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The Office of Information Practices (OIP) is authorized to resolve complaints concerning compliance with or applicability of the Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes (HRS), pursuant to sections 92-1.5 and 92F-42(18), HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

OPINION

Requesters: Kaleo Oiwi, Donovan Preza, Robert Freitas, Jr., Jim Smith, Tammie Perreira, Nanci Munroe
Board: Board of Trustees, Office of Hawaiian Affairs
Date: November 7, 2014
Subject: Polling Board Members; Testimony on Executive Session Items (S Appeal 14-27, 14-28, 14-29, 14-30, 14-31, 14-32, 14-33)

REQUEST FOR OPINION

Requesters seek a decision as to whether the Board of Trustees of the Office of Hawaiian Affairs (OHA) (OHA Board) violated the Sunshine Law by jointly signing a letter that was not discussed at any meeting of the OHA Board, and in a separate incident, by refusing to accept public testimony on an agenda item discussed in executive session.

Unless otherwise indicated, this decision is based upon the facts presented in Requesters' respective letters and e-mails to this office and attached materials received on May 13, May 16 (three letters), May 17, May 22, and June 8; and letters from OHA to this office dated June 23 and July 9, 2014.

QUESTIONS PRESENTED

1. Whether the members of the OHA Board (Trustees) complied with the Sunshine Law in their decision to jointly sign a letter dated May 9, 2014 (Rescission Letter), rescinding a letter dated May 5, 2014 that had previously been sent to United States Secretary of State John F. Kerry by OHA's Chief Executive Officer (CEO), Dr. Kamana'opono Crabbe (Crabbe Letter).

2. Whether the Sunshine Law allowed the OHA Board to refuse to accept oral testimony regarding an agenda item discussed in executive session during its meeting of May 19, 2014.

BRIEF ANSWERS

1. No. The Trustees' decision to jointly sign the Rescission Letter was not discussed during a noticed meeting of any sort, but instead was reached through a chain of serial communications involving the board's full membership. The Sunshine Law did not allow the OHA Board to use serial communications to discuss and reach agreement on the Rescission Letter outside a noticed meeting.

2. No. The Sunshine Law requires boards to accept oral testimony on every item on every agenda, including items anticipated to be discussed in executive session. Thus, the OHA Board's refusal to accept oral testimony on an agenda item discussed in executive session was contrary to the Sunshine Law's requirements.

FACTS

At the time of the relevant events, the OHA Board had previously made a commitment, adopted on March 6, 2014, to facilitate a process empowering Native Hawaiians to participate in building a Native Hawaiian governing entity. The Crabbe Letter, which was dated May 5, 2014, sought an opinion from "the Office of Legal Counsel, Department of Justice," as to the continued existence of the Hawaiian Kingdom and the effect (including potential criminal liability) of any such continued existence on OHA. The letter further noted that Dr. Crabbe would recommend that OHA "refrain from pursuing a Native Hawaiian governing entity" until receiving confirmation that the Hawaiian Kingdom did not still exist.

On May 9, 2014, the following communications transpired: (1) OHA Board Chair Colette Y. Machado learned from Dr. Crabbe that he had sent the Crabbe Letter; (2) a press release detailing the Crabbe Letter was issued indicating that it had been sent with Chair Machado's approval; and (3) Chair Machado e-mailed all of OHA to clarify that the press release and Crabbe Letter were sent without her support or approval. At that time, several Trustees were in Hawaii, and other Trustees were either in Washington, D.C., or in transit.

These communications then led to what OHA describes as "email messages sent to the trustees' staff or one-on-one telephone conversations in order to obtain the trustees' agreement to sign the Rescission Letter. . . ." The Rescission Letter was duly signed by all nine Trustees, and sent to Secretary Kerry, on May 9 (the same day the Trustees first learned about the Crabbe Letter).

On May 19, 2014, the OHA Board held a meeting that, according to its filed agenda, was to include an item for executive session closed to the public for

> Consultation with Board Counsel Robert G. Klein re: questions and issues pertaining to the Board's powers and duties with respect to Contract Number 2744, Chief Executive Officer, Dr. Kamana'opono Crabbe, and to consider appropriate action with respect to the conduct of Dr. Crabbe. Per HRS § § 92-5(a)[(]2) and (a)(4).

The meeting drew a large crowd, approximately 100 attendees in OHA's estimation, all of whom (including some Requesters) sought to present oral testimony on the executive session item regarding Dr. Crabbe. After confirming that Dr. Crabbe preferred to have the item considered in executive session and publicly voting to go into executive session, and without having allowed the members of the public to present oral testimony on the item, the OHA Board ordered the members of the public present to leave the room and proceeded to discuss the item in executive session.

