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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).

DECISION

Requester: Mr. James R. Smith
Board: Maui County Council
Date: July 24, 2015
Subject: Councilmember Attendance at Kula Community Association Meeting (S APPEAL 13-1)

REQUEST FOR DECISION

Requester seeks a decision as to whether the Maui County Council (Council) violated the Sunshine Law when three Councilmembers and the Maui County Mayor (Mayor) participated in the Kula Community Association (KCA) Community Meeting on February 19, 2013.

Unless otherwise indicated, this decision is based upon the facts presented in Requester's communications to OIP: a facsimile transmittal with attachment dated February 21, 2015; a letter dated February 27, 2013; two e-mails dated March 15, 2013; two e-mails with attachments dated April 15, 2013; e-mails dated April 17, 19, and 22, 2013; an e-mail with attachment dated February 10, 2014; two e-mails (one with attachment) dated February 12, 2014; an e-mail dated February 14, 2015; and the Council's response to this appeal dated April 12, 2013, provided by the Maui County Corporation Counsel.

QUESTIONS PRESENTED

1. Whether the Sunshine Law allowed three members of the Council to attend the KCA Community Meeting.

2. Whether Councilmember Crivello's report required by section 92-2.5(e), HRS, was properly noticed under the Sunshine Law.

BRIEF ANSWERS

1. Yes. The Sunshine Law was not violated when three members of the Council attended the KCA Community Meeting because the Councilmembers' attendance met the criteria to qualify as an informational meeting permitted interaction under section 92-2.5(e), HRS.

2. Yes. The report was listed on the agenda for the Council's March 1, 2013, meeting in accordance with the Sunshine Law's notice provisions in section 92-7, HRS.

FACTS

KCA, a nonprofit corporation¹ not subject to the Sunshine Law, held a "Community Meeting" on February 19, 2013. Requester provided a copy of an e-mail his friend received from KCA which included the following information about the Community Meeting:

COUNTY GOVERNMENT MEETS UPCOUNTRY MAUI RESIDENTS

The meeting will begin with presentations by four county government officials:

Mayor Alan Arakawa, upcountry resident and our new County Council Chair Gladys Baisa, recently elected from Molokai Councilmember Stacy Crivello (Chair – Housing Human Services, & Transportation Committee), and from Kahului Councilmember Don Guzman (Chair – Economic Development, Energy, Agriculture, & Recreation Committee).

The speakers have been asked to discuss issues of interest to Upcountry residents: water availability and source development; water meters and rates; the Maui Bus route through Kula; road repairs; upcountry infrastructure proposals in the County budget; etc.

The four presentations will be followed by a question and answer period, and then an opportunity for more personal discussion as the four county officials sit down and talk with community residents.

¹ See By-Laws of the Kula Community Association (as amended February 20, 2003) <http://www.kulamaui.com/by-laws.html>, accessed July 14, 2015.

DISCUSSION

I. Councilmembers' Attendance at the KCA Community Meeting Was an Informational Meeting Permitted Interaction Under Section 92-2.5(e), HRS

The Mayor² and three Councilmembers attended the KCA Community Meeting. Requester alleged that Council business was discussed at the Community Meeting by the Councilmembers in violation of the Sunshine Law. Requester did not attend the Community Meeting, but was informed by a friend that, at the meeting, the three Councilmembers “participated in a deliberative capacity, meaning matters before the Council were discussed by three members of the council in private, without official notice.” Requester further stated that KCA used its Community Meeting as “an opportunity to influence decision- [sic] making by the [Council], through circumstance, ambiance and status.” He further stated “[t]his meeting closed me down, put me outside our body politic.”

