

December 31, 2001

The Honorable Andy Mirikitani

Re: The Public's Right to Testify on Agenda Items, and Agenda Requirements,
under the Sunshine Law

Dear Mr. Mirikitani:

This letter responds to your request for an opinion dated June 2, 1999, regarding compliance by the Honolulu Liquor Commission ("Liquor Commission") with part I of chapter 92, Hawaii Revised Statutes, ("Sunshine Law"). Based on our review of the facts, the Office of Information Practices ("OIP") addresses three issues, as presented below.

ISSUES PRESENTED

I. Whether the Liquor Commission, in its agenda for April 9, 1998, properly noticed its decision-making on proposed rule revisions that were considered on December 10, 1997.

II. Whether section 91-3, Hawaii Revised Statutes, and section 92-3, Hawaii Revised Statutes, conflict.

III. Whether the Liquor Commission violated the Sunshine Law by prohibiting public testimony on the agenda item listed as "Decision-making on Proposed Rules of the Liquor Commission (Continued from March 19, 1998)" at the Liquor Commission's meeting of April 9, 1998.

BRIEF ANSWER

I. No. The agenda for April 9, 1998, failed to notify the public that the Liquor Commission would deliberate or decide on a set of proposed rule revisions previously considered on December 10, 1997.

II. No. There is no conflict between sections 91-3 and 92-3, Hawaii Revised Statutes. Section 91-3, Hawaii Revised Statutes, does not prohibit an agency from accepting public testimony on the date the agency announces its decision as to proposed rule revisions. Thus, it is possible for a board to follow both section 91-3, Hawaii Revised Statutes, and the Sunshine Law, without violating either. Further, a board subject to the Sunshine Law may make its decision on proposed rule revisions at a later date than the public hearing without accepting further public testimony during its decisionmaking, by continuing the decisionmaking portion of the public hearing/meeting to a reasonable day and time as provided by section 92-7(d), Hawaii Revised Statutes.

III. Yes. The Liquor Commission held separate meetings on March 19, 1998, and April 9, 1998. Even when the public has had an opportunity to testify on an agenda item at a previous meeting, the Sunshine Law requires a board to afford interested members of the public an opportunity to present oral or written testimony on any agenda item at every meeting. Thus, the Liquor Commission was obligated to permit public testimony on every agenda item at its March 19 meeting and every agenda item at its April 9 meeting.

FACTS

Mr. Mirikitani wrote to the OIP on June 2, 1999, to request an opinion regarding compliance by the Honolulu Liquor Commission¹ with the Sunshine Law. Upon request by the OIP, the Liquor Commission provided OIP with information and documents regarding its public hearings/meetings held December 10, 1997, March 18, 1998, and April 9, 1998.

I. THE DECEMBER 10, 1997 HEARING AND MEETING

In accordance with section 91-3, Hawaii Revised Statutes, the Liquor Commission published in the Honolulu Star-Bulletin on November 6, 1997, a Notice of Public Hearing for December 10, 1997 ("December 10"), at 4:00 p.m., regarding

¹ The Liquor Commission is a "board" as defined by section 92-2, Hawaii Revised Statutes, and thus is subject to the Sunshine Law. In addition, and separate from the Sunshine Law, the Liquor Commission is an "agency" as defined by section 91-1, Hawaii Revised Statutes, and thus is also required to follow the requirements of chapter 91, Hawaii Revised Statutes, regarding adoption of rules and other matters.

proposed revisions to its rules. The Liquor Commission also gave notice of the public hearing as a meeting under the Sunshine Law, by filing with the City Clerk a notice and agenda for a meeting² to be held December 10, 1997, at 4:00 p.m. The meeting agenda listed the “PUBLIC HEARING: Revision to the Rules of the Liquor Commission. . .” as its only item. The Liquor Commission met from 4:00 p.m. until 4:46 p.m. on December 10. At the hearing/meeting, Mr. Mirikitani did not testify as to the proposed rule revisions that the Liquor Commission was considering on December 10 (“December 10 revisions”). Instead, Mr. Mirikitani testified both orally and in writing regarding two separate proposals for rule revisions. The Honolulu City Council³ (“City Council”), through resolutions, had asked the Liquor Commission to amend its rules by adopting the proposals discussed by Mr. Mirikitani. The Liquor Commission ended the hearing/meeting at the conclusion of public testimony on the December 10 revisions, without continuing discussion of the revisions to a new date and place or stating a date on which it would make a decision regarding them.

