August 27, 2004

The Honorable Les Ihara, Jr.
State Senator, Ninth District
State Capitol, Room 217
Honolulu, Hawaii 96813

The Honorable Peter T. Young
Chairperson, Board of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

Re: Briefing on Contested Cases and Executive Session to Protect Privacy

Dear Senator Ihara and Chairperson Young:

On January 14, 2004, Senator Les Ihara, Jr. asked the Office of Information Practices ("OIP") to investigate possible violations of the Sunshine Law, part I of chapter 92, Hawaii Revised Statutes ("HRS"), by the Board of Land and Natural Resources ("Board"). Senator Ihara's request is based upon an article from the January 2004 issue of Environment Hawaii, entitled "Odd Executive Sessions," which reported two potential violations of the Sunshine Law during and after the Board's December meeting.

ISSUES PRESENTED

I. Is a briefing on contested cases by a board's attorney and other staff part of that board's exercise of its adjudicatory functions and, therefore, not subject to the Sunshine Law?

II. May a board hold an executive session to permit an alleged violator's attorney to present information regarding personal problems of the alleged violator because the alleged violation "requires the consideration of information that must be kept confidential pursuant to a state or federal law," specifically, the privacy provision of the Hawaii Constitution?

BRIEF ANSWERS

I. Yes. Even under a narrow reading of the term "adjudicatory functions," a staff briefing for a board regarding pending contested cases before that board is an adjudicatory function exercised by that board and thus not subject to the Sunshine Law.

II. No. When a board is charged with taking action regarding violations of state law, if an alleged violator wishes to offer information about personal problems as a defense or mitigating factor for the alleged violation, then the public has a strong interest in knowing the information that was presented to the board. It is OIP's opinion that the privacy provision of the Hawaii Constitution does not require a board to keep such information confidential. Thus, a Board may not hold an executive meeting to receive information about an alleged violator's personal problems in confidence.

FACTS

In January, 2004, Environment Hawaii reported that the Board had convened five executive meetings and questioned the propriety of two of the meetings. The first alleged violation involves a closed meeting between the Board, Department of Land and Natural Resources staff, and a deputy attorney general, for which no public notice was given. Ms. Teresa Dawson, the article's author, was later told by a staff member that the meeting had been a briefing for the board on specific contested cases.

The second potential violation involves an executive session for which no purpose was publicly stated, and which did not appear to fall under one of the executive session purposes listed in section 92-5, HRS. According to Ms. Dawson, during the December meeting the Board voted to go into an unanticipated executive session on item D-14 to discuss legal issues relating to alleged violations with the alleged violator's attorney, Mr. John Carroll. Ms. Dawson's transcription indicated that the Board did not state the purpose listed in section 92-5, HRS, for going into executive session:

> Land Division administrator Deirdre Mamiya: The partnership owns the parcel this occurred on...Our staff was talking to the family members, they have no control over Mr. Andrade....
> McCrory: They have no control over him?...Let them go after Mr. Andrade.
> John Carroll: I really would like to request an executive session for this issue if you don't mind. Unless that's too time consuming. I brought file copy which would answer your questions....
> Mamiya: …. Normally we would have run this through HOAPS. It was just because Mr. [Alfred] Andrade - there are certain circumstances which they [members of the Alfred J. Andrade Ltd. Partnership] do not want to make public about Mr. Andrade and how they are handling that situation.
> Kaua`i board member Lynn McCrory: I move we go into executive session.
> At-Large member Tim Johns: Seconded.
> Chair Peter Young: All those in favor?
> All: Aye.
> Young: We'll be back shortly.

DISCUSSION

I. SUNSHINE LAW EXCEPTION FOR ADJUDICATORY FUNCTIONS

The Sunshine Law requires a board to provide notice of all meetings. Haw. Rev. Stat. § 92-7(a) (Supp. 2003). However, it is the Board's contention that the briefing on contested cases was not subject to the Sunshine Law's notice requirements, because it fell under the exception to the Sunshine Law created by

section 92-6, HRS, for "adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9." According to the Board, there was a briefing between the Board and its counsel, "related to contested cases before the Board." Ms. Dawson's account in her article (on which this request for investigation was based) likewise states that the briefing was by the Board's staff and deputy attorney general, "on contested cases. . . ."

