ethics Commission.

Very truly yours,


for Judge Victoria S. Marks (Ret.)
Chairperson

cc: Commissioners

NOTICE TO REQUESTER

TO: Kevin Sumida, Esq.
(Requester's name)

FROM: Ethics Commission, City and County of Honolulu, Derek Mayeshiro at
dmayeshiro@honolulu.gov
(Agency, and agency contact person's name, telephone number, & email address)

DATE THAT THE RECORD REQUEST WAS RECEIVED BY AGENCY: April 5, 2016

DATE OF THIS NOTICE: April 7, 2016

GOVERNMENT RECORDS YOU REQUESTED (attach copy of request or provide brief description below):

1. See Attached Request
- 2.
- 3.
- 4.

THIS NOTICE IS TO INFORM YOU THAT YOUR RECORD REQUEST:

- Will be granted in its entirety.
- Cannot be granted. Agency is unable to disclose the requested records for the following reason:
- Agency does not maintain the records. (HRS § 92F-3)
Other agency that is believed to maintain records: _____
 - Agency needs further clarification or description of the records requested. Please contact the agency and provide the following information: _____
 - Request requires agency to create a summary or compilation from records, but requested information is not readily retrievable. (HRS § 92F-11(c))

- Will be granted in part and denied in part, OR Is denied in its entirety
Although the agency maintains the requested records, it is not disclosing all or part of them based on the exemptions provided in HRS § 92F-13 and/or § 92F-22 or other laws cited below.
(Describe the portions of records that the agency will not disclose.)

<u>RECORDS OR INFORMATION WITHHELD</u>	<u>APPLICABLE STATUTES</u>	<u>AGENCY JUSTIFICATION</u>
<u>Employee personnel file information</u>	<u>HRS §§ 92F-13(1); -14(4)</u>	<u>Employee privacy</u>

REQUESTER'S RESPONSIBILITIES:

You are required to (1) pay any lawful fees and costs assessed; (2) make any necessary arrangements with the agency to inspect, copy or receive copies as instructed below; and (3) provide the agency any additional information requested. If you do not comply with the requirements set forth in this notice within 20 business days after the postmark date of this notice or the date the agency makes the records available, you will be presumed to have abandoned your request and the agency shall have no further duty to process your request. Once the agency begins to

process your request, you may be liable for any fees and costs incurred. If you wish to cancel or modify your request, you must advise the agency upon receipt of this notice.

METHOD & TIMING OF DISCLOSURE:

Records available for public access in their entirety must be disclosed within a reasonable time, not to exceed 10 business days from the date the request was received, or after receipt of any prepayment required. Records not available in their entirety must be disclosed within 5 business days after this notice or after receipt of any prepayment required. HAR § 2-71-13(c). If incremental disclosure is authorized by HAR § 2-71-15, the first increment must be disclosed within 5 business days of this notice or after receipt of any prepayment required.

Method of Disclosure:

- Inspection at the following location: _____
- As requested, a copy of the record(s) will be provided in the following manner:
 - Available for pick-up at the following location: _____
 - Will be mailed to you.
 - Will be transmitted to you by other means requested: to Ksumida@hawaii11.com

Timing of Disclosure: All records, or the first increment if applicable, will be made available or provided to you:

- On April 7, 2016.
- After prepayment of 50% of fees and 100% of costs, as estimated below.

For incremental disclosures, each subsequent increment will be disclosed within 20 business days after:

- The prior increment (if one prepayment of fees is required and received), or
- Receipt of each incremental prepayment, if prepayment for each increment is required.

Records will be disclosed in increments because the records are voluminous and the following extenuating circumstances exist:

- Agency must consult with another person to determine whether the record is exempt from disclosure under HRS chapter 92F.
- Request requires extensive agency efforts to search, review, or segregate the records or otherwise prepare the records for inspection or copying.
- Agency requires additional time to respond to the request in order to avoid an unreasonable interference with its other statutory duties and functions.
- A natural disaster or other situation beyond agency's control prevents agency from responding to the request within 10 business days.

ESTIMATED FEES & COSTS AND PAYMENT:

FEES: For personal record requests under Part III of chapter 92F, HRS, the agency may charge you for its costs only, and fee waivers do not apply.

