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GOVERNOR

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The Office of Information Practices (OIP) is authorized to resolve complaints concerning compliance with or applicability of the Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes (HRS), pursuant to sections 92-1.5 and 92F-42(18), HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

**DECISION**

**Requester:** Mr. Glenn Shiroma  
**Board:** Board of Land and Natural Resources  
**Date:** June 13, 2014  
**Subject:** Written Testimony and Minutes (S INVES-13-8)

**REQUEST FOR DECISION**

Requester seeks a decision as to whether the Board of Land and Natural Resources (BLNR) violated the Sunshine Law by not including in its minutes the views expressed in written testimony submitted about an agenda item for its meeting on July 27, 2012.

Unless otherwise indicated, this decision is based upon the facts presented in Requester's letter to OIP received on December 5, 2012, and the minutes from BLNR's meeting on July 27, 2012 (Minutes).<sup>1</sup>

**QUESTION PRESENTED**

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<sup>1</sup> In a letter dated December 11, 2012, OIP asked BLNR to provide OIP "with a detailed explanation, including any relevant legal citations, setting forth BLNR's position on this matter and any other information you deem relevant to this inquiry." OIP asked for BLNR's written position within ten business days. No response was received.

Whether, under the Sunshine Law, the Minutes properly gave a “true reflection of the matters discussed at the meeting and the views of the participants” in light of the fact that the Minutes did not describe the views set forth in written testimony about an agenda item. HRS § 92-9 (2012).

### **BRIEF ANSWER**

Yes. The Minutes met the Sunshine Law’s requirement that they reflect “the matters discussed at the meeting and the views of the participants.” *Id.* The Sunshine Law only requires that a board’s minutes describe the board’s actions and also oral testimony and oral presentations which occurred during the meeting.

### **FACTS**

At its July 27, 2012 meeting, BLNR, among other things, discussed and approved the adoption of and amendments to proposed section 13-244-15.5, Hawaii Administrative Rules, which concerned requirements for operators of power-driven vessels to take boating safety courses (proposed boating safety rule), before forwarding the proposed rule to the Governor for final approval. The Minutes stated that a number of written testimonies were distributed to BLNR members on this agenda item and described oral testimony presented by identified individuals. The Minutes also described BLNR members’ discussion among themselves, with staff from the Department of Land and Natural Resources, Division of Boating and Ocean Recreation, and with those individuals who orally testified.

In response to Requester’s public records request, BLNR disclosed the written testimonies received about the proposed boating safety rule. Requester’s complaint cited section 92-9, HRS, requiring that “written minutes shall give a true reflection of the matters discussed at the meeting and the views of the participants.” Requester asserted, “[i]t’s my belief [that] ‘the views of the participants’ include oral or written testimonies.”

### **DISCUSSION**

The Sunshine Law allows “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.” HRS § 92-3 (2012). The law further requires a board to keep written minutes of its meeting and specifies what information must be set forth therein:

**§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.

HRS § 92-9(a) (2012) (emphasis added).

In a previous challenge to the sufficiency of minutes describing oral testimony by a member of the public to a board, OIP had opined:

[T]he primary purpose for keeping minutes is to reflect what the board did. In other words, looking to the Sunshine Law's policy of protecting the public's right to know, it is of primary importance to know the actions taken by the decision-makers, i.e. the board members, so that the public can scrutinize their actions. The OIP therefore concludes that, while the statute requires the minutes to reflect the views of non-board members who participated in the meetings, it is sufficient for the minutes to describe, in very general terms, the positions expressed by the non-board members.

OIP Op. Ltr. No. 03-13 at 6-7 (emphasis added) (footnote omitted).

In the present case, Requester contends that the board's minutes were inadequate because they failed to describe the written testimony submitted to the board. While section 92-9, HRS, does require that minutes "give a true reflection of the matters discussed at the meeting and the views of the participants," nothing in the Sunshine Law expressly requires a board's minutes to describe views expressed solely in written testimony submitted to the board. Rather, another section of the Sunshine Law clearly refers to only "oral testimony or presentations" that must be described in a board's minutes. Specifically, in describing the "record" to be created by a board while engaged in a "permitted interaction" after a cancelled meeting,<sup>2</sup> subsection 92-2.5(d), HRS, states:

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<sup>2</sup> This permitted interaction allows board members to "receive testimony and presentations" on agenda items when they are present at a meeting that either (1) must be cancelled for lack of quorum or (2) is held by teleconference or videoconference but loses its audio communication connection. HRS § 92-2.5(d) (2012). As no board meeting is being held under this permitted interaction, no official "minutes" are required to be kept under

The members present shall create a record of the oral testimony or presentations in the same manner as would be required by section 92-9 for testimony or presentations heard during a meeting of the board[.]

HRS § 92-2.5(d)(2) (2012) (emphasis added). As this permitted interaction was expressly designed to be consistent with the Sunshine Law’s requirement for recording testimony in minutes, it is significant that a record of only “oral” testimony or presentations is required to be created under this section.

The rationale for requiring a description of only oral testimony in a board’s minutes is plain. Unlike written testimony, the minutes may be the sole record of oral testimony presented to a board. In contrast, written testimony submitted to and maintained by a board would be a “government record” that is accessible to requesters under the State’s Uniform Information Practices Act (Modified), chapter 92F, HRS. See HRS § 92F-3 (2012) (“government record” is defined as “information maintained by an agency in written . . . form”). Instead of a summary or general description, every written testimony “speaks for itself” and provides a complete accurate record of its contents.

Consequently, given the lack of an express statutory requirement for a description of written testimony within minutes, the accessibility of written testimony as a government record, and the instruction of section 92F-2.5(d)(2), HRS, to create a written record of only the “oral” testimony or presentations, OIP concludes that, in order for minutes to give a “true reflection of the matters discussed at the meeting and the views of the participants,” the minutes must generally describe only the oral testimony or presentations at the meeting and need not summarize the written testimony. Consistent with OIP’s prior opinion, it is sufficient for the minutes to describe, in very general terms, positions expressed by persons who are not board members because the primary purpose of the minutes is to reflect what the board itself did. OIP Op. Ltr. No. 03-13.

Having reviewed BLNR’s Minutes regarding the proposed boating safety rule, OIP finds that the Minutes described the BLNR’s actions and described, in general terms, other participants’ views presented in oral testimony. Therefore, OIP finds that BLNR complied with the Sunshine Law’s requirement that its Minutes for this agenda item “give a true reflection of the matters discussed at the meeting and the views of the participants.” HRS § 92-9(a).

### **RIGHT TO BRING SUIT**

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section 92-9, HRS. In the place of “minutes,” this section requires a “record” to be created that would meet the requirements for minutes.

Any person may file a lawsuit to require compliance with or to prevent a violation of the Sunshine Law or to determine the applicability of the Sunshine Law to discussions or decisions of a government board. HRS § 92-12 (2012). The court may order payment of reasonable attorney fees and costs to the prevailing party in such a lawsuit. *Id.*

Where a final action of a board was taken in violation of the open meeting and notice requirements of the Sunshine Law, that action may be voided by the court. HRS § 92-11 (2012). A suit to void any final action must be commenced within ninety days of the action. *Id.*

This opinion constitutes an appealable decision under section 92F-43, HRS. A board may appeal an OIP decision by filing a complaint with the circuit court within thirty days of the date of an OIP decision in accordance with section 92F-43. HRS §§ 92-1.5, 92F-43 (2012). The board shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. *Id.* The court's review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-43(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. *Id.*

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR.

## **OFFICE OF INFORMATION PRACTICES**

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APPROVED:

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