

May 2, 2003

Ms. Linda Vannatta

Re: Electronic Transmission of Testimony; Identification of
Testimony Received by Boards

Dear Ms. Vannatta:

This is in response to your request to the Office of Information Practices (“OIP”) of March 22, 2003, as to whether the Board of Agriculture, State of Hawaii (“Board”), violated the “Sunshine Law,” part I of chapter 92, Hawaii Revised Statutes, by not accepting your e-mail testimony.

ISSUES PRESENTED

- I. Whether the Sunshine Law’s provision requiring boards to accept written testimony on agenda items requires acceptance of testimony submitted by e-mail, facsimile transmission, or other electronic means.
- II. Whether submissions by the public concerning an upcoming agenda item are required to include the word “testimony” before being considered to be such by a board.

BRIEF ANSWERS

I. Yes. The Sunshine Law must be liberally construed to afford the public the opportunity to submit written testimony. Given the widespread use of e-mail and facsimile transmission, where possible, boards must allow testimony to be submitted by those means.

II. No. The Sunshine Law does not require that the word “testimony” be included in written submissions concerning agenda items. Where a written submission relates to a matter on a board’s agenda and reasonably appears to have been intended for consideration by the board, the board should consider the submission to be written testimony and distribute copies of the testimony to each board member.

FACTS

In your March 22, 2003 letter to the OIP, you allege that the Board did not accept your testimony submitted via e-mail on February 17, 2003. Based upon the copy provided to the OIP, your e-mail was addressed to Ms. Sandra Kunimoto, the Board’s chairperson. The subject line of the e-mail read “Item D-1 on Agenda, Orangutan move,” and the salutation was “To the Hawaii State Board of Agriculture.” Your testimony related to a request before the Board to revise a permit to allow the transfer of a male orangutan, Rusti, from the Honolulu Zoo to a temporary facility at Kualoa Ranch, Kaneohe, pending completion of a planned facility at Kualoa Ranch. The agenda for the Board’s meeting on February 20, 2003 identified the permit request relating to Rusti’s transfer to Kualoa Ranch as “Item D-1” and, based upon the minutes of the meeting, the matter regarding Rusti was approved.

You advise that you learned on February 21, 2003, that the Board members did not receive your testimony for their review prior to the Board meeting. You allege that the e-mail was clearly recognizable as testimony, even though the word “testimony” was not used and should have been distributed to the Board members. You also allege that, at the Board meeting, Ms. Kunimoto did not indicate that she had received written testimony in opposition to Item D-1 on the Agenda. In a letter dated February 22, 2003, addressed to Ms. Kunimoto, you requested that a new hearing be held on this agenda item so that the Board members could have an opportunity to consider e-mail testimony opposing the permit request.

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By letter dated March 7, 2003, Ms. Kunimoto responded to you that she had not noticed that your e-mail was addressed to the Board and had believed that your e-mail was intended to persuade her, individually, as to your position. She further stated:

It is unfortunate that these e-mails, if intended as testimony, were not identified as testimony; otherwise they would have been shared with Board members. In any event, the issues raised in these e-mails seem to have been addressed in oral testimony and were fully considered by the Board in making its decision. As a result, it does not seem necessary or appropriate at this time for the Board to revisit the issue of Rusti's relocation to Kualoa Ranch.

Thereafter, you sought the OIP's assistance to investigate whether Ms. Kunimoto's failure to distribute your e-mail to the other Board members before the Board voted on the subject matter of your e-mail was a violation of the Sunshine Law. In response to a letter from the OIP requesting the Board's position concerning this matter, Ms. Kunimoto advised the OIP that, as she understands the Sunshine Law, "[i]t does not specify procedures for distribution of testimony and other correspondence to Board members for their review." Notwithstanding her understanding of the statute, Ms. Kunimoto claims that "[i]t has been the Department of Agriculture's consistent practice to make and distribute copies of testimony to Board members prior to Board meetings." With respect to your e-mail, Ms. Kunimoto explained:

Ms. Vannatta's e-mail addressed to me dated February 17, 2003 was not clearly identified as "testimony" in the subject heading of the e-mail or recognized as intended testimony, as I did not notice her reference to the Board in the body of her e-mail.

Ms. Kunimoto further advised that the Board "will continue to make [its] best efforts to promote public input and provide the Board with as much information as possible."