DISCUSSION

I. The Rescission Letter

Because the Rescission Letter was apparently signed by all Trustees, at a time when they were not all in the same place and no meeting had been noticed, some of the Requesters questioned whether a meeting had been held at which the letter was discussed, and if so, whether it was an emergency meeting or a videoconference or audioconference meeting.[1] OHA's explanation was that although no meeting was held, the Trustees agreed to sign the Rescission Letter via "email messages sent to the trustees' staff or one-on-one telephone conversations[.]" While OHA did not specify either the names of the participants or the number of e-mail and telephone exchanges, it is nonetheless clear from OHA's explanation that the Trustees were polled on the issue via a number of serial communications either directly between Trustees or using Trustees' staff as go-betweens.

The Sunshine Law requires that board members' discussions of board business take place during a properly noticed meeting, or as otherwise specifically permitted by the law, notably section 92-2.5, HRS. See HRS §§ 92-2 (2012) (defining a social or informal gathering with no discussion of official business as a "chance meeting"), 92-2.5 (2012) (listing permitted interactions outside a meeting), 92-3 (2012) (requiring meetings to be open to the public unless otherwise permitted), and 92-5(b) (2012) (declaring "[n]o chance meeting, permitted interaction, or electronic communication shall be used to circumvent the spirit or requirements of [the Sunshine Law] or to deliberate toward a decision over which the board has supervision, control, jurisdiction, or advisory power.")

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[1] The Sunshine Law allows boards to hold meetings by interactive conference technology so long as specified criteria are met. HRS § 92-3.5 (2012).

OHA acknowledges that no meeting was held, and does not argue that any permitted interaction listed in section 92-2.5, HRS, would apply to a discussion involving the full OHA Board.[2] Rather, OHA's argument is that the OHA Board's decision to rescind the Crabbe Letter did not require a meeting, because the Crabbe Letter had no legal effect and the Rescission Letter was consistent with previously adopted OHA policy. In Sunshine Law terms, OIP understands OHA to be arguing that the decision to send the Rescission Letter was not OHA Board business because it was simply an implementation of a policy previously adopted by the OHA Board. The question of whether the Trustees complied with the Sunshine Law in their decision to sign the Rescission Letter depends, then, on whether: (1) rescinding the Crabbe Letter was OHA Board business, and (2) the Trustees discussed that topic.

A. The Rescission Letter as Board Business

Board business includes discrete matters over which a board has supervision, control, jurisdiction, or advisory power, that are actually pending before the board or that are likely to arise before the board. OIP Op. Ltrs. No. 04-04 at 2, 04-01 at 7, and 01-01 at 31.

OHA argues that because Dr. Crabbe was not authorized to seek a legal opinion from the Secretary of State without the approval of the OHA Board, the Crabbe Letter was void from the outset as an *ultra vires* act. It was therefore unnecessary, OHA contends, for a majority of the Trustees to agree to rescind the unauthorized Crabbe Letter, so there was no need for the Trustees to meet to discuss the matter.

OHA's argument that the trustees did not actually need to meet to decide on a response to the Crabbe letter because it was void is beside the point. OHA did, in fact, poll the Trustees to obtain their agreement to send the Rescission Letter, which they all signed. If OHA had not done so, and if OHA's letter to Secretary Kerry had been signed by the Chair alone and had stated that the Crabbe Letter was issued without the authorization of the Trustees, then the argument that the Trustees did not need to agree to rescind the Crabbe Letter would be a cogent response to any inference that the Trustees must have discussed the matter and agreed to send such a letter. In this case, though, OHA has acknowledged that the Trustees were polled and did agree to send the Rescission Letter. The key question is not whether the Crabbe Letter was authorized or whether the OHA Board's Chair could have responded to it unilaterally; instead, the key question is whether the Trustees' alleged serial discussion and agreement as to how to respond to the Crabbe Letter involved an issue that was OHA board business.

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[2] The permitted interaction set out in section 92-2.5 (a), HRS, allowing two members of a board to discuss board business outside a meeting so long as no commitment to vote is made or sought, appears to be the only one potentially applicable to a discussion of how to respond to the Crabbe Letter in the circumstances as described; however, as it is limited to two members, it could not apply to a discussion involving three or more Trustees.

The question of how to respond to the Crabbe Letter was clearly a discrete matter and was within the OHA Board's supervision, control, jurisdiction, or advisory power because the content of the Crabbe Letter itself, and supervision of the CEO, are within OHA's statutory authority. See HRS §§ 10-5(6) (2009) (requiring that OHA Board shall "[d]elegate to the administrator, its officers and employees such powers and duties as may be proper for the performance of the powers and duties vested in the board"), 10-10 (2009) (giving OHA Board the power, by a majority vote, to appoint an administrator for a term to be determined by the board; and, by a two-thirds vote of all members to which it is entitled, to remove the administrator for cause at any time).