Thus, the question presented is whether a briefing of the board by its staff and attorney, regarding a contested case before the board, is part of that board's exercise of its adjudicatory functions. The Sunshine Law requires a liberal construction of the law in favor of public access and a strict construction against closed meetings. Haw. Rev. Stat. § 92-1(1) and (2) (1993). OIP must therefore use a narrow interpretation of what constitutes an adjudicatory function when determining whether such a briefing is an adjudicatory function.

The Hawaii Supreme Court has applied the adjudicatory function exception in the specific context of a board's closed deliberations, but has not spoken regarding whether a briefing by staff is an adjudicatory function. See Chang v. Planning Commission, 64 Haw. 431, 442-443, 643 P. 2d 55, 63-64 (1982).[1] The Senate Judiciary Committee report regarding section 92-6, HRS, provides some additional guidance:

> Quasi-judicial boards in the exercise of adjudicatory functions are . . . specifically exempted because closed deliberation is traditional in quasi-judicial proceedings. Your Committee sees no objection to maintaining this practice, as availability of procedural safeguards, transcripts, written decisions, and the appellate process, all work to permit adequate public scrutiny as well as insure fairness and the required observance of constitutional rights.

[1] In another case involving section 92-6, HRS, Outdoor Circle v. Land Use Commission, 4 Haw. App. 633, 675 P. 2d 784 (1983), the court reviewed actions by the Land Use Commission, to which by statute the Sunshine Law "shall apply to require open deliberation of [its] adjudicatory functions." Haw. Rev. Stat. § 92-6(b) (1993). Because the statute required that the Land Use Commission's adjudicatory functions be conducted openly, the court explicitly used a liberal construction of the statute to determine that the adoption of conclusions of law were part of the board's adjudicatory functions. Outdoor Circle, supra, at 4 Haw. App. 641-2, 675 P. 2d 790-1. As the term "adjudicatory functions" must be strictly construed for other boards (for which the Sunshine Law does not apply to adjudicatory functions), the Outdoor Circle opinion offers only limited guidance here.

Senate Stand. Comm. Rep. No. 878, 8th Haw. Leg., 1st Sess., S.J. 1177, 1178 (1975). Although the only specific type of contested case activity mentioned as being traditionally closed is deliberation, the report also indicates the Committee's belief that the contested case process as a whole includes sufficient safeguards of the public interest to make application of the Sunshine Law unnecessary. We further note that, even if a briefing takes place before the hearing on a contested case, board members may discuss some aspect of the case during the briefing: it is impracticable to draw a bright line between the briefing a board's staff and attorney provides it and the board's own deliberation regarding the merits of a case.

Although the legislature clearly had closed deliberations in mind as a reason for the exception, it did not limit the exception to a board's deliberations, as statutes in some other states do.[2] Considering that the exception in Hawaii law is not limited to deliberations and considering as well the legislature's belief that the contested case process as a whole includes sufficient safeguards for the public interest, OIP concludes that, even under a narrow reading of the term "adjudicatory functions," a staff briefing for a board regarding pending contested cases before that board is part of the adjudicatory function exercised by that board and thus not subject to the Sunshine Law.

II. CONSTITUTIONAL RIGHT TO PRIVACY AS BASIS FOR EXECUTIVE MEETING

In the second incident brought to OIP's attention, the Board failed to announce the purpose of an executive session before going into executive session. The Board's reason for closing the meeting was apparently to permit an alleged violator's attorney to present sensitive information regarding the alleged violator, as a mitigating factor to influence the Board's decision regarding an alleged violation. The Board has represented that it agreed to receive the information in an

