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LESLIE H. KONDO
DIRECTOR

April 27, 2005

Mr. Richard Stauber

Re: Special Council Meetings Held on January 6, 2005 and January 20, 2005 (RFO-P 05-001)

Dear Mr. Stauber:

This letter responds to your request to this office for an opinion regarding whether certain actions of the Kauai County Council (the "Council"), related to the above-referenced meetings (the "Meetings"), were proper under part I of chapter 92, Hawaii Revised Statutes ("HRS") (commonly referred to as the "Sunshine Law"). Specifically, we have construed your request to raise the following two issues:

ISSUES PRESENTED

I. Whether the building in which the Meetings were held could properly be closed to the public after the Council voted to convene in executive sessions; and

II. Whether the Council could properly commence the Meetings more than seven hours after the times stated on the notices and agendas for the Meetings.[1]

BRIEF ANSWERS

I. Yes. The Sunshine Law expressly provides for meetings that are closed to the public, and may be read consistently to allow boards to shield participants in an executive meeting in certain instances. Absent any provision granting the public

[1] We offered the Council the opportunity to respond to the issues raised in your request, but did not receive any response or other input from the Council.

the right to remain, we cannot say that the public's exclusion from the building, limits or restricts any right to access granted to the public under the Sunshine Law. However, we believe that proper application of the open meeting exceptions require a board to reconvene in an open meeting in too many instances to make it reasonable and practicable to meet in a place that would not allow a board to reconvene in an open meeting. We therefore strongly recommend that boards hold executive meetings within the context of an open meeting and in a place where the public may remain so that the board may reconvene in the open meeting where necessary or desired.

II. No. We find that the more than seven hour delay in commencing the Meetings substantially deprived the public of its rights to access granted by the Sunshine Law and thus rendered the filed notices insufficient under the Sunshine Law.

FACTUAL BACKGROUND

Based upon our review of the notices and agendas for the Meetings, it is our understanding that the Meetings were noticed and commenced as open meetings. The notice and agenda for the January 6 meeting lists the time of the meeting to be "1:00 P.M., OR SOON THEREAFTER" and lists two items for consideration with executive meeting purposes stated for both items.[2] You have stated that this meeting commenced seven hours after the noticed time. You have also stated that after the Council voted to go into executive session you were asked to leave the building. You were apparently told that the building needed to be closed because of the late hour and because there was no public meeting going on in the Council Chambers. The notice and agenda for the January 20 meeting lists the time of the meeting to be "2:00 P.M., OR SOON THEREAFTER" and again lists two items for consideration with executive meeting purposes stated for both items. You have stated that this meeting commenced at 10:30 p.m., eight and a half hours after the noticed time. You have stated that the building was again closed to the public after the Council convened in an executive meeting.

We first address the issue of whether the closure of the building by the Kauai County Clerk during the Council's executive meetings violated the Sunshine Law. For the reasons discussed below, it is our opinion that this action did not violate the Sunshine Law, but that boards should generally avoid such practice.

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[2] By separate letter, we have provided the Council with guidance as to the amount of detail required to be included in agendas and the manner in which executive meetings should be noticed in the agendas.

The Sunshine Law implements the policy of this State that the formation and conduct of public policy be conducted as openly as possible to allow for public scrutiny and participation. Haw. Rev. Stat. 92-1 (1993). Section 92-3, in particular, sets forth the right of the public to access the meetings of government "boards."[3] Recognizing that certain matters require private deliberation, however, the legislature provided for executive meetings from which the public may be excluded, but narrowly limited these closed meetings to the consideration of certain matters enumerated in section 92-5. See Haw. Rev. Stat. § 92-4 (1993) ("A meeting closed to the public shall be limited to matters exempted by section 92-5.").[4] The Sunshine Law thus expressly provides for certain instances in which the public may rightfully be excluded from a meeting of a board.

Moreover, if the privacy of an individual is the underlying purpose for holding the executive session, such as when an individual is being considered as a candidate for government employment, we believe that it is consistent with the Sunshine Law that the board be allowed to shield the identity of that individual if disclosure would defeat the lawful purpose for convening the executive meeting. See Haw. Rev. Stat. § 92-5(a)(2) (Supp. 2004) (allows board to hold a closed meeting to, among other reasons, consider the hire of an employee "where consideration of matters affecting privacy will be involved").