II. THE MARCH 19, 1998 HEARING AND MEETING

On February 12, 1998, the Liquor Commission published another Notice of Public Hearing in the Honolulu Star-Bulletin, giving notice that a public hearing would be held on March 19, 1998 (“March 19”), at 4:00 p.m., regarding additional proposed rule revisions that were not included in the December 10 revisions. This new, separate set of proposed rule revisions (“March 19 revisions”) would (among other things) address the issues raised by the City Council resolutions and by Mr. Mirikitani’s testimony at the December 10 public hearing. The Liquor Commission also gave notice of the public hearing as a meeting under the Sunshine Law, by filing with the City Clerk a notice and agenda for its 35th meeting to be held at the same date and time, March 19 at 4:00 p.m. The meeting agenda listed “Public hearing on the Revision to the Rules . . .” as item 22 on the agenda.

The Liquor Commission met on March 19 from 4:01 p.m. until 6:02 p.m. When it reached item 22 on its agenda, the Liquor Commission began hearing public testimony on the March 19 revisions, which had not been considered on December 10. Councilmember Mirikitani and others presented testimony. When it

² In this opinion, references to “public hearing” mean the hearings that an agency is required to hold by section 91-3, Hawaii Revised Statutes, for adoption of agency rules, as part of the rulemaking process. References to “meeting” mean a meeting as defined in the Sunshine Law at section 92-2, Hawaii Revised Statutes. The public hearings held by the Liquor Commission and discussed in this opinion were also meetings under the Sunshine Law.

³ Mr. Mirikitani was a member of the City Council at the time of the events discussed herein. He has since retired.

had finished hearing public testimony regarding the March 19 revisions, the Liquor Commission announced its intention to close the public hearing portion of the hearing/meeting and continue its decisionmaking on the March 19 revisions to April 9, 1998. The Liquor Commission then moved on to other business before adjourning the meeting.

III. THE APRIL 9, 1998 MEETING

The Liquor Commission listed "Decision-making on Proposed Rules of the Liquor Commission (Continued from March 19, 1998)" as item 18 on the agenda for its 37th meeting, scheduled for April 9, 1998 ("April 9") at 4:00 p.m. The Liquor Commission met from 4:10 p.m. until 6:28 p.m. on April 9. However, when it reached item 18 on its agenda, the Liquor Commission began decisionmaking on the December 10 revisions, rather than on the March 19 revisions. After voting to adopt (with an amendment) the December 10 revisions, the Liquor Commission then moved on to discussion of the March 19 revisions.

While the Liquor Commission was considering a motion to not adopt one of the March 19 revisions (proposed Rule 55-1), Mr. Mirikitani asked from the audience whether the Liquor Commission was accepting public testimony. The Liquor Commission declined to hear public testimony on the proposed rule, despite Mr. Mirikitani's objection. The Liquor Commission then voted to carry the pending motion, and thus did not adopt proposed Rule 55-1.

DISCUSSION

I. ADEQUACY OF AGENDA

The Sunshine Law requires a board to publish before each meeting "an agenda which lists all of the items to be considered at the forthcoming meeting. . . ." Haw. Rev. Stat. § 92-7(a) (Supp. 2000). The Liquor Commission listed, as item 18 on the agenda for its April 9 meeting, "Decision-making on Proposed Rules of the Liquor Commission (Continued from March 19, 1998)," thus notifying the public that the Liquor Commission would conduct decisionmaking on the March 19 revisions.

At the April 9 meeting the Liquor Commission adopted, with amendments, the December 10 revisions. However, the agenda for the April 9 meeting did not list decisionmaking on the December 10 revisions.⁴

Because the Liquor Commission's April 9 agenda specifically referred to the decisionmaking as "[c]ontinued from March 19," the agenda failed to give public notice as required by section 92-7(a), Hawaii Revised Statutes, that it would also conduct decisionmaking on the December 10 revisions. The OIP has not received any complaint regarding this violation of the Sunshine Law. However, the OIP is required to "take action to oversee compliance with [the Sunshine Law] by all state and county boards. . . ." Haw. Rev. Stat. § 92F-42(18) (Supp. 2000). Thus, the OIP is bound to note the April 9 meeting agenda's failure to satisfy the requirements of section 92-7(a), Hawaii Revised Statutes.