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[2] See Kennedy v. Upper Milford Township Zoning Hearing, 575 Pa. 105 at 131 n.33, 834 A. 2d 1104 at 1120 n. 33, (quoting state statutes with an open meetings exception for quasi-judicial deliberations, including Alaska Stat. § 44.62.310(d)(1) (1980) (exempting quasi-judicial bodies "when holding a meeting *solely to make a decision* in an adjudicatory proceeding"); Kan. Stat. § 75-4318(f)(1) ("(f) The provisions of the open meetings law shall not apply: (1) To any administrative body that is authorized by law to exercise quasi-judicial functions *when such body is deliberating matters relating to a decision* involving such quasi-judicial functions"); Or. Rev. Stat. § 192.690(a) ("shall not apply to the *deliberations* of . . . state agencies conducting hearings on contested cases"); W. Va. Code § 6-9A-2(4) (definition of "meeting" excludes "(A) Any meeting *for the purpose of making an adjudicatory decision* in any quasi-judicial, administrative or court of claims proceeding.")) (Emphases added).

executive meeting to avoid potential embarrassment or distress to the alleged violator or his family by the public disclosure of the information.

A. Announcement of Executive Session Purpose

A board cannot go into executive session without making a public announcement of the reason for holding the executive session. Haw. Rev. Stat. § 92-4 (1993). Accordingly, the procedure employed by the Board in convening the executive meeting at issue was not in compliance with the statutory requirements. OIP reminds the Board that before convening an executive meeting it must publicly announce its reasons for closing the meeting. See id. The only purposes for which a board may go into executive session are those listed in section 92-5(a), HRS:

> A board may hold a meeting closed to the public pursuant to section 92-4 for one or more of the following purposes:
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> (1) To consider and evaluate personal information relating to individuals applying for professional or vocational licenses cited in section 26-9 or both;
> (2) To consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved; provided that if the individual concerned requests an open meeting, an open meeting shall be held;
> (3) To deliberate concerning the authority of persons designated by the board to conduct labor negotiations or to negotiate the acquisition of public property, or during the conduct of such negotiations;
> (4) To consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities;
> (5) To investigate proceedings regarding criminal misconduct;
> (6) To consider sensitive matters related to public safety or security;
> (7) To consider matters relating to the solicitation and acceptance of private donations; and

> (8) To deliberate or make a decision upon a matter that requires the consideration of information that must be kept confidential pursuant to a state or federal law, or a court order.

Haw. Rev. Stat. § 92-5(a) (Supp. 2003). A board may not deliberate or make a decision in executive session on "matters not directly related to" the section 92-5(a), HRS, purposes. Haw. Rev. Stat. § 92-5(b) (Supp. 2003). Paragraph (4) of section 92-5(a), HRS, which allows an executive session to consult with the board's attorney, protects a board's ability to consult in confidence with its own legal counsel. See OIP Op. Ltr. No. 03-12 at 7-10 (July 14, 2003). It does not apply to a board's consultation with the attorney for another party.

In response to a letter from OIP regarding the executive session with no announced purpose, the Board stated that the executive session with the alleged violator's attorney was justified by paragraph 92-5(a)(8), HRS, on the theory that Hawaii's constitutional privacy protection[3] required the Board to keep confidential the information about the alleged violator's personal problems. When a matter before a board requires the board to consider information whose disclosure would violate Hawaii's constitution, then the board may properly hold an executive session under section 92-5(a)(8), HRS. The question, however, is whether disclosure of the information at issue here would have violated Hawaii's constitutional privacy protection as the Board argues.

B. Constitutional Right to Privacy

The Board argues, correctly, that highly personal and intimate information is typically private. The Board does not specify what the information presented to it was, beyond stating that it related to personal problems of the alleged violator, but we will assume that it was in fact highly personal and intimate information that would carry a significant privacy interest. Looking by analogy to the balance of the public access interest against an individual's significant privacy interest in the context of the Uniform Information Practices Act (Modified), chapter 92F, HRS,[4] the

[3] "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." Haw. Const. Art. I, § 6.

[4] The balance in the UIPA between "the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy," is explicitly based on a "recognition of the right of the people to privacy, as embodied in section 6 and section 7 of the Constitution of the State of Hawaii." Haw. Rev. Stat. § 92F-2 (1993). OIP therefore agrees with the Board

Board argues that the public interest here is not high because the alleged violator was not a public employee and was a private citizen. Thus, it is the Board's contention that public disclosure of this information would be a violation of the alleged violator's right to privacy, so the Hawaii Constitution *required* the board to receive the information in confidence notwithstanding the Sunshine Law.

