

This opinion has been affected by Act 64 (Sess. Law H. 2017). In summary, section 92-7.5, HRS (effective July 1, 2018), requires boards to make the board packet available to the public at the time the board packet is distributed to the board members; to provide notice to persons requesting notification of meetings that the board packet is available for inspection in the board's office; and to provide reasonably prompt access to the board packet to any person upon request.

June 18, 2003

The Honorable Ian K. Costa
Director of Planning
Department of Planning, County of Kauai
4444 Rice Street, Suite A473
Lihue, Hawaii 96766-1326

Re: Kauai Planning Commission and Subdivision Committee Meetings

Dear Mr. Costa:

This is in response to your request to the Office of Information Practices (“OIP”) dated May 7, 2003 for an opinion on the above-referenced matter.

ISSUE PRESENTED

Whether written reports of the Subdivision Committee (“Committee”) of the Kauai Planning Commission (“Commission”) containing the Committee’s recommendations to the Commission on subdivision applications must be available to the public at the time that the Commission provides notice of the public meeting at which the subdivision applications are to be considered.

BRIEF ANSWER

No. The “Sunshine Law” at part I of chapter 92, Hawaii Revised Statutes, does not require that reports prepared by subcommittees of boards for consideration of the full board be available for public inspection at the time the board’s notice and agenda for a public meeting are filed.

The Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (“UIPA”), requires that agency records that are open for public inspection and copying be available upon request, thus the written reports should be made public once they are completed. Haw. Rev. Stat. § 92F-11(b) (1993). If the reports are not yet in existence at the time an agenda is posted, they need not be created in order to satisfy a record request. Haw. Rev. Stat. § 92F-11(c) (1993).

FACTS

The Kauai Planning Commission conducts hearings and approves certain types of zoning permits and subdivision applications. The Commission meets twice a month. The Commission's Subdivision Committee meets one hour before each Commission meeting to review subdivision applications that will be considered by the Commission.

The following language is an example of what the Committee would discuss at a meeting, based on the sample agenda that you provided:

D. NEW BUSINESS

1. Tentative Subdivision Action:

- | | |
|--|--|
| a. S-2003-39 = Grove Farm Company | 17-lot Subdivision, TMK: 3-3-16-90
Puhi, Lihu'e, Kaua'i |
|--|--|

At Committee meetings, members vote on each subdivision application on the agenda. The Committee's votes and recommendations are memorialized in a report as required by Planning Commission Rules of Practice and Procedure 1-2-13. A blank report form entitled "Subdivision Committee Report No. 17" was provided for review. This form does not contain detailed information. Instead, it lists each "tentative subdivision action" and then the Committee's recommendation and vote for each is recorded. At the adjournment of each Committee meeting, staff prepares the written report.

A summary of the Committee's action is verbally reported to the Commission at its meeting immediately subsequent to the Committee meeting. These recommendations are verbal because the written reports may not yet be completed at the time an application is discussed by the Commission. The Commission's rules do not require that the Committee's reports be in written form at the time Committee recommendations are made to the Commission. The Commission then votes on the subdivision applications.

You provided a sample Commission agenda from its April 22, 2003 meeting which included the following language:

C. SUBDIVISION - Action of subdivision matters listed in the Subdivision Committee Agenda (attached).

The Commission agenda did not include a description of the subdivision matters to be considered by the Commission. Rather, the Commission's "SUBDIVISION" agenda item referred to the Committee's agenda for the same day regarding subdivision applications and attached the Committee agenda. The applications listed on the Committee agenda were available for public inspection at the time both agendas were posted. Records relating to a particular application were made available to the public once received by the Department of Planning. The public is allowed to testify on agenda items at both Commission and Committee meetings.

A member of the public complained to the Kauai Department of Planning that the Commission's current practice of including on its agenda items for which the Committee's written reports are not available violates the Sunshine Law. According to the member of the public, the written reports of the Committee should be made publicly available at the time the Commission agenda is filed, which is six days prior to when the Commission takes action on it. As you note, to do so would require the Committee to meet one week prior to the Commission in order for the report to be available by the time the Commission agenda is posted.

DISCUSSION

I. SUNSHINE LAW

The Sunshine Law governs the manner in which State and county boards¹ must conduct their meetings and is intended to make government more accountable to the public by mandating that board meetings² be public in most instances.³ The Sunshine Law also dictates the manner in which a board must give notice of its meetings. More specifically, the Sunshine Law states with regard to notice of meetings:

¹ "Board" means "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." Haw. Rev. Stat. § 92-2 (1993).

² "Meeting" means "the convening of a board for which a quorum is required in order 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. § 92-2 (1993).

³ See Haw. Rev. Stat. § 92-3 (1993).

§ 92-7 Notice. (a) The board shall give written public notice of any regular, special, or rescheduled meeting, or any executive meeting when anticipated in advance. The notice shall include an agenda which lists all of the items to be considered at the forthcoming meeting, the date, time, and place of the meeting, and in the case of an executive meeting the purpose shall be stated.

