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VIA FACSIMILE NO. 527-5737

The Honorable Donovan M. Dela Cruz
Chairman, City Council
City and County of Honolulu
530 S. King Street, 2nd Floor
Honolulu, HI 96813

Re: Serial One-On-One Communications

Dear Council Chair Dela Cruz:

You have requested that we reconsider our opinion to you that part I of chapter 92, Hawaii Revised Statutes (the "Sunshine Law"), does not allow members of the City Council (the "Council") to discuss the same council business through a series of private one-on-one discussions. To clarify our interpretation of the statute for you and other boards that are subject to the Sunshine Law, we are responding to your letter by way of a formal opinion letter.

ISSUE PRESENTED

Whether two council members who have discussed council business[1] between themselves may discuss the same council business with other council members through a series of one-on-one discussions.

[1] To describe the discussions, deliberations and decisions that require compliance with the Sunshine Law, we coined the term "board business" (or, in this case, "council business"), which we define as those matters over which the board has supervision, control, jurisdiction, or advisory power that are currently before the board or that are reasonably anticipated to come before the board in the foreseeable future for discussion, deliberation, and action. See OIP Op. Ltr. No. 01-01. The discussions, deliberations, and decisions concerning "board business" must be conducted in a properly noticed meeting unless there is an exception in the statute that allows the board members to discuss, deliberate or decide the matter outside of a meeting.

BRIEF ANSWER

No. While the Sunshine Law allows two council members to discuss council business between themselves, the statute does not permit either of those council members to then discuss the same council business with any other council members outside of a properly noticed meeting. Such serial communication is contrary to the letter, the intent and the spirit of the statute.

FACTUAL BACKGROUND

On July 7, 2005, seven members of the Council co-introduced Resolution 05-243 (the "Resolution") for the purpose of reorganizing the Council's standing committees, including the chairmanships of certain committees.[2] The Resolution listed each of the Council's standing committees and identified the proposed chairs, vice-chairs and members of those committees. The Resolution was included on the Council's agenda for its Special Meeting held on July 13, 2005.[3]

On July 8, the Honolulu Star-Bulletin and the Honolulu Advertiser reported that the Council was reorganizing its committees. Based upon statements attributed to you and other council members, it appeared that, although the Resolution had yet to be considered at a public meeting, the reorganization of the committees had already been discussed by a majority of the Council and that a majority of the Council had already decided to vote to approve the Resolution. Consequently, we contacted your office for information about the Resolution, including whether it was council business. Among other things, we were advised by your office that you had discussed the matter in a series of one-on-one discussions with the majority of the other council members.[4]

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[2] In our letter to you dated July 12, 2005, we raised our concern about multiple council members introducing the Resolution. As we explained, at a minimum, it appears that, by asking other council members to co-introduce the Resolution, the Resolution's author essentially "polled" the other council members as to their preliminary inclinations regarding the proposed reorganization of the committees. Because the Sunshine Law is intended to protect the public's ability to participate in and scrutinize the Council's business, council members may not decide council business, even if the decision is preliminary and subject to change, outside of a properly noticed meeting. See OIP Op. Ltr. No. 04-04. While that issue is beyond the scope of this letter, we strongly caution you that the practice of allowing multiple council members to introduce bills, resolutions and other business may, in certain circumstances, violate the Sunshine Law.

[3] We understand that the Rules of the City Council, in effect at that time, required that the Council establish its committees, including the organization and membership of those committees, by resolution. Accordingly, the reorganization of the Council's committees, which had to be decided by the entire Council, was council business that could not be conducted outside of a properly noticed meeting unless allowed by law.

[4] We have repeatedly requested information from you about your communications with other council members, including the number of council members that you spoke with through the

By letter dated July 12, we advised you of our opinion that, because reorganization of the committees was council business, council members could discuss specifics about the reorganization only in a public meeting unless a permitted interaction or other statutory exception allowed the council members to discuss the matter privately. We noted that, although one of the permitted interactions allows two council members to privately discuss council business, those two council members cannot then discuss the same council business with any other council member outside of a meeting. To protect against the Council's subsequent actions being declared void and to cure the apparent violations, we recommended that the Council completely consider the Resolution at the meeting:

> Because no firm decision appears to have been previously made, we believe that the Council may cure or mitigate the injury to the public's right to know in this instance by completely considering the Resolution at the July 13 meeting. **This means that you and the other council members should fully discuss any information or argument previously heard and considered in deciding whether to support or oppose the reorganization of the Council's standing committees.** In our opinion, this would best allow the public to scrutinize and to participate in the Council's consideration of this decision in the manner in which the public is entitled under the Sunshine Law.