However, in arguing that the public access interest in the information is minimal, the Board entirely fails to address the fact that this information was being provided by the alleged violator's attorney as part of his defense to an alleged violation of state law. The public interest in the fair and even-handed application of the law is so strong that even in the absence of a specific statute requiring openness (such as the Sunshine Law), open trials are the societal norm. "[S]o deeply ingrained has been our traditional mistrust for secret trials . . . that the general policy of open trials has become firmly embedded in our system of jurisprudence." Gannett Pacific Corp. v. Richardson, 59 Haw. 224, 228, 580 P. 2d 49, 53-54 (1978) (citation omitted), quoted in State v. Ortiz, 91 Haw. 181, 190, 981 P. 2d 1127, 1136 (Haw. Sup. Ct. 1999).

As many courts have stated, the public interest in the fair application of the law is served by public access to legal proceedings. E.g. Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 508, 104 S. Ct. 819, 823, 78 L. Ed. 2d 629, 638 (1984) ("[c]losed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569-571 (1980), quoted in Press-Enterprise, supra, 464 U.S. 501, 508, 104 S. Ct. 819, 823, 78 L. Ed. 2d 629, 638 (regarding the public interest in open trials, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing"); Gannett, supra, at 59 Haw. 228, 580 P. 2d 54 (citations omitted) ("while the defendant is entitled as of right to a public trial, he is not entitled as of right to a private trial"); State v. Hashimoto, 47 Haw. 185, 200, 389 P. 2d 146, 155 (1963) quoted in Gannett, supra, (openness of court proceedings "serves as a safeguard of the integrity of our courts").

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that the balance between individual privacy and public access struck by the UIPA is an appropriate way to analyze whether the information falls within Hawaii's constitutional right to privacy and be considered in an executive meeting.

We see no reason that the public access interest in governmental application of state laws would be lessened when those laws are applied in the course of a board meeting subject to the Sunshine Law (which itself requires open meetings) rather than a judicial setting. In a judicial setting, an alleged violator cannot close the courtroom because he wishes to present a defense that includes embarrassing personal information. Similarly, when a board is charged with taking action regarding violations of state law, if an alleged violator offers information about personal problems as a defense or mitigating factor for the alleged violation, then the public has a strong interest in knowing the information that the board had before it in making a decision. Based on the analogy to the UIPA's balance between privacy and the public access interest, it is OIP's opinion that the public access interest outweighs an individual's significant privacy interest in such information, and therefore the privacy provision of the Hawaii Constitution does not require a board to keep such information confidential. Thus, it is OIP's opinion that the Sunshine Law did not permit the Board to hold an executive meeting to receive information about the alleged violator's personal problems in confidence.

CONCLUSION

Section 92-6, HRS, provides an exception to the Sunshine Law for "adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9." Even under a narrow reading of the term "adjudicatory functions," a staff briefing for a board regarding pending contested cases before that board is an adjudicatory function exercised by that board and thus not subject to the Sunshine Law. The Board thus did not violate the Sunshine Law through its closed, unannounced briefing of the Board by its staff and attorney.

With respect to its executive session to allow an alleged violator's attorney to present information regarding the alleged violator's personal problems, the Board violated the Sunshine Law in two ways. First, the Board failed to publicly announce the reason for holding the executive session, as required by section 92-4, HRS. Second, the Board's reason for holding the executive session was not a permitted purpose listed in section 92-5(a), HRS. The right to privacy under the Hawaii Constitution does not require a board that is considering an alleged violation of state law to keep information about the alleged violator's personal

problems confidential, when that information is presented in defense of the alleged violator. Thus, paragraph 92-5(a)(8) does not allow a Board to hold an executive meeting to receive such information in confidence.

Very truly yours,

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APPROVED:

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Director

JZB:cly

cc: Linda L.W. Chow, Esq.
Ms. Teresa Dawson