As to whether the issue was actually pending before the OHA Board, OIP notes that although a board's pending business typically appears on its agendas for recent or upcoming meetings, the OHA Board's discussion of its response to the Crabbe Letter took place entirely outside a meeting, and thus was not listed as a pending issue on any OHA Board agenda. However, OIP has never held that an issue cannot be considered to be board business until such time as it appears on a board's meeting agenda. Indeed, such an interpretation would be contrary to the Sunshine Law's mandate to strictly construe exceptions to the open meeting requirements, as it would allow a board to avoid the Sunshine Law's open meeting requirements with regard to its discussion of an issue within its authority simply by not placing the issue on its agenda. See HRS § 92-1(3) (2012).

The mere fact that the Trustees discussed and immediately acted on the question of how to respond to the Crabbe Letter is sufficient to indicate that the Trustees believed the OHA Board had supervision, control, jurisdiction, or advisory power over that question, and that it was currently pending before the OHA Board. OIP therefore concludes that the OHA Board's response to the Crabbe Letter, and specifically the proposal to send the Rescission Letter, were board business of the OHA Board.

Although it was not relevant to the issues raised by this appeal, OHA's argument that the Crabbe Letter was void as an *ultra vires* act would have provided a basis for holding an emergency meeting based on an unanticipated event: the OHA Board did not have advance knowledge and could not reasonably have known that its CEO would act beyond his authority and contrary to the OHA Board's stated commitment by sending the Crabbe Letter, and under the circumstances, the OHA Board needed to take immediate action to clarify its actual position to the State Department. See HRS § 92-8(b) and (c)(1) (2012) (setting out standards for when an emergency meeting may be held based on an unanticipated event). Nothing in the Sunshine Law indicates that an emergency meeting cannot be held by interactive technology as permitted by section 92-3.5, HRS, so the fact that several board members were in Washington, D.C., would not have been a bar to the OHA board holding an emergency meeting as permitted by section 92-8, HRS, by interactive technology under section 92-3.5, HRS. HRS §§ 92-3.5 (2012) and 92-8.

However, the facts as they stand indicate that the OHA Board did not seek to set up an emergency meeting or a regular meeting to discuss the proposed response to the Crabbe Letter, but instead discussed it through a series of telephone and e-mail conversations. Whether or not it was legally necessary for the OHA Board to take action as a board to rescind the Crabbe Letter, the fact remains that the OHA Board did act as a board in agreeing to send the Rescission Letter.

B. Discussion of Rescinding the Crabbe Letter

OHA emphasized that the telephone conversations regarding the Rescission Letter were one-on-one discussions. Section 92-2.5(a), HRS, allows two members of a board to discuss board business outside a meeting so long as no commitment to vote is made or sought. HRS § 92-2.5(a). However, OIP has previously opined that "[w]hether 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)." OIP Op. Ltr. No. 05-15 at 8. The Hawaii Intermediate Court of Appeals upheld OIP's conclusion that serial one-on-one communications involving a quorum of board members did not fall within the permitted interactions set out in section 92-2.5, HRS, and were thus in violation of the Sunshine Law. Right to Know Comm. v. City Council, City and Cnty. of Honolulu, 117 Haw. 1, 12-13, 175 P. 3d 11, 122-123 Ct. App. 2007), as corrected (Feb. 15, 2008) (Right to Know).

All of the one-on-one communications at issue in Right to Know were between board members, in comparison to the present case, where the communications included e-mail communications sent to a board member's staffer to be passed on to the board member. Staffers are not subject to the Sunshine Law in the way that members of the board themselves are, and communications between a board member and staffer, or between two staffers, are not generally subject to Sunshine Law scrutiny in the same way as communications between two board members. However, the question raised here, which OIP has not previously addressed, is whether board members' use of a staffer as an intermediary may be considered a communication between those board members in appropriate circumstances, particularly in a case where it appears that the staffer's role was that of a mere go-between passing on a message between board members.

Notably, one case cited by the Intermediate Court of Appeals in support of its conclusion did not involve one-on-one communications between board members, but instead held that a series of one-on-one meetings between individual members of a school board and the school superintendent, a member of that board's staff, was in effect a communication among those board members. Blackford v. Sch. Bd. of Orange County, 375 So.2d 578, 580 (Fla. Dist. Ct. App. 1979) (holding that "the scheduling of six sessions of secret discussions, repetitive in content, in rapid-fire seriatim and of such obvious official portent, resulted in six de facto meetings by two or more members of the board at which official action was taken," and "[a]s a consequence, the discussions were in contravention of the Sunshine Law"), cited in Right to Know, supra, at 117 Haw. 12, 175 P.3d 122.