For public record requests under Part II of chapter 92F, HRS, the agency is authorized to charge you fees to search for, review, and segregate your request (even if a record is subsequently found to not exist or will not be disclosed in its entirety). The agency must waive the first \$30 in fees assessed for general requesters, OR in the alternative, the first \$60 in fees when the agency finds that the request is made in the public interest. Only one waiver is provided for each request. See HAR §§ 2-71-19, -31 and -32.

COSTS: For either personal or public record requests, the agency may charge you for the costs of copying and delivering records in response to your request, and other lawful fees and costs.

PREPAYMENT: The agency may require prepayment of 50% of the total estimated fees and 100% of the total estimated costs prior to processing your request. If a prepayment is required, the agency may wait to start any

search for or review of the records until the prepayment is received by the agency. Additionally, if you have outstanding fees or costs from previous requests, including abandoned requests, the agency may require prepayment of 100% of the unpaid balance from prior requests before it begins any search or review for the records you are now seeking.

The following is an itemization of what you must pay, based on the estimated fees and costs that the agency will charge you and the applicable waiver amount that will be deducted:

For public record requests only:

Fees: Search	Estimate of time to be spent: _____ hours (\$2.50 for each 15-minute period)	\$
Review & segregation	Estimate of time to be spent: _____ hours (\$5.00 for each 15-minute period)	\$
Fees waived	<input type="checkbox"/> general (\$30), <u>OR</u> <input type="checkbox"/> public interest (\$60) (Only one waiver per request)	<\$ _____>
Other	_____	\$
	(Pursuant to HAR §§ 2-71-19 & 2-71-31)	
Total Estimated Fees:		\$

For public or personal record requests:

Costs: Copying	Estimate of # of pages to be copied: 20 (@ \$ 0.25 per page, pursuant to HRS § 92-21)	\$ 5.00
Delivery	Postage	\$
Other	_____	\$
Total Estimated Costs:		\$

TOTAL ESTIMATED FEES AND COSTS from above: \$5.00

- The estimated fees and costs above are for the first incremental disclosure only. Additional fees and costs, and no further fee waivers, will apply to future incremental disclosures.
- PREPAYMENT IS REQUIRED (50% of fees + 100% of costs, as estimated above) \$
- UNPAID BALANCE FROM PRIOR REQUESTS (100% must be paid before work begins) \$

TOTAL AMOUNT DUE AT THIS TIME \$5.00

Payment may be made by: cash
 personal check payable to _____
 other _____

For questions about this notice or the records being sought, please contact the agency person named at the beginning of this form. Please note that the Office of Information Practices (OIP) does not maintain the records of other agencies, and a requester must seek records directly from the agency it believes maintains the records. If the agency denies or fails to respond to your written request for records or if you

have other questions regarding compliance with the UIPA, then you may contact OIP at (808) 586-1400, oiip@hawaii.gov, or 250 South Hotel Street, Suite 107, Honolulu, Hawaii 96813.

REQUEST TO ACCESS A GOVERNMENT RECORD

This is a model form that may be used by a Requester to provide sufficient information for an agency to process a record request. Although the Requester is not required to use this form or to provide any personal information, the agency needs enough information to contact the Requester with questions about this request or to provide its response. This request may not be processed if the agency has insufficient information or is unable to contact the Requester.

DATE: April 5, 2016 _____

TO: Honolulu Ethics Commission , c/o Ernest Nomura, Esq.
Agency that Maintains the Government Record

enomura@honolulu.gov
Agency's Contact Informationenomura@honolulu.gov

FROM: Kevin Sumida
Requester's Name or Alias

Ksumida@hawaiiilaw411.com
735 Bishop Street, Suite 411
Honolulu, HI 96813
Requester's Contact Information

AS THE REQUESTER, I WOULD LIKE THE FOLLOWING GOVERNMENT RECORD:

Describe the government record as specifically as possible so that it can be located. Try to provide a record name, subject matter, date, location, purpose, or names of persons to whom the record refers, or other information that could help the agency identify the record. A complete and accurate description of the requested government record will prevent delays in locating the record. Attach additional pages if needed.

All records relating to of actions taken by the Honolulu Ethics Commission with respect to Charles Tutto in the last 100 days, including but not limited to: 1) records pertaining to his suspension without pay, and 2) records pertaining to investigations(s) of Charles Tutto by the Honolulu Ethics Commission, and 3) documents released to the press and/or to the public (including copies of an investigative report) as described in the Honolulu Civil Beat article dated April 5, 2016, a copy of which is attached hereto.