Haw. Rev. Stat. § 92-7 (Supp. 2002). In addition, section 92-7(b), Hawaii Revised Statutes, requires that county boards subject to the Sunshine Law shall file a notice and agenda in the county clerk's office at least six calendar days before the meeting.

Other than the notice and agenda, the Sunshine Law does not require a board to file or make publicly available any document prior to a meeting nor does the Sunshine Law specifically require that all documents relevant to agenda items be available for public inspection at the time a notice and agenda are filed. Although the Commission's practice does not violate the letter of the statute, the OIP must consider whether the policy and intent of the law would require that the Committee's report be available at the time the Commission's agenda is posted.

The legislature expressed the policy and intent of the statute as follows:

§ 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).

It is widely recognized that the statute's notice and agenda requirements "are at the very heart of the Sunshine Law." In re Order Declaring Annexation, 637 P.2d 1270, 1273 (Okla. App. 1981). Requiring that a board give notice of its meeting and include with that notice an agenda describing the items to be considered is essential to protecting the public's ability to meaningfully participate in the meeting. The public simply must be informed as to the matters to be discussed at the meeting.

After reviewing the agenda for the Commission, including the Committee's agenda attached thereto, the OIP finds that the Commission notice and agenda provided sufficient notice to the public of the items to be considered by the Commission. The Commission's agenda advised the public that the Commission would consider action on certain subdivision matters. The attached Committee agenda specifically described the type of subdivision action that the Commission would discuss and identified the petitioner and the parcel by tax map key number. The OIP finds that such information was sufficiently detailed as to have reasonably allowed members of the public to provide meaningful testimony if they so chose.

The fact that the Committee's report was not available at the time the Commission's notice and agenda were filed does not restrict or even change the public's ability to participate in the Commission's meeting. The Committee's report, like public testimony, was an item to be considered by the Commission in its decision-making process at its meeting. It did not represent the Commission's decision. Moreover, the public had the opportunity to attend and provide testimony at the Committee meeting. In addition, the written reports do not contain a detailed analysis of the Committee's recommendation. Instead, it merely lists the recommendation and vote for each subdivision application. Thus, the OIP finds that the current procedure of the Commission and its Committee do not violate the spirit of the Sunshine Law. Requiring that the Committee's report be available at the time that the Commission's notice and agenda are posted would not further the statutory intent of protecting the public's right to know.

The OIP emphasizes that boards should always consider the policy and intent of the Sunshine Law. The current practices of the Commission and the Committee regarding subdivision applications should never be used to prevent or hinder public

access to or participation in meetings. Such action would most likely be a violation of the Sunshine Law.

II. UIPA

The UIPA governs access to government records⁴ maintained by agencies⁵. The UIPA requires that “[a]ll government records are open to public inspection unless access is restricted or closed by law.” Haw. Rev. Stat. § 92F-11(a) (1993). The UIPA does not require agencies to respond to record requests by creating records where none exist, unless such records are readily retrievable. Haw. Rev. Stat. § 92F-11(c) (1993). Here, Committee written reports do not yet exist at the time the Commission’s agendas are posted. They are, however, available shortly after the Commission’s meeting begins. The information in the reports is not readily retrievable at the time the Commission’s agenda is posted because the Committee has not yet taken any action that it can report on. Therefore, the Committee is not obligated under the UIPA to make its written reports available for public inspection and copying until such time as they are completed.

CONCLUSION

The Sunshine Law clearly does not require that written reports of a committee of a board that are relevant to an item on the board’s agenda be public at the time a notice and agenda are filed. Because the Commission notice attaches the Committee’s agenda, which is sufficiently detailed; and because both meetings are open to the public, the public has the opportunity to attend and provide meaningful testimony at both meetings. Thus, the current procedure of the Commission and its Committee do not violate the spirit of the Sunshine Law.

There is no requirement in the UIPA that a record pertaining to an item on a board’s agenda be available in final form at the time the agenda is posted. In addition, the UIPA does not require agencies to respond to record requests by creating records where none exist, unless such records are readily retrievable. Haw. Rev. Stat. § 92F-11(c) (1993). As Committee written reports do not yet exist and are not readily retrievable at the time the Commission’s agenda is filed, the

⁴ “Government record” means “information maintained by an agency in written, auditory, visual, electronic, or other physical form.” Haw. Rev. Stat. § 92F-3 (1993).

⁵ “Agency” means “any unit of government in this State, any county, or any combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, but does not include the nonadministrative functions of the courts of this State.” Haw. Rev. Stat. § 92F-3 (1993).

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Committee is not obligated under the UIPA to make written reports available for public inspection and copying until they are completed.

Very truly yours,

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Staff Attorney

APPROVED:

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Director

CMD: ankd