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January 19, 2005

Ms. Constance Kiriu  
County Clerk  
Office of the County Clerk  
County of Hawaii  
25 Aupuni Street  
Hilo, Hawaii 96720

Mr. Buck Joiner  
Kihei, Hawaii 96753

Re: Speaking at Public Meetings on Matters Outside the Agenda (RFO-M 00-001)

Dear Ms. Kiriu and Mr. Joiner:

Mr. Al Konishi, then the County Clerk for the County of Hawaii, asked the Office of Information Practices ("OIP") for an opinion on the Hawaii County Council's practice of permitting members of the public to make statements at the end of each meeting regarding matters outside of the agenda. Mr. Buck Joiner subsequently asked OIP for an opinion regarding whether members of the public who testify at a public meeting may be restricted to speaking only about matters that are on the meeting agenda.

**ISSUES PRESENTED**

I. Must a board provide members of the public an opportunity to speak on matters that are not on the agenda, such as during a "Statements from the Public" or "Open Forum" portion of the meeting intended for that purpose?

II. May board members speak on matters that are not on the agenda, either during a portion of the meeting intended for that purpose or in response to statements from members of the public?

OIP Op. Ltr. No. 05-02

## BRIEF ANSWER

I. No. A board may permit members of the public to speak at a meeting on matters that are not on the agenda, but is not required to do so.

II. No. Board members may not discuss, deliberate, or decide matters that are not on the agenda. Thus, if a board elects to hear public statements regarding matters not on the agenda and the statements relate to matters over which the board has supervision, control, jurisdiction, or advisory power, the board members must be careful not to respond by discussing the matter.

## FACTS

At the time Mr. Konishi made his request, the Council had been taking public testimony on items on the agenda at the beginning of each meeting and also permitting "Statements from the Public" at the end of each meeting. The matters raised by the public during the Council's "Statements from the Public" portion of the meeting were often unrelated to agenda items.<sup>1</sup> Occasionally, when a non-agenda matter was raised by a member of the public, Council members would discuss it.

Mr. Joiner's request was based on his concern that, if the public is not permitted as a matter of right to speak on matters outside the agenda, a board might decline to place an item on the agenda to prevent public discussion of that item.

## DISCUSSION

### **I. STATEMENTS BY MEMBERS OF THE PUBLIC**

Section 92-3, Hawaii Revised Statutes, requires a board to "afford all interested persons an opportunity to present oral testimony on **any agenda item.**" Haw. Rev. Stat. 92-3 (1993) (emphasis added). In other words, as we have stated in previous opinions, we interpret the Sunshine Law to require a board to accept oral testimony relating to any item on every meeting agenda. See, e.g., OIP Op. Ltr. No. 01-06 (Dec. 31, 2001). There, however, is no provision of the Sunshine Law that requires a board to allow public testimony on matters outside the agenda. So,

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<sup>1</sup> The agendas filed by other boards sometimes include items such as "Open Forum" or "Public Comments," which OIP understands is for the similar purpose of allowing the public to comment about any matter, whether or not on the meeting agenda for that meeting. This opinion regarding the appropriateness of the Hawaii County Council's "Statements from the Public" agenda item applies equally to other boards that allow the public to comment on matters that are not listed on the meeting agenda.

as we interpret the statute, a board can decline to accept testimony regarding non-agenda items.

The Sunshine Law also does not prohibit members of the public from raising and discussing matters outside of the agenda. A board, therefore, may permit the public to speak at a meeting on matters that are not on the agenda. See, e.g., Ariz. Att’y Gen. Op. I099-006 (1999) (Arizona’s Open Meeting Law, A.R.S. §§ 38-431 to -431.09, which neither requires nor prohibits participation by members of the public in an open meeting, does not prevent members of the public from raising non-agenda items to board members at an open meeting). Such testimony, however, is at the board’s discretion. As noted above, the statute does not require a board to accept testimony regarding matters that are not on the agenda.

## II. STATEMENTS BY BOARD MEMBERS

If a board allows public testimony on matters outside of its agenda, the board must be careful that its members do not then yield to the temptation to discuss, deliberate, decide or take action on those matters.<sup>2</sup> The Sunshine Law prohibits board members from discussing, deliberating, or deciding matters that are not on the agenda. See Haw. Rev. Stat. § 92-7(a) and (d) (supp. 2004). Thus, if a board hears public statements regarding matters not on the agenda, the board members cannot respond by discussing those matters. See Ariz. Att’y Gen. Op. I099-006, supra (Under Arizona’s Open Meeting Law, supra, board members may not respond to public comments made during an open meeting about non-agenda items). If the board wishes to discuss a non-agenda matter raised during the “Statements from

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<sup>2</sup> A board considering allowing a period for general public comment on non-agenda items should also be aware that in doing so, it is likely to create a public forum.

The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Widmar v. Vincent, 454 U.S. 263 (1981) (university meeting facilities); City of Madison Joint School District v. Wisconsin Employment Relations Comm’n, 429 U.S. 167 (1976) (school board meeting); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal theater) [footnote omitted]. Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Widmar v. Vincent, supra, at 269-270.

Perry Education Association v. Perry Local Educators’ Association, 460 U.S. 37, 45, 103 S. Ct. 948, 955 (1983). Thus, a board may wish to discuss with its deputy attorney general or corporation counsel the possibility that it would not be able to cut off public statements that the board feared were defamatory, or that were simply of no interest to the board.

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the Public” portion of the meeting, the board must either amend its agenda to include the matter<sup>3</sup> or delay its discussion of the matter until a future meeting so that the matter can be placed on that meeting’s agenda. Our advice, however, is not meant to be construed to restrict responses that do not involve “board business,” meaning matters over which the board has supervision, control, jurisdiction or advisory power that the board is considering or that the board reasonably may consider in the foreseeable future. For example, board members may respond with purely administrative information about a non-agenda matter, such as stating that the matter will be considered for inclusion on the next agenda or informing the public that the deadline for submitting proposals or comments on the issue is a particular date.

### CONCLUSION

A board may permit members of the public to speak at a meeting on matters that are not on the agenda, but is not required to do so. The board members themselves, though, may not discuss non-agenda matters. Thus, if a board hears public statements regarding matters not on the agenda, the board members must be careful not to respond by discussing the matter.

Very truly yours,

Jennifer Z. Brooks  
Staff Attorney

APPROVED:

Leslie H. Kondo  
Director

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<sup>3</sup> The board may add to its agenda an item that is not “of reasonably major importance” and that will not “affect a significant number of persons,” if two-thirds of the board’s full membership votes in favor of doing so. Haw. Rev. Stat. § 92-7(d) (supp. 2004).