

September 24, 2002

Ms. Moana M. Ramaya
Deputy Corporation Counsel
Department of the Corporation Counsel
County of Maui
200 South High Street
Wailuku, Hawaii 96793

Re: Actions on Bills and Resolutions Without Notice

Dear Ms. Ramaya:

This is in response to your facsimile transmittal to the Office of Information Practices (“OIP”) of September 14, 2002, on the above-referenced matter.

ISSUE PRESENTED

Whether a committee of the County Council for the County of Maui (“Maui County Council”), may act on a proposed bill or resolution that is not specifically mentioned in the meeting agenda.

BRIEF ANSWER

No. Chapter 92, Hawaii Revised Statutes (“Sunshine Law”) requires that notices and agendas be posted six days prior to meeting dates, and that such agendas list, among other things, all items to be considered at the meeting. Haw. Rev. Stat. § 92-7(a) (Supp. 2001). Accordingly, items that are not listed on agendas should not be discussed at meetings.

The OIP does acknowledge, however, that there may be unforeseen circumstances in which a discussion at a meeting results in the decision to draft a bill or resolution to address an agenda item. Because the proposed bill or resolution was not previously in existence, it could not have been noticed. So long as there is a sufficient nexus between what was noticed and what the discussion resulted in, there would be no violation of the Sunshine Law. This however, must be determined on a case by case inquiry. Further,

the OIP is of the opinion that this nexus should be reflected in the meeting minutes, and voting on such a bill or resolution should take place at a future meeting that is properly noticed.

Conversely, an existing or proposed bill or resolution that is already drafted, and which is not specifically listed in an agenda but is discussed at a meeting, would likely violate the Sunshine Law if it could have been foreseen that discussion on the bill or resolution would be had. While the OIP cannot speculate on the future, it is possible that discussion of an existing bill or resolution may be unforeseen prior to the meeting yet still be a natural consequence of the committee's discussion on a listed agenda item. Thus, it is possible in some circumstances that the Sunshine Law would not be violated by an unforeseen discussion of an existing bill or resolution, so long as there was a sufficient nexus to what was listed on the agenda. Such a determination must be made on a case by case inquiry.

FACTS

In an Interoffice Correspondence to the Chair of the Maui County Council dated December 12, 1999, the County of Maui Department of the Corporation Counsel ("Corporation Counsel") opined that a committee of the Maui County Council may act on a proposed bill or resolution that is not specifically listed on the agenda for the meeting at which it is acted upon. The Corporation Counsel's opinion noted that under the Sunshine Law, providing public notice and agendas of meetings is required, and this provision of "notice to the public of what will be discussed facilitates the public's ability to observe as well as participate in the government processes, thus preserving 'open government.'" The Corporation Counsel went on to qualify its opinion, saying:

The above requirement [of giving public notice of meetings and the opportunity to testify] and purpose and intent of the Sunshine Law (§92-1, HRS) must be kept in mind when determining whether a Council committee may act upon a proposed bill or resolution that was not listed as part of the agenda. The public must have been given notice that the particular item was going to be discussed and an opportunity to testify on the merits of the item. Once that has been provided, if a bill or resolution is recommended as a natural conclusion to the committee's discussion on the particular agenda item, then no further notice is required at the committee level.

A footnote at the end of the above-quoted paragraph noted that a proposed bill or resolution would be posted on the agenda for the full Council, giving the public additional notice and another opportunity to testify.

As an example of a permitted discussion, the Corporation Counsel's Interoffice Correspondence referred to a committee meeting in which the discussion resulted in the drafting of a resolution to resolve the issue discussed. Conversely, the Corporation Counsel noted an example of an improper discussion would be when the Mayor transmitted a proposed resolution for the purchase of property to a committee that was hearing testimony on the issue. The committee was advised to put the proposed resolution on a future agenda. The Corporation Counsel also noted that determinations of this type must be made on a case by case inquiry.

In a memo to the Corporation Counsel dated September 12, 2002, Mr. Ken Fukuoka, Director of the County of Maui Department of Council Services, asked the Corporation Counsel to confirm whether the criteria in its Interoffice Correspondence of December 12, 1999, should still be adhered to when determining whether a committee may act on a proposed bill or resolution not specifically noticed on an agenda. You subsequently asked the OIP for its opinion on this issue.

DISCUSSION

The policy and intent of the Sunshine Law are listed in section 92-1, Hawaii Revised Statutes:

§92-1 Declaration of policy and intent. In a democracy, the people are vested with the ultimate decision-making power. Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore, the legislature declares that it is the policy of this State that the formation and conduct of public policy – the discussions, deliberations, decisions, and action of governmental agencies – shall be conducted as openly as possible. To implement this policy the legislature declares that:

- (1) It is the intent of this part to protect the peoples' right to know;
- (2) The provisions requiring open meetings shall be liberally construed; and
- (3) The provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings.