To reach this conclusion, we refer to section 92-9(b), which protects executive meeting minutes from disclosure where such disclosure would be inconsistent with section 92-5 for as "long as their publication would defeat the lawful purpose of the executive meeting[.]" Haw. Rev. Stat. § 92-9(b) (1993); see Haw. Rev. Stat. § 1-13 (1993) ("Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other."); State v. Keawe, 108 P.3d 304 (Haw. 2005) (statutory language must be read in the context of the entire statute and consistent with "the reason and spirit of the law . . . ." (quoting Haw. Rev. Stat. § 1-15(2) (1993)). We read section 92-5(a)(2) together with section 92-9(b) to similarly shield the identity of a candidate for employment where the disclosure of the candidate's attendance would defeat the lawful purpose for convening the executive meeting, i.e., the privacy interest of the candidate for hire. See Op. Att'y Gen. No. 94-1 (Haw. 1994) (reading sections 92-5(a)(2) and 92-9 together to preclude commission members

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[3] See Kaapu v. Aloha Tower Development Corp., 74 Haw. 365, 384, 846 P.2d 882, ___ (1993) ("The 'mandate' of HRS § 92-3 is that: (1) meetings of state 'boards' be open to the public; (2) all persons be permitted to attend; and (3) interested persons be afforded an opportunity to *submit* written and oral testimony and information. In other words, HRS § 92-3 ensures public access to open meetings of state agencies and an opportunity to be heard." (emphasis in original)).

[4] See also H. Stand. Comm. Rep. No. 485, 8th Leg., 1975 Reg. Sess., Haw. H.J. 1183 (1975) ("To preserve the sanctity of certain matters—such as personnel matters, labor negotiations and consultation with attorneys—that must of necessity require private deliberation, this bill excludes 'executive meetings' from the open meeting requirement.").

from disclosing matters inconsistent with section 92-5(a)(2) for as long as disclosure would defeat the purpose of convening the executive meeting).

We understand that the public may wish to "watch the doors" leading to the room where an executive meeting is being held to scrutinize who attends the meeting in order to challenge the propriety of the executive meeting. However, we simply find no provision in the Sunshine Law that grants the public the right to do so. Absent any provision providing such a right, we cannot say that the public's exclusion from the building, while the Council is properly in a meeting closed to the public as expressly provided for by the Sunshine Law, limits or restricts any right to access granted to the public under the Sunshine Law.[5] Accordingly, we find no violation of the Sunshine Law based upon the building closures at issue here.

Although we find that nothing in the Sunshine Law precludes the public's exclusion from a board's meeting place during an executive meeting, it is our further opinion that, in most instances, efficiency and proper compliance with the executive meeting requirements should dictate otherwise. The Sunshine Law places narrow constraints on the use of the exceptions to the open meeting requirements: Executive meetings may only be held for certain narrow purposes. Haw. Rev. Stat. §§ 92-4, 92-5 (Supp. 2004). To close a meeting to the public, the board must publicly announce the reason for the executive meeting and take an affirmative recorded vote of the board members. Id. A board cannot, in most instances, deliberate toward and make a decision in an executive meeting. Haw. Rev. Stat. § 92-5(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)."). And, because closed meetings are contrary to the policy of open government, the statute explicitly provides that the "provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings." Haw. Rev. Stat. § 92-1(3).

Given these narrow constraints on the open meeting exceptions, we believe that proper interpretation and application of those exceptions require a board to reconvene in an open meeting in too many instances to make it reasonable and practicable to meet in a place that would not allow a board to reconvene in an open meeting. We provide the following examples to illustrate what we envision are common situations that would require a board to reconvene in an open meeting.

[5] We note that our conclusion is premised upon adjournment of the public meeting. Nothing in this letter should be read to allow a board to deny or limit access to the building if the public meeting has not been adjourned or continued.

First, when any board discussion extends beyond the narrow confines of the specified executive meeting purpose, which purpose must be strictly construed, the board must reconvene in a public meeting to continue the discussion. See Haw. Rev. Stat. § 92-4. Second, this applies even where the discussion extends into a topic that is within another specified executive meeting purpose where that second purpose was not separately announced and voted on in the open meeting. In such instance, the board must reconvene in an open meeting to publicly announce and vote on this separate purpose in order to discuss the second matter in an executive meeting. See id. Third, there may also be instances when a board, during the course of a discussion in an executive meeting, may decide that there is no need to hold the discussion in a closed meeting. The board may then want to continue the discussion in an open meeting.

Fourth, a board cannot deliberate toward and make a decision in an executive meeting that is not "directly related" to the specified purpose for which the executive meeting is convened. Haw. Rev. Stat. § 92-5(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 . . . ."). The Sunshine Law does not define "directly related." However, the legislature made clear, by the restrictive language of this section, the direction that exceptions to the open meetings requirements be strictly construed against closure and the legislature history to this section,[6] that the term "directly related" should be construed to limit the discussions, deliberations, decisions, and action conducted in executive meetings as narrowly as possible. Section 92-9(b) again also guides our interpretation of this provision. See Haw. Rev. Stat. § 1-13; Keawe, 108 P.3d 304.

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[6] The Sunshine Law in its original form did not include language specifically addressing deliberation and decision making in an executive meeting. Despite the absence of any specific provision, the legislature clearly intended that final decisions be made in the open meeting. H. Stand. Comm. Rep. No. 485, 8th Leg., 1975 Reg. Sess., Haw. H.J. 1183 (1975) (Sunshine Law bill "makes it explicit that final actions on such other governmental activities as rulings, decisions, etc., are not to be accomplished at executive meetings.").