Requester specifically claimed that section 92-2.5(b), HRS, was violated, and that, in the alternative, section 92-2.5(e), HRS, was violated. Section 92-2.5(b), HRS, is discussed below. OIP first finds that the attendance by the three Councilmembers at the Community Meeting was in compliance with section 92-2.5(e), HRS, which states:

(e) Two or more members of a board, but less than the number of members which would constitute a quorum for the board, may attend an informational meeting or presentation on matters relating to official board business, including a meeting of another entity, legislative hearing, convention, seminar, or community meeting; provided that the meeting or presentation is not specifically and exclusively organized for or directed toward members of the board. The board members in attendance may participate in discussions, including

² Requester complained that the fact that the Mayor was also in attendance at the KCA Community Meeting “presents a dilemma, uncharted ground, in that the Office of Corporation Counsel may have facilitated this obvious circumvention of law, separation of powers and duty’s [sic] seem thwarted.” The Sunshine Law applies only to boards. “Board” is defined in the Sunshine Law as “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.” HRS § 92-2 (2012). Although the Council is a Sunshine Law board, the Mayor does not meet the definition of “board” and his presence at the Community Meeting does not implicate the Sunshine Law. Further, the Mayor’s presence at the Community Meeting does not affect the Council’s compliance or noncompliance with the Sunshine Law here.

discussions among themselves; provided that the discussions occur during and as part of the informational meeting or presentation; and provided further that no commitment relating to a vote on the matter is made or sought.

At the next duly noticed meeting of the board, the board members shall report their attendance and the matters presented and discussed that related to official board business at the informational meeting or presentation.

HRS § 92-2.5(e) (2012).

Section 92-2.5(e), HRS, allows less than a quorum of a board to attend an informational meeting of another entity. The Council consists of nine members, so attendance at the Community Meeting by three Councilmembers would not constitute a quorum.³

Water was one of the Community Meeting's topics, so OIP presumes based on the information provided that the Community Meeting included a discussion on official business⁴ of the Council, as Requester noted that the agenda for a subsequent Council meeting on March 1, 2013, included a bill to amend the Maui County Code's provisions on water shortages. The Community Meeting was open to the public and, based on KCA's e-mail, was intended to provide the public with a chance to interact with Councilmembers and the Mayor. Therefore, given the announced purpose of the Community Meeting, OIP finds that the Community

³ After this appeal was filed, section 92-3.1(b), HRS, was added to the Sunshine Law (Act 221, SLH (2014)). This law allows any number of Councilmembers to hold a limited meeting open to the public, as the guests of a board or community group holding its own meeting, and the Council is not required to have a quorum present nor is it limited to having less than a quorum attend such a meeting. HRS § 92-3.1(b) (Supp. 2014). These "guest" limited meetings must be noticed in accordance with section 92-7, HRS, and the notice must name the board or community group whose meeting the council is attending, but the notice need not include an agenda and public testimony need not be taken. HRS § 92-3.1(b)(1). "Guest" limited meetings are subject to other provisos set forth in section 92-3.1(b), HRS, including the prohibition against using a "guest" limited meeting to circumvent the purpose of the Sunshine Law. Act 221 is set to repeal on June 30, 2016.

If Councilmembers wish to attend an event such as the Community Meeting, the Council could notice their attendance at a "guest" limited meeting in accordance with section 92-3.1(b), HRS, and any number of Councilmembers would be able to attend.

⁴ Board business includes "matter[s] over which ... [a] board has supervision, control, jurisdiction, or advisory power." Such matters are those that are before a board or are reasonably expected to come before a board." OIP Op. Ltr. No. 04-01 at 7 note 7.

Meeting was not “specifically and exclusively organized for or directed toward members of the [Council.]”

The incident complained of here was, in fact, precisely the type of situation that section 92-2.5(e), HRS, which was enacted in 2012, was intended to allow. As Maui Corporation Counsel noted, OIP’s testimony on the bill that ultimately became section 92-2.5(e), HRS, stated:

The Sunshine Law prohibits members from discussing official board business outside of a meeting of their board, except as specifically permitted. One aspect that has been a source of much frustration for board members is that the Sunshine Law does not generally allow more than two members to discuss board business in the course of attending another board’s meeting, a presentation, a legislative hearing, or a seminar, even though that other board’s meeting may be open to the public either as a Sunshine Law meeting or for other reasons. Thus, for example, three of seven [Honolulu] City Council members who represent districts overlapping with one neighborhood board district cannot all attend and participate in that neighborhood board’s public meeting relating to Council matters, or in a community meeting regarding a proposed development, or in a legislative hearing on a bill of interest to that community. Although the law allows a board to set up a permitted interaction group (“PIG”) of less than a quorum to attend such meetings, there often is not sufficient lead time before the other bodies’ meetings for the board to hold its own meeting to establish such a PIG.