DISCUSSION

The Sunshine Law governs State and county "boards" which are required to hold meetings and to take official action. Haw. Rev. Stat. § 92-2(1). As a preliminary matter, the OIP finds that there is no dispute that the Board is subject to the Sunshine Law and, accordingly, must comply

with the open meeting requirements of the statute. The Board has not contended otherwise or articulated any issue disputing the applicability of the Sunshine Law to the matter raised by you.

I. ACCEPTANCE OF TESTIMONY SUBMITTED BY E-MAIL OR FACSIMILE TRANSMISSION

The OIP first addresses the question of whether public testimony received via e-mail must be accepted by the Board. Although, from the statements in Ms. Kunimoto's letters, it appears that the Board treats e-mail testimony¹ in the same manner as other forms of written testimony, because the issue has not been addressed by an OIP opinion previously and, potentially, may be of importance to a large number of parties, public and private alike, the OIP will discuss testimony received via e-mail to provide guidance for other boards subject to the Sunshine Law.

The Sunshine Law requires a board to allow anybody wishing to submit testimony to do so. Haw. Rev. Stat. § 92-3 (1993). Specifically, the statute provides in relevant part:

§92-3 Open meetings. Every meeting of all boards shall be open to the public and all persons shall be permitted to attend any meeting unless otherwise provided in the constitution or as closed pursuant to sections 92-4 and 92-5; provided that the removal of any person or persons who wilfully disrupts a meeting to prevent and compromise the conduct of the meeting shall not be prohibited. **The boards shall afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item.** The boards shall also afford all interested persons an opportunity to present oral testimony on any agenda item. The boards may provide for reasonable administration or oral testimony by rule.

Haw. Rev. Stat. § 92-3 (1993) (emphasis added). The Sunshine Law, however, contains no express provision as to whether boards are required to accept testimony sent by e-mail.

¹ For the purposes of this Opinion, references to e-mail transmissions shall also include facsimile transmissions, as the OIP has recently received an inquiry as to whether testimony must be sent by mail or whether facsimile transmission is permissible.

In analyzing issues involving the Sunshine Law, the OIP has routinely referred to the underlying intent expressed by the legislature in its enactment of the statute. More specifically, the legislature declared that, among other things, it is this State's policy that the governmental process be open to public scrutiny and participation. Haw. Rev. Stat. § 92-1 (1993).² Furthermore, the legislature directed that the open meetings requirements are to be construed liberally. Id.

The OIP finds that e-mail use, both by the public and governmental agencies, is widespread and has become an acceptable method of communication for governmental agencies.³ The OIP further finds that testimony submitted via e-mail imposes no undue additional burden on a board. As with other forms of written testimony, e-mail testimony can be forwarded, either electronically or in paper form, to the members of a board for their consideration. Moreover, allowing testimony to be submitted via e-mail is consistent with the legislative mandate to protect the public's right to participate in the governmental process. Accordingly, in light of the widespread acceptance of e-mail and the expressed policy of the Sunshine Law, the OIP concludes that, in accordance with section 92-3, Hawaii Revised

² Section 92-1, Hawaii Revised Statutes, provides:

§92-1 Declaration of policy and intent. In a democracy, the people are vested with the ultimate decision-making power. Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore, the legislature declares that it is the policy of this State that the formation and conduct of public policy - the discussions, deliberations, decisions, and action of governmental agencies - shall be conducted as openly as possible. To implement this policy the legislature declares that:

- (1) It is the intent of this part to protect the people's right to know;
- (2) The provisions requiring open meetings shall be liberally construed; and
- (3) The provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings.

Haw. Rev. Stat. § 92-1 (1993).

³ The OIP notes that the State of Hawaii, Department of Accounting and General Services posts a General Records Schedule at <http://www://state.hi.us/dags/archives>. Section 11.7 of the General Records Schedule states that "[s]ender's and recipient's versions of electronic mail (e-mail) messages that meet the definition of government records as defined by Section 92F-3, Hawaii Revised Statutes, shall be evaluated for information contact. . . . Records transmitted through e-mail systems will have the same retention period as the same records in other formats."

Statutes, boards must accept testimony submitted via e-mail and treat such e-mail testimony in the same manner as other forms of written testimony.