II. A BOARD'S OBLIGATION TO ACCEPT PUBLIC TESTIMONY

A. Interaction Between Sunshine Law and Section 91-3, Hawaii Revised Statutes

Two different statutes speak to the obligation of a board subject to the Sunshine Law to accept public testimony when it proposes to adopt, amend, or repeal rules. Section 91-3, Hawaii Revised Statutes, which is not part of the Sunshine Law, requires an agency to hold a public hearing and accept public testimony on proposed rule revisions, and permits an agency to separate the public hearing from its decisionmaking on the proposed revisions. An agency may make its decision on proposed revisions at a later date than the public hearing, after announcing the decision date at the public hearing. Haw. Rev. Stat. § 91-3 (Supp. 2000). Section 91-3, Hawaii Revised Statutes, does not require the decisionmaking to occur at a hearing.

However, the Sunshine Law generally requires a board to make its decisions in open meetings, and to allow public testimony on every agenda item at every meeting. Haw. Rev. Stat. § 92-3 (1993). The OIP concurs with the opinion of Hawaii's Attorney General that even when the public has had an opportunity to

⁴ The OIP also notes that at the December 10 public hearing, the Liquor Commission did not announce a date on which it would make its decision as to the December 10 revisions. However, the OIP does not opine as to whether the failure to announce a date for decisionmaking required another public hearing under chapter 91, Hawaii Revised Statutes, before the December 10 revisions could be taken up for decisionmaking. That issue concerns chapter 91, Hawaii Revised Statutes, not the Sunshine Law, and is therefore outside the OIP's jurisdiction as set forth in section 92-42, Hawaii Revised Statutes.

testify on an agenda item at a previous meeting, the Sunshine Law requires that “an opportunity to present oral or written testimony must be afforded on any agenda item **at every meeting** of all boards.” Haw. Att’y Gen. Op. No. 86-5 at 7 (Feb. 10, 1986) (emphasis added).

The Liquor Commission sought to comply with section 91-3, Hawaii Revised Statutes, in its acceptance of public testimony regarding proposed rule revisions. The Liquor Commission has argued that accepting public testimony regarding proposed rule revisions at its April 9 meeting, without having published an additional Notice of Public Hearing as provided in section 91-3, could have violated section 91-3, Hawaii Revised Statutes. Thus, a question is raised whether section 91-3, Hawaii Revised Statutes, and the Sunshine Law conflict as to a board’s duty to accept public testimony.

The Sunshine Law and section 91-3, Hawaii Revised Statutes, do not conflict with one another as to a board’s duty to accept public testimony on proposed rule revisions. The Sunshine Law requires a board to allow testimony at every meeting. However, section 91-3, Hawaii Revised Statutes, does not *prohibit* an agency from accepting public testimony outside of the required public hearing on proposed rule revisions. It is possible for a board to follow both section 91-3, Hawaii Revised Statutes, and the Sunshine Law, without violating either; thus, there is no conflict. However, if a board subject to the Sunshine Law chooses to make its decision on proposed rule revisions at a meeting subsequent to the public hearing/meeting on the revisions, it must accept public testimony at the decisionmaking meeting.

Alternatively, a board subject to the Sunshine Law may decide on proposed rule revisions after the public hearing without the duty to accept further public testimony during its decisionmaking simply by continuing the decisionmaking portion of the **meeting** to a reasonable day and time as provided by section 92-7(d), Hawaii Revised Statutes. Specifically, a board should:

- (1) At the meeting that includes the public hearing, agree on and announce the continuation of the meeting to an announced and reasonable date, time, and place;
- (2) Adjourn the meeting subject to the announced continuation; and
- (3) Reconvene the meeting for decisionmaking on the announced date and at the announced time and place.

Cf. Haw. Rev. Stat. § 92-7(d) (Supp. 2000). A board should take care to treat the continued and reconvened meeting as a continuation rather than a new meeting.

At its March 19 meeting, the Liquor Commission announced its intention to continue its decision on the March 19 revisions to the April 9 meeting. However, the Liquor Commission failed to announce a time or place for a continued meeting on that date. Also, rather than attempting to reconvene the March 19 meeting on April 9, the Liquor Commission treated its April 9 meeting as a separate meeting, with a separate notice, separate agenda, and separate meeting number. Therefore, the OIP concludes that the Liquor Commission's April 9 meeting was a separate meeting, and not a continuation of its March 19 meeting.

The Sunshine Law requires a board to allow public testimony on every agenda item at every meeting. See Haw. Rev. Stat. § 92-3 (1993). As the Liquor Commission held a newly noticed meeting on April 9 (during which it made its decision on the March 19 revisions) rather than continuing and then reconvening its March 19 meeting, the Liquor Commission was required to allow public testimony on every agenda item at the April 9 meeting. Therefore, the OIP concludes that the Liquor's Commission's refusal to accept public testimony on its decisionmaking at its April 9 meeting violated the Sunshine Law.