Emphasis added. The Council, however, elected to disregard our recommendation. Instead, at its Special Meeting on July 13, the Council approved the Resolution without any substantive discussion.[5]

At your request, we met with you, Corporation Counsel Carrie K.S. Okinaga, First Deputy Corporation Counsel Donna M. Woo, Deputy Corporation Counsel Diane T. Kawauchi, and Diane E. Hosaka, director of the Office of Council Services, on July 14 to discuss, among other things, our opinion that the Sunshine Law does

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serial discussions. Given that you have not responded to our request for additional information about your communications with other council members, we must assume that such one-on-one discussion did occur and, therefore, base this opinion on that assumption. We also note that you have advised us that you and the other council members believe that serial one-on-one discussions are allowed under the Sunshine Law and intend to continue discussing council business between yourselves through such private serial discussions.

[5] Only Councilmember Nester Garcia spoke regarding the Resolution. His statements, however, did not relate to the substance of the Resolution. Instead, Councilmember Garcia expressed his appreciation for being allowed to serve as chairman of the Committee on Transportation and as vice-chairman of the Committee on Budget and his eagerness to work with certain people as the new chair of the Committee on Parks. Rather than cure any earlier Sunshine Law violation, Councilmember Garcia's statements served to confirm that the reorganization of the Council's committees had been discussed and decided prior to the meeting.

not allow serial one-on-one discussions between council members about the same council business. Subsequent to our meeting, we received correspondence from you, attaching a memorandum to you from the Office of Council Services, regarding the serial communication issue. You have also informed us that it is your position and the position of the other council members that the Sunshine Law allows the Council to have these serial one-on-one discussions. As discussed in more detail below, we do not find either the arguments raised during our meeting or the memorandum persuasive.

DISCUSSION

The explicit language of our statute, both in its general provisions and its specific provisions, clearly prohibits serial one-on-one discussions between council members about the same council business. The legislature expressly declared its policy and intent "'that the formation and conduct of public policy - the discussions, deliberations, decisions, and actions of government agencies - shall be conducted as openly as possible' in order to protect the people's right to know . . . ." Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 383 (1993) (quoting Haw. Rev. Stat. § 92-1 (1993)). To effectuate this policy and intent, the legislature directed that "[t]he provisions requiring open meetings shall be liberally construed" and "[t]he provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings." Haw. Rev. Stat. § 92-1.

Based upon the legislature's expressed policy and intent, we -- and the Department of the Attorney General (the "AG") before us -- have consistently opined that, under the Sunshine Law, board members may discuss board business only in a properly noticed public meeting unless the statute expressly allows otherwise. See Op. Att'y Gen. No. 85-27 (even if quorum not present, committee may be prohibited from discussing official board business if notice requirements not met). Consistent with this interpretation, the legislature amended the Sunshine Law in 1996 to expressly allow certain "permitted interactions," i.e., instances when board members can discuss or consider board business outside of a meeting, without notice and without public participation. See Haw. Rev. Stat. § 92-2.5 (Supp. 2004).

In the preamble to the act that added the permitted interactions, the legislature recognized "that there are instances when it is appropriate for interactions between board members to occur" outside of a public meeting. Act 267, 18th Leg., 1996 Reg. Sess. The legislature thus stated that the purpose of the act was, in part, to specify those instances and occasions in which board members could discuss certain board matters **"in a manner that does not undermine the essence of open government."** Id. (Emphasis added).

The legislature accordingly added a permitted interaction specifying that "**[t]wo** members of a board may communicate or interact privately between themselves to gather information from each other about official board matters to

enable them to perform their duties faithfully, as long as no commitment to vote is made or sought." Id. (Emphasis added). At the same time, however, the legislature specifically addressed any potential misuse by expressly prohibiting board members from using the permitted interactions to defeat the statute's purpose of protecting the public's right to know, adding "permitted interactions" to the list of methods under section 92-5(b) that shall not be used to circumvent either the requirements or the spirit of the Sunshine Law:

> No chance meeting, **permitted interaction**, or electronic communication shall be used to circumvent the spirit or requirements of this part to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power.