In its response to the OIP, the Board noted that the statute does not specify the manner in which testimony should be distributed to board members. While the Board is correct in its observation, that fact does not relieve the Board of its obligation to ensure that each Board member receives copies of written testimony before a decision is made on the issue. Written testimony would be meaningless if a board was able to refuse to distribute that testimony to its members simply because the statute does not specify the manner in which distribution is to be made, and such an interpretation of the statute would be contrary to the Sunshine Law's stated policy. The Board is empowered to determine how to best and most efficiently provide its members with copies of written testimony, including such testimony received electronically. The OIP, however, recognizes that certain board members may not have or use e-mail. Given that written testimony, including that received electronically, is meaningless unless made available to board members before a decision on the issue is made, the OIP emphasizes that testimony received via e-mail must be provided to each board member in a form reasonably calculated to be received by that particular board member. In other words, if certain board members do not have or use e-mail, those board members must be provided a printed copy of the e-mail testimony.

II. THE FORM OF WRITTEN SUBMISSIONS RELATING TO A MATTER ON THE BOARD'S AGENDA

While, as noted above, the Board appears to accept testimony submitted by e-mail, in her letter to the OIP, Ms. Kunimoto explained that she did not recognize your e-mail to be testimony because it was not clearly identified as being such. The Sunshine Law does not state that, for a written submission to be considered by a board, it must be specifically identified as "testimony." To impose such a requirement on written submissions would be contrary to the intent and purpose of the statute. Indeed, section 92-3, Hawaii Revised Statutes, does not even contain the word "testimony," but requires boards to "afford . . . an opportunity to submit **data, views, or arguments**, in writing, on any agenda item." Haw. Rev. Stat. § 92-3 (1993) (emphasis added). Accordingly, the OIP rejects any contention that written submissions must include the word "testimony" before being considered to be such by a board. The OIP concludes that a board must accept any written

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submission received prior to the publicly noticed board meeting which, upon reasonable review, relates to a matter on the board's agenda and reasonably appears to have been intended for consideration by each member of the board.

In this case, although addressed to Ms. Kunimoto, your e-mail's salutation was "To the Hawaii State Board of Agriculture." Moreover, the subject line of the e-mail specifically referenced the item number on the Board's Agenda as well as the words "Orangutan move." The OIP finds that your e-mail provided sufficient information for the Board to have reasonably identified it as being testimony relating to a matter on its February 20, 2003 Agenda. Upon a review of your e-mail, the Board should have reasonably understood that it was intended for distribution to each of the Board members for the simple fact that the salutation was to the Board, not only Ms. Kunimoto. Accordingly, the OIP concludes that the Board's failure to distribute copies of your e-mail to all of the members of the Board before they decided the permit issue involving Rusti was contrary to the requirements of the statute.

Because the OIP has found that the Board's action in not accepting your e-mail testimony violated the Sunshine Law, by copy of this letter to the Board, the OIP suggests that the Board put the issue involving Rusti on the Board's next agenda for consideration of your and any other testimony received prior to the Board meeting on February 20, 2003, that was not considered as part of that meeting. The OIP is not suggesting that the Board must reconsider all of the testimony, either written or oral, which it previously heard or considered in rendering its decision on the request to revise the permit relating to Rusti's transfer to Kualoa Ranch. Rather, the agenda item should be limited to consideration of the testimony which the Board received prior to its February 20, 2003 meeting but which was not provided to its members before their vote on the issue.

Should the Board decline to follow the OIP's suggestion to place the matter on a future agenda, section 92-11, Hawaii Revised Statutes, authorizes you to file a lawsuit to void any final action taken by the Board in violation of section 92-3, Hawaii Revised Statutes, upon "proof of wilful violation." Please be advised that such a lawsuit must be filed within 90 days of the Board's action.

CONCLUSION

The OIP concludes that the Board should have reasonably understood your February 17, 2003 e-mail to have been testimony relating to "Item D-1 on Agenda, Orangutan move." By not distributing copies of your e-mail to each of the Board members prior to the February 20, 2003 meeting, the Board failed to afford you the opportunity to submit testimony as required by section 92-3, Hawaii Revised Statutes, and therefore, the Board's action with respect to the request to revise the permit relating to Rusti's transfer to Kualoa Ranch violated the Sunshine Law. In accordance with the procedure outlined above, the OIP suggests that the Board make consideration of the testimony submitted prior to the February 20, 2003 Board meeting, including your e-mail, an item on its next agenda.

By copy of this letter to Ms. Kunimoto, the OIP recommends that Board members, as well as the staff who are assigned to administratively assist the Board, be trained on compliance with the Sunshine Law. The Board may contact the OIP to arrange a date and time for training. The Board is also welcome to contact an OIP Staff Attorney during regular business hours whenever questions arise on the Sunshine Law.

Sincerely,

Leslie H. Kondo
Director

SRK/LHK: ankd

cc: Ms. Sandra Lee Kunimoto
Chairperson, Board of Agriculture