The OIP notes, however, that this violation did not significantly impair the public's ability to present testimony regarding the March 19 revisions or to view the decisionmaking process. The Liquor Commission accepted all public testimony offered at the March 19 meeting. It would have been possible for the Liquor Commission to continue the March 19 meeting to a reasonable and announced date, time, and place,⁵ reconvene the meeting to conduct its decisionmaking, and then adjourn the continued hearing: no violation would have occurred, yet the public's ability to testify would have been the same as in the present case⁶.

⁵ The OIP does not decide whether a date three weeks later than the original meeting would be a reasonable continuation date for the original meeting. Because the Liquor Commission did not, in fact, reconvene the original meeting at a continued date, it would be merely speculative for OIP to discuss what length of time could reasonably elapse between a meeting and its continuation.

⁶ Two factors mitigate concerns that a board might use its option of continuing an agenda item to a reconvened meeting as a way to avoid the Sunshine Law's public testimony requirement. First, to take up any new matter of reasonably major importance and affecting a significant number of persons, a board would need to publish a new agenda and thus call a new meeting. Haw. Rev. Stat. § 92-7(d) (Supp. 2000). Second, a board may only continue consideration of an agenda item without calling a new meeting when that continuation is reasonable, and a continuation that impaired to any significant degree the public's ability to testify on an ongoing issue would likely not be reasonable.

B. The Public's Role Regarding an Agenda Item

As discussed above, members of the public have a right to testify on every agenda item at every meeting of a board subject to the Sunshine Law, even if the board heard public testimony on the agenda item at a previous meeting. See Haw. Rev. Stat. § 92-3 (1993). However, a board can control at what point in the meeting it will take public testimony on an item. The public does not have the intrinsic right, for instance, to participate in the board's deliberation of an agenda item. As part of a board's deliberation, its members may propose amendments to a proposed rule, a permit, or a course of action under consideration. If a member of the public seeks to testify about not just the agenda item itself, but also about each amendment proposed or each motion made by a board member as to the agenda item, then that person is essentially seeking to participate in the deliberation as an *ex officio* board member.

The Sunshine Law's public testimony requirement does not require a board to allow members of the public to act as *ex officio* board members by participating in the board's deliberation toward a decision. See Haw. Rev. Stat. § 92-3 (1993). As a practical matter, for a board to perform its designated role by deliberating toward decisions, it must be able to conclude the public testimony portion of an agenda item once it has "afford[ed] all interested persons an opportunity to present oral testimony," and begin its deliberations without further public participation in the deliberations. See id. Thus, to comply with the Sunshine Law's public testimony requirement and at the same time be able to deliberate without interruption, a board should allow the public an opportunity to testify on an agenda item before moving into its deliberation. Having allowed the public an opportunity to testify on the agenda item, the board would not then be required to allow members of the public to participate in its deliberation as well.

C. The Effect of Amendments on the Public's Right to Testify

Mr. Mirikitani has argued that the public should have been permitted to testify on the March 19 revisions at the April 9 meeting, because there had been no prior opportunity for the public to testify on the amendments proposed and adopted by the board at the April 9 meeting. However, the issue of whether proposed rules have been so substantially amended after their public hearing that another public hearing is required before their adoption, falls under chapter 91, Hawaii Revised

Statutes, and not the Sunshine Law.⁷ Thus, the issue of when amendments to a proposed rule require another public hearing is outside the OIP's jurisdiction.

III. LEGAL EFFECT OF A DECISION MADE IN VIOLATION OF THE SUNSHINE LAW

A decision made in willful violation of the Sunshine Law is voidable "upon proof of wilful violation," through a suit commenced within ninety days of the contested action. Haw. Rev. Stat. § 92-11 (1993). The Sunshine Law gives "jurisdiction to enforce the provisions of this part by injunction or other appropriate remedy" to the circuit courts of the State. Haw. Rev. Stat. § 92-12(b) (1993). Thus, it is clear that an action taken in violation of the Sunshine Law is not automatically void: the action must be challenged and the violation must be proven to be willful for the action to be voided.

