

Op. Ltr. 03-01 Charter School Boards and the Sunshine Law

This opinion was overruled by OIP Op. Ltr. 05-09.

February 5, 2003

Ms. Sarah T. Casken

Re: Charter School Boards and the Sunshine Law

Dear Ms. Casken:

This is in response to your request to the Office of Information Practices (“OIP”) dated October 4, 2002, for an investigation to determine whether chapter 92, Hawaii Revised Statutes, commonly referred to as the “Sunshine Law,” has been violated by the Lanikai Elementary School’s board.

FACTS

Your letter of October 4, 2002, alleges that the board of Lanikai Elementary School has been using executive sessions as a pretext to discuss business that may not be discussed in executive sessions. More specifically, you alleged that the Lanikai Elementary School’s board went into executive meeting “even when the individual concerned requests an open meeting.” It appears that you are referring to executive meetings held to discuss the employment of Lanikai Elementary School’s principal.

You also alleged that no minutes are being kept of executive sessions.

In a letter to the Superintendent of Education dated October 15, 2002, the OIP asked for a response to your allegations. No written response was received, however, Lanikai Elementary School Principal Donna Estomago spoke to the OIP via telephone on January 14, 2003.

Principal Estomago advised Lanikai Elementary School had a new board this past year. She also advised that as Lanikai Elementary School is a charter school, everything has been a learning process because none of this has been done before. There are inherent conflicts because her staff as well as parents are required to be on the board by law. Principal Estomago is also on the board.

Principal Estomago advised that the Sunshine Law became an issue when the board felt it did not have to follow Sunshine because it was a “humbug.” Things like voting online were attempted then abandoned.

The OIP is informed from Principal Estomago that the board contacted Deputy Attorney General Russell Suzuki regarding compliance with the Sunshine Law. Principal Estomago stated that Mr. Suzuki advised that Lanikai Elementary, as a charter school, only has to follow health, safety, and collective bargaining laws. He also suggested they follow Sunshine, although the law does not force them to.

Principal Estomago advised she is leaving at the end of the year and is preparing for the transition. She believes the Sunshine Law is an essential “double-check” for the system, and wants to make sure its safeguards are in place. She wants the level of transparency that the Sunshine Law provides. The OIP suggested that if Principal Estomago’s transition documents will include sections on the Sunshine Law and the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes, she can forward them to the OIP for review.

DISCUSSION

I. CHARTER SCHOOLS ARE NOT SUBJECT TO THE SUNSHINE LAW

A threshold issue here is whether the Lanikai Elementary School’s board is subject to the Sunshine Law. Chapter 302A, Hawaii Revised Statutes, which governs charter schools, states:

§ 302A-1184 New century charter schools; exemptions. Schools designated as new century charter schools shall be exempt from all applicable state laws, except those regarding:

- (1) Collective bargaining under chapter 89; provided that:
 - (A) The exclusive representatives defined in chapter 89 may enter into agreements that

contain cost and noncost items to facilitate decentralized decisionmaking;

- (B) The exclusive representatives and the local school board of the new century charter school may enter into agreements that contain cost and noncost items;
- (C) The agreements shall be funded from the current allocation or other sources of revenue received by the new century charter school; and
- (D) These agreements may differ from the master contracts;

(2) Discriminatory practices under section 378-2; and

(3) Health and safety requirements.

New century charter schools shall be exempt from the state procurement code, chapter 103D, but shall develop internal policies and procedures for the procurement of goods, services, and construction, consistent with the goals of public accountability and public procurement practices. However, where possible, the new century charter school is encouraged to use the provisions of chapter 103D; provided that the use of one or more provisions of chapter 103D shall not constitute a waiver of the exemption of chapter 103D and shall not subject the new century charter school to any other provision of chapter 103D. New century charter schools shall account for funds expended for the procurement of goods and services, and this accounting shall be available to the public. In addition, notwithstanding any law to the contrary, as public schools and entities of the State, new century public charter schools shall not bring suit against any other entity or agency of the State of Hawaii.

Haw. Rev. Stat. § 302A-1184 (Supp. 2002) (emphasis added).

Section 302A-1184, Hawaii Revised Statutes, clearly exempts charter schools from “all applicable state laws” except those listed therein. Therefore, the OIP must conclude that charter schools, and their boards, are not subject to the Sunshine Law.

II. EXECUTIVE MEETINGS

Principal Estomago advised the OIP that although the Lanikai Elementary School board is not subject to the Sunshine Law, she believes it should be followed. She did not directly address your allegations regarding executive meetings and minutes. As it is the OIP's understanding that the Lanikai Elementary School board intends to follow the Sunshine Law, the OIP includes the following discussion.

Before a board may go into an executive meeting, it must vote to do so. Haw. Rev. Stat. § 92-4 (1993). In addition, the reason for holding an executive meeting must be publicly announced, and the vote of each member on the question of holding an executive meeting must be entered into the minutes of the meeting. Id. Section 92-5, Hawaii Revised Statutes, lists the only instances when a board subject to the Sunshine Law may enter into executive meetings.¹

¹ **§92-5 Exceptions.** (a) A board may hold a meeting closed to the public pursuant to section 92-4 for one or more of the following purposes:

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

(b) In no instance shall the board make a decision or deliberate toward a decision in an executive meeting on matters not directly related to the purposes specified in subsection (a). 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 (Supp. 2002).

III. MINUTES

Section 92-9 Hawaii Revised Statutes, requires that all boards subject to the Sunshine Law keep minutes of all meetings, including executive meetings:

§92-9 Minutes. (a) The board shall keep written minutes of all meetings. Unless otherwise required by law, neither a full transcript nor a recording of the meeting is required, but the written minutes shall give a true reflection of the matters discussed at the meeting and the views of the participants. The minutes shall include, but need not be limited to:

- (1) The date, time and place of the meeting;
- (2) The members of the board recorded as either present or absent;
- (3) The substance of all matters proposed, discussed, or decided; and a record, by individual member, of any votes taken; and
- (4) Any other information that any member of the board requests be included or reflected in the minutes.

(b) The minutes shall be public records and shall be available within thirty days after the meeting except where such disclosure would be inconsistent with section 92-5; provided that minutes of executive meetings may be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer.

Haw. Rev. Stat. § 92-9 (1993).

CONCLUSION

The Lanikai Elementary School board, as part of a charter school is not subject to the Sunshine Law, pursuant to section 302A-1184, Hawaii Revised Statutes. As Principal Estomago has expressed an interest in the board's complying with the Sunshine Law, the OIP recommends that the board comply in all instances, and not arbitrarily. The OIP is available to provide assistance in interpreting the Sunshine Law, and has issued legal advisory opinions thereon.

Very truly yours,

Carlotta Dias
Staff Attorney

Approved:

Moya T. Davenport Gray
Director

CMD: ankd

cc: Ms. Donna Estomago, Principal
Lanikai Elementary School

The Honorable Patricia Hamamoto, Superintendent
Department of Education