I WOULD LIKE: (Please check one or more of the options below, as applicable)

- To inspect the government record
- A copy of the government record: (Please check only one of the options below.) See the next page for information about fees and costs that you may be required to pay for agency services to process your record request. Note: Copying and transmission charges may also apply to certain options.

- Pick up at agency (date and time): _____
- Mail (address): _____
- E-mail (address): Ksumida@hawaiiilaw411.com
- Fax (toll free and only if available; provide fax number): _____
- Other, if available (please specify): _____

- If the agency maintains the records in a form other than paper, please advise in which format you would prefer to have the record.

Electronic Audio Other (please specify): _____

Check this box if you are attaching a request for waiver of fees in the public interest
(See waiver information on next page).

FEES FOR PROCESSING PUBLIC RECORD REQUESTS

You may be charged fees for the services that the agency must perform when processing your request for public records, including fees for making photocopies and other lawful fees. **The first \$30 of fees charged for searching for a record, reviewing, and segregating will not be charged to you. Any amount over \$30 will be charged to you.** Fees are as follows:

Search for a Record	\$2.50 for 15 minutes
Review and Segregation of a Record	\$5.00 for 15 minutes

Generally, no search, review, and segregation fees may be charged if you are making a request for personal records that are about you.

WAIVER OF FEES IN THE PUBLIC INTEREST

As an alternative to the \$30 fee waiver (not in addition to), the agency may waive the first \$60 of fees for searching for, reviewing and segregating records when the waiver would serve the public interest. If you wish to apply for a waiver of fees in the public interest, you must attach to this request a statement of facts, including your identity as the requester, to show how the waiver of fees would serve the public interest. The criteria for this waiver, found at section 2-71-32, Hawaii Administrative Rules, are

- (1) The requested record pertains to the operations or activities of an agency;
- (2) The record is not readily available in the public domain; and
- (3) The requester has the primary intention and the actual ability to widely disseminate information from the government record to the public at large.

COSTS

The Agency may charge you any other lawful fees and the costs to copy and deliver your personal or public record request.

AGENCY RESPONSE TO YOUR REQUEST FOR ACCESS

The agency to which you addressed your request must respond within a set time period. The agency will normally respond to you within 10 business days from the date it receives your request; however, in *extenuating circumstances*, the agency must respond within 20 business days from the date of your request. If you have questions about the response time or the records being sought, you should first contact the agency and request to consult with the agency's UIPA contact person.

Please note that the Office of Information Practices (OIP) does not maintain the records of other agencies and a requester must seek records directly from the agency. If the agency denies or fails to respond to your written request for records or if you have other questions regarding compliance with the UIPA, then you may contact OIP at 808-586-1400, ojp@hawaii.gov, or 250 South Hotel Street, Suite 107, Honolulu, Hawaii 96813.




REQUESTER'S RESPONSIBILITIES

You have certain responsibilities under section 2-71-16, Hawaii Administrative Rules, which include making arrangements to inspect and copy records, providing further clarification or description of the requested record as instructed by the agency's notice, and making a prepayment of fees and costs, if assessed. The rules and additional training materials are available online at oip.hawaii.gov or from OIP.

HONOLULU

Why Was Ethics Director Suspended? Report Offers Few Details

On the day Chuck Totto returns to work in Honolulu, the city releases heavily redacted documents related to his discipline.