OIP agrees with the Blackford court that in the presence of factual circumstances such as a rapid-fire series of discussions with repetitive content, communication of information from one board member to another via a staff member may be considered a communication between those board members. OIP also finds it significant that the e-mail messages sent to the Trustees' staff were not primarily intended to carry information to the staff, but instead were intended to obtain the Trustees' agreement to sign the Rescission Letter. In other words, in this case, the staffers were not independent actors, but merely go-betweens tasked with passing on the information in the e-mail to each Trustee and sending back each Trustee's response.[3]

OIP thus concludes that through a series of one-on-one communications, either directly or through e-mail messages addressed to staff, all the Trustees discussed the question of whether the OHA Board should respond to the Crabbe Letter by sending the Rescission Letter and ultimately agreed to do so. This serial discussion was not permitted under any part of section 92-2.5, HRS, nor did it take place in a properly noticed meeting. The discussion therefore violated the Sunshine Law.

II. The May 19, 2014 Executive Session

Some Requesters argued that when the OHA Board went directly into executive session from the public portion of its May 19 meeting, without allowing public testimony on the executive session topic, the OHA Board violated the Sunshine Law's requirement to "afford all interested persons an opportunity to present oral testimony on any agenda item." See HRS § 92-3. In response, OHA argues that the executive session was proper because the topic of discussion fell within two of the permitted purposes for holding an executive session: those for consideration of matters affecting employee privacy and for consultation with a board's attorney. See HRS § 92-5(2) and (4) (2012).

OHA's position stems from its apparent assumption that the Sunshine Law does not require a board to accept oral testimony on agenda items that are considered in executive session. Thus, OHA does not dispute that it denied the public the opportunity to provide oral testimony on the agenda item before the board began its executive session discussion, and it argues that the OHA Board could properly discuss the agenda item in question in executive session. OHA mistakes the nature of the

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[3] The situation presented by this appeal is distinguishable from a more typical one in which a staffer may happen to repeat one board member's comments to a second board member in the course of the staffer's subsequent conversation with the second member, or may seek input from several board members that the staffer will synthesize into work product such as an analysis of issues for distribution to the board for or at a future meeting. OIP does not intend to suggest that staffers' communications with board members should generally be considered as communications subject to the Sunshine Law.

Requesters' complaint: they do not question the propriety of holding an executive session to discuss Dr. Crabbe's employment, but rather focus on the OHA Board's undisputed denial of the public's ability to provide oral testimony on that subject during the public meeting.

OIP has previously noted the public's right to testify on every agenda item at every meeting. HRS § 92-3; e.g. OIP Op. Ltr. 05-02 (stating the general rule that a board must accept testimony on any agenda item at every meeting and distinguishing items **not** on the board's agenda, which it is not required to hear testimony on). However, OIP has not previously issued a formal opinion directly addressing the public's right to testify on agenda items anticipated to be held in executive session. With this opinion, OIP clarifies that the requirement to accept testimony applies to **every** agenda item at **every** meeting, including items to be discussed in executive session at a meeting where only executive session items are on the agenda.

Section 92-3, HRS, requires boards to "afford all interested persons an opportunity to present oral testimony on any agenda item." HRS § 92-3. Unlike another requirement in the same section that "all persons shall be permitted to attend every meeting," which precedes the added qualifier, "unless otherwise provided in the constitution or as closed pursuant to sections 92-4 and 92-5," the requirement that a board must "afford all interested persons an opportunity to present oral testimony on any agenda item" does not have any qualification or exception for agenda items that the board will discuss in executive session pursuant to sections 92-4 and 92-5, HRS. The OHA Board was therefore required to afford all interested persons an opportunity to present oral testimony on the executive session agenda item at issue, and its failure to do so violated the Sunshine Law.

RIGHT TO BRING SUIT

Any person may file a lawsuit to require compliance with or to prevent a violation of the Sunshine Law or to determine the applicability of the Sunshine Law to discussions or decisions of a government board. HRS § 92-12 (2012). The court may order payment of reasonable attorney fees and costs to the prevailing party in such a lawsuit. Id.

Where a final action of a board was taken in violation of the open meeting and notice requirements of the Sunshine Law, that action may be voided by the court. HRS § 92-11 (2012). A suit to void any final action must be commenced within ninety days of the action. Id.

This opinion constitutes an appealable decision under section 92F-43, HRS. A board may appeal an OIP decision by filing a complaint with the circuit court within thirty days of the date of an OIP decision in accordance with section 92F-43. HRS §§ 92-1.5, 92F-43 (2012). The board shall give notice of the complaint to OIP and the

person who requested the decision. HRS § 92F-43(b). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court's review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-43(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR.

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