Consequently, OIP believes that the Sunshine Law, as currently written, deters board members from attending presentations or other meetings, discourages board members from testifying or participating in discussions that are a part of those presentations, lessens the public’s ability to interact with board members, makes it difficult for board members to be fully informed of all sides of an issue, and reduces communication and cooperation between various boards on issues of mutual concern. To correct this, the Sunshine bill proposes to create a second new permitted interaction that would allow less than a quorum of board members to attend meetings of other boards, conferences, or community groups

....

The proposed amendment is intended to improve the performance of the board members and their boards by allowing for a more thorough gathering of information and a fuller understanding of various perspectives, which would promote better discussion and

deliberation before the full board. So long as there is no quorum to make decisions, board members would be able to attend other entities' meetings (e.g., legislative hearings; neighborhood board meetings) on short notice and they will no longer have to leave or refrain from participating in the discussions held as part of the presentations. The proposal is also intended to foster better and more effective communication and coordination between boards and other entities on issues of common concern.

By giving board members greater freedom to attend and participate in meetings other than their own board meetings, the proposal will also increase the public's ability to engage with board members on matters of public concern. Board members can now go to the public, and not simply wait for the public to come to their board meetings. Thus, the proposal will give the public increased access to information about a board's current business and greater ability to interact and express their views with board members.

Testimony of OIP submitted to the House Committee on the Judiciary for its March 16, 2012 hearing on Senate Bill No. 2859.

Based on the law itself, the above findings, and the legislative history of section 92-2.5(e), HRS, OIP concludes that the three Councilmembers at the Community Meeting were permitted under section 92-2.5(e), HRS, to attend the Community Meeting and to participate in discussions about Council business during the Community Meeting, so long as no commitment to vote was made or sought. Requester provided no evidence that any commitment to vote was made or sought.

The Council held a meeting on March 1, 2013, subsequent to the Community Meeting. According to the meeting minutes, at the March 1 meeting, Councilmember Crivello read her written report to the Council on her attendance, along with Councilmembers Baisa and Guzman, at the KCA Community Meeting, in accordance with section 92-2.5(e), HRS. This law requires that, at the next meeting after a permitted interaction allowed by section 92-2.5(e), HRS, occurs, "the board members shall report their attendance and the matters presented and discussed that related to official board business at the informational meeting or presentation." HRS § 92-2.5(e) (2012).

Having found that the three Councilmembers at the Community Meeting followed all the provisions of section 92-2.5(e), HRS, including the report requirement, OIP concludes that their attendance was in compliance with the Sunshine Law.

II. Councilmember Crivello's Report Was in Compliance With the Notice Requirements in Section 92-7, HRS

The Sunshine Law requires that a board give at least six calendar days' notice of any regular, special, or rescheduled meeting or any anticipated executive meeting. HRS § 92-7(a) (2012). The meeting notice must include an agenda which lists all of the items, or "business," to be considered at the meeting. Id.

The agenda for the Council's meeting of March 1, 2013, which occurred subsequent to the Community Meeting, contained the following agenda item under the heading "COMMUNICATIONS" and subheading "1. COUNTY COMMUNICATIONS:"

NO. 13-81 - COUNCILMEMBER CRIVELLO, relating to Council Members' reports on the Kula Community Association meeting held on February 19, 2013.

Again, according to the meeting minutes, Councilmember Crivello read her written report to the Council on her attendance, along with Councilmembers Baisa and Guzman, at the KCA Community Meeting, as required by section 92-2.5(e), HRS.