ABOUT 10 HOURS AGO • By Nick Grube   

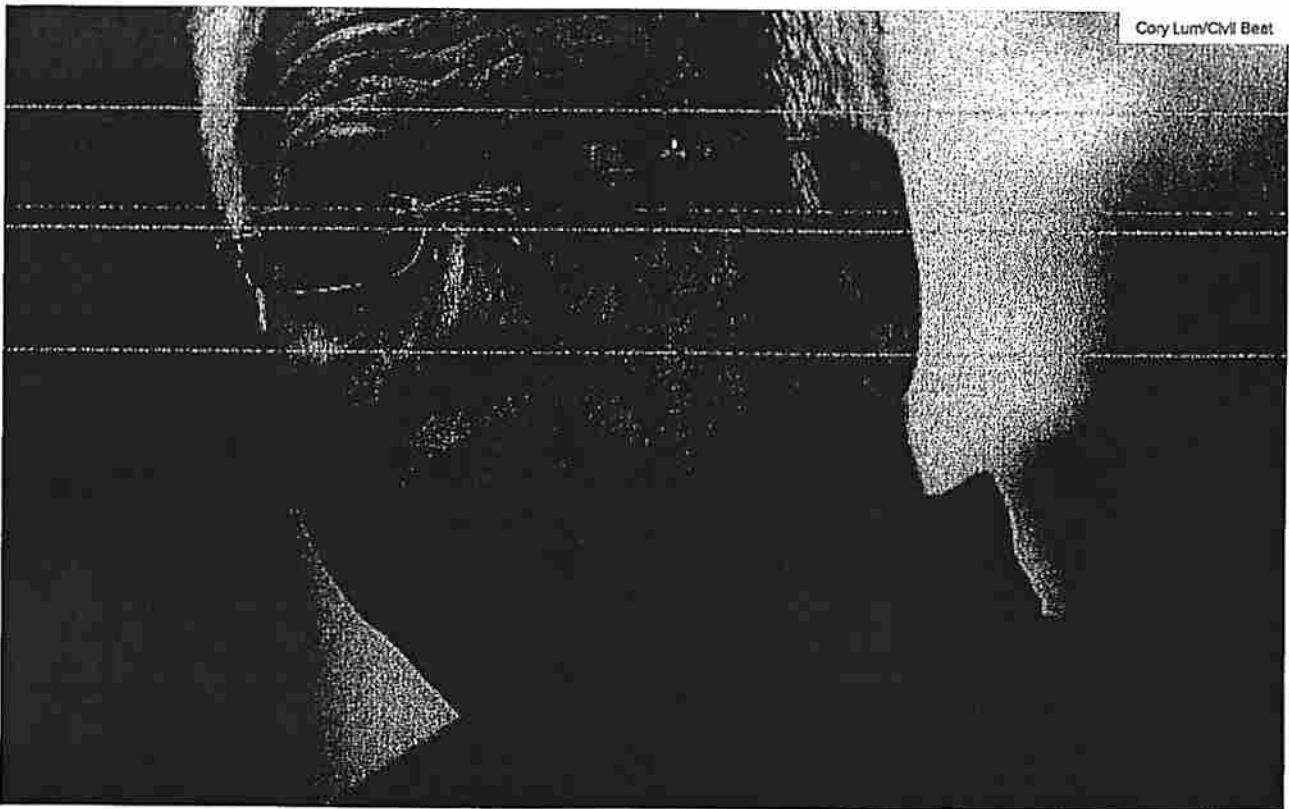
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3

Honolulu Ethics Commission Executive Director Chuck Totto was back at work Monday after a month-long suspension over allegations of improper management and possible violations of the Hawaii Whistleblower Protection Act.

City officials, including Totto, have refused to provide details about why he was placed on unpaid leave for 30 days.

Documents related to the Ethics Commission's internal investigation of Totto released Monday were heavily redacted.



Ethics Commission Executive Director Chuck Totto just came back from a 30-day suspension. With a salary of \$108,000, that time off will cost him about \$9,000.

Civil Beat obtained a copy of the outside Investigator's report through a public records request, but most of the salient facts were blacked out by city attorneys, including identifications of anyone else involved, details about the allegations and statements made by witnesses.

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reviewed the investigator's report and said the city's redactions appear to be excessive.

He added that the city so far has failed to provide a meaningful justification for withholding information under the state's public records law, and has relied on overly broad exemptions related to privacy and frustration of a legitimate government function.

"The information that's provided only tells part of the story," Black said. "There's a lot of ambiguity that's left because of the redactions."

What can be gleaned from the investigator's redacted report is that at least one person in Totto's office complained about his management style and his recent handling of an investigation of Honolulu City Council members for possible ethics violations related to lobbyist gifts and votes cast in favor of the \$6.6 billion commuter rail project.

According to the documents, an Ethics Commission employee complained that Totto seemed to be pursuing the case too doggedly despite concerns that there wasn't enough evidence or legal grounding.

That employee reportedly feared retaliation from Totto for not cooperating in pursuing the case, which was eventually dismissed by the commission.

Laurie Wong-Nowinski was the only attorney besides Totto on the five-member Ethics Commission staff at the time.

Wong-Nowinski is no longer working for the Ethics Commission. Her last day was Thursday.