Haw. Rev. Stat. § 92-5(b) (emphasis added).

Indeed, the AG has until recently interpreted section 92-2.5(a) along with 92-5(b) to allow two board members to discuss board matters only in general, as opposed to specific, terms. The AG's interpretation, thus, would prohibit even two council members from discussing the committee reorganizations outside of a public meeting. Because we read section 92-2.5(a) to allow two board members to discuss official board business in specific terms, we sought an amendment to section 92-2.5(a) in this last legislative session in order to eliminate any confusion over the extent to which **two** board members could carry on a discussion regarding official board business. See Act 84, 23rd Leg., 2005 Reg. Sess. Specifically, the legislature passed the amendment to clarify that **two** board members may discuss specific, official board business as long as no decision is made. Section 92-2.5(a) was thus amended to read as follows:

> **Two** members of a board may discuss between themselves matters relating to official board business to enable them to perform their duties faithfully, as long as no commitment to vote is made or sought and the **two** members do not constitute a quorum of their board.

Act 84, 23rd Leg., 2005 Reg. Sess. (Emphasis added). The amendment further emphasizes that the two board members cannot constitute a quorum of their board to again direct, consistent with the legislature's directive in section 92-5(b), that this permitted interaction not be used to circumvent the Sunshine Law's requirements that board business be deliberated and decided in a public meeting.

Notwithstanding the legislature's explicit directives and the AG and OIP's opinion construing section 92-2.5(a), the Council has decided to liberally construe the exception provided by section 92-2.5(a) in order to use it to allow council members to discuss the same council business between a majority of its members through a series of one-on-one discussions so long as there are only two council

members present at any one discussion. To interpret this exception to allow the council members to discuss, in a series of conversations, what they could not do together outside of a noticed public meeting renders the specific language of the provisions discussed above as well as the very essence of the Sunshine Law meaningless. See Jones v. Tanzler, 238 So.2d 91, 93 (Fla. 1970) ("It is elementary that officials cannot do indirectly what they are prevented from doing directly"); State ex rel. Cincinnati Post v. City of Cincinnati, 668 N.E.2d 903, 906 (Ohio 1996) ("To find . . . game of 'legislative musical chairs' is allowable under the Sunshine Law would be to ignore the legislative intent of the statute, disregard its evident purpose, and allow an absurd result"). Our statute's very purpose is to protect the public's right to be present during the Council's discussion of council business, with the exception of very specific instances provided, which the legislature expressly directed "shall be strictly construed against closed meetings." Haw. Rev. Stat. § 92-1. Serial communications could not be a clearer example of the use of a permitted interaction to circumvent both the letter and the spirit of the Sunshine Law in direct contravention to section 92-5(b).

Moreover, you have stated the Council's belief that, absent a commitment to vote, the public's interest is unharmed by the serial discussions. This contention misunderstands the nature of the harm that the Sunshine Law is meant to protect against. The harm is not the damage that may ultimately result from the actual decision made. Rather, the harm is to the public's ability to witness and participate in the process: The express premise of the Sunshine Law is that "[o]pening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest." Haw. Rev. Stat. § 92-1. Accordingly, where the Council limits the public's right to scrutinize its actions, including its discussions, the public is inherently harmed.

In reorganizing its committees, the council members privately discussed council business and thereafter approved the Resolution without any substantive discussion or deliberation, giving the public no understanding of, for instance, the reasons for the reorganization. The Council thus simply "rubber stamped" a decision that had obviously been made prior to the meeting through private one-on-one discussions. It is our opinion that your discussions with other council members about the reorganization violated the Sunshine Law because it deprived the public of its right to hear the Council's discussion and, therefore, that the Council's approval of the Resolution and matters flowing therefrom are voidable. Haw. Rev. Stat. § 92-11.

While the specific issue here, namely the committee reorganizations, may rightly be a "housekeeping" matter of little public import, it is the broader issue that the council's actions raised that must be addressed. For example, under the Council's interpretation, council members could discuss increasing property taxes or the location of Oahu's landfill outside of a meeting -- without public notice, without public participation in the discussion and without minutes reflecting the substance

of the discussion -- and, as you did with the Resolution, could then decide the matter at a Council meeting without any discussion.[6] While you claim that such a scenario is unrealistic, we emphasize that the law does not provide boards discretion on this matter. Where an exception does not exist to discuss council business outside of a meeting, the Sunshine Law is absolute. The public has a right to participate and to hear all of the Council's discussions, deliberations and actions taken in a properly noticed meeting.