The legislature amended the Sunshine Law in 1985 to, among other things, clarify the deliberation and decision making that could occur in an executive meeting. In so doing, the Legislature first considered an outright prohibition on "board deliberations to reach decisions in an executive meeting[,]" but believed that the definition of "meeting" in the statute did not allow this prohibition. H. Comm. Rep. No. 745, 11th Leg., 1985 Reg. Sess., Haw. H. J. 1349 (1985); S. Comm. Rep. No. 714, 11th Leg., 1985 Reg. Sess., Haw. S. J. 1196 (1985). The legislature also considered prohibiting deliberation or decision making "in matters not **reasonably related** to the open meeting exceptions. H. Conf. Comm. Rep. No. 41, 11th Leg., 1985 Reg. Sess., Haw. H. J. 906 (1985) (emphasis added); see also S. Conf. Comm. Rep. No. 36, 11th Leg., 1985 Reg. Sess., Haw. S. J. 867 (1985).

Ultimately, however, the legislature decided to amend section 92-5(b) "to insure that a board would not deliberate toward or make a decision in an executive meeting on matters not **directly related** to the open meeting exceptions." See H. Conf. Comm. Rep. No. 42, 11th Leg., 1985 Reg. Sess., Haw. H. J. 907 (1985) (emphasis added); see also S. Conf. Comm. Rep. No. 36, 11th Leg., 1985 Reg. Sess., Haw. S. J. 867 (1985). Section 92-5(b) was thus amended to include the following language: "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)." Haw. Rev. Stat. § 92-5(b).

Thus construing the phrase "directly related" narrowly and consistent with section 92-9, we interpret section 92-5(b) to only allow a board to deliberate and make decisions in executive meetings when to do otherwise would defeat the lawful purpose for which the executive meeting was convened. See Op. Att'y Gen. No. 94-1; OIP Op. Ltr. No. 03-07. Stated otherwise, it is our opinion that a board may deliberate and decide matters in an executive meeting only to the extent necessary to execute the lawful purpose for which the executive meeting is convened and to maintain the confidentiality of the matters intended to be protected by the exception provided. A board, thus, must reconvene in an open meeting to make or deliberate toward a decision to the extent it may do so without defeating the lawful purpose for which the executive meeting may be held. We believe that, in many instances, deliberation and decision making may occur in an open meeting without defeating the lawful purpose of the executive meeting, therefore requiring the board to reconvene in an open meeting to do so.

In these situations described and others, a board would be forced, absent the ability to reconvene in an open meeting, to end any discussion until another properly noticed open meeting could be held. This approach, while proper, requires the vigilance and discipline of the board members to halt any further discussion, and is also inefficient and likely to lead to frustration for the board members. We thus believe that a much better practice would be to preserve the board's ability to reconvene in an open meeting. Accordingly, we strongly recommend that boards hold executive meetings within the context of an open meeting and in a place where the public may remain so that the board may reconvene in the open meeting where required to comply with the Sunshine Law's provisions or where desired by the requisite number of board members.

We next address the second issue raised, namely, whether the Council properly commenced the January 6 meeting and the January 20 meeting, seven hours and eight and a half hours, respectively, after the times noticed for those meetings. We find that the delay in commencing the Meetings rendered the filed notices virtually meaningless and thereby substantially deprived the public of its rights to access granted by the Sunshine Law. It is our opinion, thus, that the notices filed for the Meetings failed to provide the notice required by the Sunshine Law. See Haw. Rev. Stat. § 92-7 (Supp. 2004).

Section 92-7 sets forth the notice requirements under the Sunshine Law. That section requires, among other things, that the public be provided written notice of the date, time and place of the meeting. Clearly, the purpose of this notice is to give the public the opportunity to exercise its right to know and to scrutinize and participate in the formation and conduct of public policy. See Haw. Rev. Stat. § 92-1; Haw. Rev. Stat. § 92-3 (1993); *supra* note 1. Where a board so unreasonably departs from the noticed time for a meeting that it substantially deprives the public

of access to and the opportunity to participate in the meeting, it is our opinion that the notice provision of the Sunshine Law has been violated. See Ann Taylor Schwing, Open Meeting Laws 2d 167 (2000) ("Notice has not been given within the meaning of the open meeting law if the public body convenes the meeting at a time so unreasonably departing from the time stated in the notice that the public is misled or substantially deprived of the opportunity to attend, observe and record the meeting."). Keawe, 108 P.3d 304. Although we decline to set a bright line as to what amount of deviation will render a notice insufficient, we find that a delay of more than seven hours is clearly unreasonable.

CONCLUSION

It is our opinion that the practice of closing the building during an executive meeting does not violate the Sunshine Law, but that this practice should be avoided in order to allow the reconvening of an open meeting where desired or necessary. It is our further opinion that any deviation from the time stated in a notice for a public meeting must be reasonable or the notice given for the meeting will be rendered insufficient under the Sunshine Law.

Very truly yours,

Cathy L. Takase
Staff Attorney

APPROVED:

Leslie H. Kondo
Director

CLT:cy

cc: The Honorable Bill "Kaipo" Asing (via facsimile - 241-6349)
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