The investigator's report questioned whether Totto's "ego and emotions" clouded his professional judgment and if statements he made in the office caused "unnecessary anxiety" for his staff because he was sharing his personal views about individual ethics commissioners, city attorneys and other officials in the Caldwell administration.

Another allegation focused on his recent personnel evaluation by ethics commissioners. It was alleged that Totto tried to improperly obtain a transcript of those closed-door proceedings.

Ethics Commission Chairwoman Victoria Marks declined to comment Monday on Totto's suspension or the investigator's report. She referred questions to Deputy Corporation Counsel Ernest Nomura, who is representing the Ethics Commission.

Nomura was not available for comment. Totto also did not respond to requests for comment.

The documents include a Feb. 29 letter that Marks wrote to Totto telling him of the Ethics Commission's unanimous decision to suspend him.

Marks' letter included a number of remedial actions that Totto would have to take to improve office efficiency, including developing flow charts for complaints and having staff fill out timesheets that log what they're doing every six minutes.

She also warned Totto against going after those who filed the complaint against him.

"If we learn that you retaliated in any way against any person who complained or participated in the workplace investigation, you will be disciplined further, including immediate termination," Marks said.

"We trust that on a going forward basis, you and your team will establish, develop and maintain a workplace that is productive, proactive and positive. The Commissioners will continue to look to you to set a sound, professional and positive example for the Honolulu Ethics Commission."

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drawn the ire of certain commissioners and cabinet members.

His recent suspension is the latest episode in a saga that has included an investigation of Honolulu Mayor Kirk Caldwell's inaugural luau, a high-profile disagreement with the city's top attorney and an attempt by the Ethics Commission to prevent him from talking to the media.

Read the Commission's letter and the investigator's report here:

Follow Civil Beat on Facebook and Twitter. You can also sign up for Civil Beat's free daily newsletter.

About the Author



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John Bond

PRP Caldwell "government"- Getting rid of critics, hiring away the best investigative journalists into government jobs to silence them, installing corrupt former city councilmen into key news jobs... all so the organized rail crime government can loot and rape the people without any questions asked. Honolulu "newspapers" are owned by the 1 percent.

The PRP Caldwell group has provided ZERO protection against sea level rise, storm surge, tsunamis and floods in identified flood and tsunami zones. ZERO responsibility, accountability as elected officials. City DPP is a house of prostitution for PRP Caldwell campaign fundraising. Rail PRP Money being stashed in off shore accounts like: <http://www.nytimes.com/.../leaked-documents-offshore...>

Like · Reply · 4 · 8 hrs · Edited



Choon James

WOW! This is worse than working in the Politburo! Is this for real?

If the "staff fill out timesheets that log what they're doing every six minutes," they would have to spend at least 80 times in bureaucratic tape log in each working day.

Logging in what they're doing every six minutes could easily take up 80 minutes each work day. This does not include the anticipation for the next six minutes to come :-)

Like · Reply · 3 · 2 hrs · Edited



Ed Wagner

More government coverups to protect the crooks in power.

"allegations of improper management and possible violations of the Hawaii Whistleblower Protection Act."

How can he be in violation when he IS the whistleblower of blatant government corruption?

Like · Reply · 3 · 41 mins



David C. Briscoe Jr. · Kapolei, Hawaii

Such unfortunate irony here – scandal in the office tasked with stopping scandal. It seems obvious that standards must be higher for the Ethics Commission. The suspension itself is ridiculous. Give him another job if you must, but this office must be better than this. Otherwise, how can it pass judgment on the rest of government?

Like · Reply · 22 mins

Ed Wagner

City and state ethical standards are floating away in the sewer!

Like · Reply · 3 mins



Daniel Gardner · Naval Postgraduate School

Thanks for the update Nick. Please tell us that your reporting the requirement to "log every six minutes on the time sheet" was a mistake. Leading for example to: Was that restroom break worth six minutes or a full twelve??? If the Commissioners actually believe their staff needs that degree of micro-management, probably time to wipe the slate clean and start over with a new set of Commissioners. Without knowledge of Mr. Totto's alleged transgressions, to his credit he has facilitated discussion of questionable government officials' practices throughout the State.

Like · Reply · 1 · 8 mins



Ed Wagner

It is time to throw all the bums out except Mr. Totto, the only ethical one in the bunch!

Like · Reply · Just now

Facebook Comments Plugin