Accordingly, it is our duty to advise the Council that its asserted interpretation of the Sunshine Law to allow council members to discuss council business through a series of discussions outside of a meeting as long as no more than two members are present at each discussion is contrary to the letter, intent and spirit of the Sunshine Law. See Haw. Rev. Stat. § 92F-42(18) (Supp. 2004). As explained above, such an interpretation flies in the face of the express language as well as the legislature's explicit policy and intent of the Sunshine Law and would render much of the law's principal provisions meaningless.

Because the language of our statute is clear, cited cases in the Office of Council Services' memorandum to you provide no guidance in interpreting our statute. We note in passing, however, that the cases are legally distinguishable and represent a minority opinion among the jurisdictions.[7] The majority of jurisdictions in fact reject serial communications as being counter to the very purpose of their respective open meetings laws. See, e.g., Booth Newspapers v. Wyoming City Council, 425 N.W.2d 695, 700-01 (Mich. App. 1988) (luncheon meetings with less

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[6] In rejecting the argument that California's public meetings law applied only to "formal" meetings, the California appellate court noted:

> An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices.

Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, 69 Cal. Rptr. 480, 487 (Cal. App. 1968).

[7] In fact, three of the four cases cited in the memorandum appear to support our finding that the series of one-on-one discussions that you had with other council members is prohibited by the statute. The courts there held that serial discussions did not violate the open meetings laws in question because there was no evidence that the boards had intended to avoid the public meeting process through the serial discussions. Moberg v. Indep. Sch. Dist. No. 281, 336 N.W.2d 510, 518 (Minn. 1983); Hispanic Educ. Comm. v. Houston Indep. Sch. Dist., 886 F. Supp. 606, 610 (S.D. Houston 1994); Harris County Emergency Serv. Dist. #1 v. Harris County Emergency Corps, 999 S.W.2d 163, 169 (Tex. App. 1999). Implicit in those opinions, thus, is the prohibition of serial discussions designed to circumvent the public's right to participate in the board's discussions, deliberations and decisions.

than a quorum to get a "non-binding sense of direction" from other council members "circumvent[ed] the legislative principles as well as the overall objective of the [Open Meetings Act] to promote openness and accountability in government."); Jones v. Tanzler, 238 So.2d at 93 ("statute should not be circumvented by . . . small individual gatherings wherein public officials . . . may reach decisions in private on matters which may foreseeably affect the public."); State ex rel. Cincinnati Post v. City of Cincinnati, 668 N.E.2d 903; Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 69 Cal. Rptr. 480 (Cal. App. 1968); Okla. Op. Atty. Gen. 81-69 (Apr. 2,1981) ("Permitting a single member of the governing body to obtain a consensus or vote of that body by privately meeting alone with each member, would be to condone decision-making by public bodies in secret, which is the very evil against which the Open Meeting Act is directed."); Ky. Op. Atty. Gen. 00-OMD-63 (2000) (series of less than a quorum meetings about public business "deprived [the public] of an opportunity to observe their discussion of these matters in contravention of the principle, codified at KRS 61.800, that 'the formation of public policy is public business and shall not be conducted in secret . . . .'").

CONCLUSION

Given the explicit language and purpose of our statute, we believe that section 92-2.5(a) statute cannot be read to allow a board to use a series of one-on-one discussions to discuss the same council business with more than one other council member outside of a meeting. Whether intended or not, use of section 92-2.5(a) to conduct serial one-on-one communications clearly circumvents the spirit and requirements of the Sunshine Law in direct violation of section 92-5(b).

Very truly yours,

Leslie H. Kondo
Director

cc: The Honorable Ann Kobayashi (via facsimile 523-4220)
The Honorable Romy M. Cachola (via facsimile 523-4220)
The Honorable Todd K. Apo (via facsimile 523-4220)
The Honorable Barbara Marshall (via facsimile 523-4220)
The Honorable Charles K. Djou (via facsimile 523-4220)
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The Honorable Gary Okino (via facsimile 523-4220)
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