Haw. Rev. Stat. § 92-1 (1993).

In keeping with its express policy on openness, the Sunshine Law requires that boards¹ file written notices and agendas of their meetings with the Lieutenant Governor or county clerk six calendar days prior to the meeting. Haw. Rev. Stat. § 92-7(a) (Supp. 2001). Agendas must include a list of all items to be considered at the meeting, and the date, time, and place of the meeting. Id. In light of this clear provision, boards should not discuss items at meetings unless such items have been properly listed on an agenda.

The OIP acknowledges that in unusual circumstances there may be times when a bill or resolution is not specifically listed as an agenda item, and is not yet written, but is proposed at a meeting as a natural consequence of the discussions on an item that was properly listed on the agenda. Agendas are posted so that members of the public may be able to prepare meaningful testimony on items before a board. Discussion of an item not properly agendized would prevent the public from preparing meaningful testimony. Therefore, the OIP advises there must be a sufficient nexus between the item on the agenda and the direction the discussion at the meeting ultimately takes to allow the public to present meaningful testimony. In other words, the discussion at the meeting should not stray beyond the items listed on the agenda. The minutes of the meeting should show this nexus between what is on the agenda and what is discussed at the meeting. If there is insufficient nexus, the bill or resolution should not be discussed until it is properly noticed. Whether such discussions are appropriate should be determined on a case by case inquiry. Further, the OIP recommends that voting on a proposed bill or resolution take place only at a properly noticed future meeting to ensure that the public has sufficient opportunity to prepare testimony.

¹ A "board" is "any agency, board, commission, authority, or committee of the State or its political subdivisions which is created by constitution, statute, rule, or executive order, to have supervision, control, jurisdiction or advisory power over specific matters and which is required to conduct meetings and to take official actions." Haw. Rev. Stat. § 92-2 (1993).

If discussion of an existing or proposed bill or resolution that has already been drafted is a natural result of discussions held at a board meeting on properly noticed items, then it is likely that the discussion could have been anticipated far enough in advance for the item to be placed on an agenda. If a board had reason to believe an item might be raised at a meeting and did not list that item on the agenda, the item should not be discussed.

It is also possible for discussion of an existing bill or resolution to be a natural consequence of the committee's discussion on a listed agenda item, but that such a discussion was not anticipated in advance. Thus, it is possible that discussion of the non-noticed item would not violate the Sunshine Law, so long as the non-noticed item could not have been anticipated in time to notice it, and there was a sufficient nexus to what was listed on the agenda. Such a determination must be made on a case by case inquiry.

The OIP also emphasizes that boards subject to the Sunshine Law should make every effort to ensure that everything that will be discussed at a meeting is listed on the agenda, as the law requires. The policy and intent of the Sunshine Law are clearly set forth at section 92-1, Hawaii Revised Statutes, and all boards should keep these in mind at all times. In particular, because section 92-1, Hawaii Revised Statutes, requires that the provisions in the Sunshine Law on openness be liberally construed, the OIP strongly recommends that boards err on the side of caution if discussion on an agenda item digresses to an item not on the agenda.

CONCLUSION

Because the Sunshine Law requires that notices and agendas be posted six days prior to meeting dates, and that such agendas list, among other things, all items to be considered at the meeting, items that are not listed on a meeting agenda should not be discussed at the meeting. Haw. Rev. Stat. § 92-7(a) (Supp. 2001).

The OIP acknowledges that there may be unforeseen circumstances in which a discussion at a meeting results in the decision to draft a bill or resolution to address an agenda item. So long as there is a sufficient nexus between what was noticed and what the discussion resulted in, there would be no violation of the Sunshine Law. This however, must be determined on a

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case by case inquiry. Further, minutes for the meeting should reflect this nexus, and voting on such a bill or resolution should take place at a future meeting that is properly noticed.

Discussion at a meeting of an existing bill or resolution not specifically listed in the agenda would likely violate the Sunshine Law if the discussion on the bill or resolution could have been foreseen. It is also possible that discussion of an existing bill or resolution could be a natural consequence of the committee's discussion on a listed agenda item but not foreseen at the time the agenda was posted. Thus, it is possible that such a discussion would not violate the Sunshine Law, so long as the discussion was not foreseeable, and so long as there was a sufficient nexus to what was listed on the agenda. Such a determination must be made on a case by case inquiry.

Please feel free to contact me if you have any questions.

Very truly yours,

Carlotta Dias
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

CMD: ankd