The Liquor Commission's decision not to adopt proposed Rule 55-1, one of the March 19 revisions, has arguably been challenged by Mr. Mirikitani through his objection at the April 9 meeting and subsequent request for an opinion by the OIP. However, although the OIP has the duty to "receiv[e] and resolv[e] complaints" under the Sunshine Law, section 92F-42(18)(A), Hawaii Revised Statutes, there is no indication in the Sunshine Law or in section 92F-42, Hawaii Revised Statutes, that the OIP has the power to void a decision made in willful⁸ violation of the Sunshine Law. In any case, the question of whether the OIP has the power to void the non-adoption of proposed Rule 55-1 is moot in this instance. If a board's decision to not adopt a proposed rule were voided, that would not cause the rule to be adopted; rather, it would cause the rule's legal status⁹ to be the same as if no decision had been made regarding it.

⁷ The Sunshine Law would not prohibit a board from proposing major changes to a proposal (rule or otherwise) after hearing public testimony on the item, and then proceeding to adopt the changed proposal without reopening public testimony, assuming that the public testimony, deliberation, and decision all took place during the same meeting. It is chapter 91, Hawaii Revised Statutes, not the Sunshine Law, that requires a board to publish proposed rules before a hearing.

⁸ The OIP does not imply that the Liquor Commission's violation of the Sunshine Law was willful.

⁹ The OIP does not opine on what that legal status would be for a proposed rule as to which no decision has been made (or for which a decision was made, but subsequently voided) on the announced decisionmaking date. Whether chapter 91 would require another public hearing for such a proposed rule to be reconsidered, is a question beyond the OIP's jurisdiction.

CONCLUSION

I. CONCLUSION

The Liquor Commission's April 9 meeting violated the Sunshine Law in two ways. First, the Liquor Commission's agenda for its April 9 meeting listed decisionmaking on the March 19 revisions, but failed to list decisionmaking on the December 10 revisions. Nonetheless, the Liquor Commission conducted decisionmaking on the December 10 revisions at the April 9 meeting. Thus, the Liquor Commission failed to give public notice in its agenda, as required by section 92-7(a), Hawaii Revised Statutes, that it would conduct decisionmaking on the December 10 revisions. This was a violation of the Sunshine Law.

Second, the Liquor Commission refused to accept public testimony on an agenda item at its April 9 meeting. If a board subject to the Sunshine Law, such as the Liquor Commission, chooses to make its decision on proposed rule revisions at a separate meeting from the public hearing on the revisions, it must accept public testimony on its decisionmaking at any meeting that includes decisionmaking as an agenda item. The Liquor Commission made its decision on the March 19 revisions at a separate meeting (the April 9 meeting), rather than reconvening the March 19 meeting at an announced date, time, and place. Therefore, the Liquor Commission was required to allow public testimony on the decisionmaking (and every other agenda item) at the April 9 meeting. Its refusal to accept public testimony on the decisionmaking agenda item violated section 92-3, Hawaii Revised Statutes.

II. RECOMMENDATIONS

The OIP recommends that when a board wishes to deliberate or decide on proposed rules under chapter 91, Hawaii Revised Statutes, at a date after the public hearing, without again hearing public testimony on the proposed rules, the board should continue the decisionmaking portion of the hearing/meeting to a reasonable day and time as provided by section 92-7(d), Hawaii Revised Statutes. Specifically, a board should:

- (1) At the meeting that includes the public hearing, agree on and announce the continuation of the meeting to an announced and reasonable date, time, and place;
- (2) Adjourn the meeting subject to the announced continuation; and

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- (3) Reconvene the meeting for decisionmaking on the announced date and at the announced time and place.

Cf. Haw. Rev. Stat. § 92-7(d) (Supp. 2000). When continuing a meeting, a board should take care to treat the continued and reconvened meeting as a continuation rather than a new meeting and not add any items to the agenda. Although the OIP has not opined on how long a time can reasonably pass between a meeting and its continuation, a board should also be conscious that a meeting continued over too long a time span could be challenged as unreasonable. Cf. id.

If a board wishes to deliberate on proposed rules at a separate, future meeting, then the board should comply with the Sunshine Law's requirements for that agenda item at that meeting. Specifically, the board should list the item on its agenda for the meeting, and allow the public an opportunity to testify on the agenda item before beginning deliberation and decisionmaking.

Finally, because the Liquor Commission violated the Sunshine Law in two ways during the course of its April 9 meeting, the OIP recommends training in the Sunshine Law's requirements for the Liquor Commission and its staff.

Very truly yours,

Jennifer Z. Brooks
Staff Attorney

APPROVED:

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JZB:jetf

c: Mr. Wallace Weatherwax
Administrator, Honolulu Liquor Commission