In an e-mail to OIP dated March 15, 2013, Requester stated that the Council "does not take up, nor does it consider matters listed in" the "Communications" sections of its agendas unless it first hears a motion to waive Council rules to allow for deliberation on the item. Requester noted that the agenda for the March 1 meeting did not include a notice of a motion for waiver of Council rules "as it relates to a Communication by a member who participated in [the KCA] event that is listed on the March 1, 2013 agenda." OIP understands Requester is complaining that Councilmember Crivello's report was not properly noticed because it was under the "Communications" section of the agenda when it should have been under another section of the agenda listing items for the Council's deliberation; or that the Council should have considered a motion to waive its rules to allow for deliberation on this item.

Under the Sunshine Law, a board must provide a meeting notice that "lists all of the items to be considered" and there is no requirement that the board's consideration must include deliberation or decision-making on an agenda item. HRS § 92-7(a) (emphasis added). The fact that an item is on an agenda indicates that it is "before" the board and is business of that board, which may or may not include deliberation and decision making by that board. See OIP Op. Ltr. No. 07-06 at 2 (finding that an agenda does not need to specifically notice that a decision may be made on an item or the exact nature of that decision as long as it reasonably arises under the subject matter listed). Councilmember Crivello's report as required by section 92-2.5(e), HRS, was listed on the March 1 agenda, under

“Communications” section. OIP finds no violation of the Sunshine Law’s notice requirements. Whether the Council may have violated its own rules or procedures is outside of OIP’s jurisdiction.

Requester’s e-mail, dated March 15, 2013, noted that he attended the Council meeting of March 1, 2013, and further asserted his belief that, because section 92-2.5(e), HRS, requires members who attend an informational briefing to “report” back to the Council, this reporting requirement thereafter requires “deliberation, thoughtful consideration” by the full board of the informational meeting report. Requester apparently believed that a bill pertaining to the water shortage on the March 1, 2013, agenda should have been referred back to committee for deliberation because he believed “consideration” of Councilmember Crivello’s report would not occur. Section 92-2.5(e), HRS, contains no requirement that a board consider or take action on a report provided thereunder. OIP finds no merit to this allegation.

In conclusion, Councilmember Crivello’s report of the Councilmembers’ attendance at the KCA Community Meeting was properly noticed as required by the Sunshine Law, section 92-7, HRS.

III. Other Arguments Raised by Requester Lack Merit

A. Section 92-2.5(b), HRS, Is Not Applicable

Requester claimed that section 92-2.5(b), HRS, was violated by the three Councilmembers’ attendance at the Community Meeting. Section 92-2.5(b)(1), HRS, allows boards to designate two or more board members, but less than the number of members that would constitute a quorum, to investigate matters concerning board business. The members designated by the board are required to report their resulting findings to the full board at a future meeting. This permitted interaction is often used to allow some members to participate in a site inspection outside of a meeting or to gather information relevant to a matter before the board. Section 92-2.5(b)(2), HRS, allows a board to assign two or more members, but less than the number of members that would constitute a quorum, to present, discuss, or negotiate a position that a board has adopted.

There is no evidence that the Council intended to create a permitted interaction group, that it improperly set up a permitted interaction group, or that it otherwise violated the provisions of section 92-2.5(b), HRS. Further, because OIP has found that the Councilmembers who attended the Community Meeting were clearly in compliance with section 92-2.5(e), HRS, section 92-2.5(b), HRS is not applicable.

B. Consent Decree

Requester's letter to OIP dated February 27, 2013, made reference to a November 19, 1999, ruling by Second Circuit Judge Shackley F. Raffetto. Requester stated that Judge Raffetto:

adjudged, ordered and decreed at paragraph b, page four, of its [sic] Consent Decree (in a case titled at its conclusion Smith vs Arakawa et al,) [sic] Civil No. 97-0536 (2) , [sic] that the county would strictly construe exceptions to the open meeting requirements of our Sunshine Law. The County, through the Office of Corporation Counsel knows this, or has reason to know this.

The litigation referenced by Requester as "Smith v. Arakawa" was litigated on different facts than those at issue here. Requester did not provide OIP with a copy of the consent decree for this appeal, and OIP finds no evidence to support a claim that the Council did not strictly construe the exception to the Sunshine Law's open meeting requirement set forth in section 92-2.5(e), HRS.

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.

This letter also serves as notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES

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