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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).

OPINION

Requester: Senator Donovan Dela Cruz
Board: Hawaii Tourism Authority
Date: 12/12/18
Subject: Executive Sessions and Communications Outside a Meeting (S APPEAL 18-6)

REQUEST FOR OPINION

Requester seeks a decision as to whether the board of the Hawaii Tourism Authority (HTA) violated the Sunshine Law by going into executive session for discussions that should have been held in open session, and by its members' communications with one another outside a meeting.

Unless otherwise indicated, this decision is based upon the facts presented in Requester's email to this office received on May 2, 2018, and attached materials; and HTA's emails to OIP dated May 16, 2018, and July 2, 2018, and attached materials.

QUESTIONS PRESENTED

1. Whether HTA properly held two executive sessions to discuss ongoing negotiations for prospective contracts either under the Sunshine Law or for one of the HTA-specific executive session purposes set out in section 201B-4(a)(2), HRS.

2. Whether HTA properly held an executive session to discuss its annual budget either under the Sunshine Law or for one of the HTA-specific executive session purposes set out in section 201B-4(a)(2), HRS.

3. Whether all communications among HTA members outside HTA meetings complied with the Sunshine Law.

BRIEF ANSWERS

1. No. Neither the HTA-specific executive session purpose nor the Sunshine Law's general purposes allowed HTA to go into executive session to discuss its annual budget. See HRS §§ 92-5 (2012) and 201B-4(a)(2) (2017).

2. Yes. The two executive sessions in which HTA discussed ongoing negotiations for prospective contracts were justified under the HTA-specific executive session purpose allowing it to hold a closed meeting to discuss information whose confidentiality is necessary to protect Hawaii's competitive advantage as a visitor destination. See HRS §§ 92-5 and 201B-4(a)(2).

3. No. In the great majority of written communications OIP reviewed, either the topic at hand was not HTA's board business or the discussion fell within one of the Sunshine Law's permitted interactions allowing discussion of board business outside a board meeting; however, in one instance, an email from HTA's chair to its other members was a discussion of board business in violation of the Sunshine Law. See HRS § 92-2.5 (2012). Nevertheless, because the email's content was background information that could have properly been sent to all members by a nonmember such as an HTA employee, and no further discussion ensued, OIP believes the public impact of this violation was minimal.

FACTS

Requester appealed to OIP regarding HTA's use of executive sessions, particularly for discussion of its annual budget, and its members' alleged communications relating to board business by board members outside of meetings, which Requester believed might be in violation of the Sunshine Law. In response to this appeal, HTA provided for OIP's *in camera* review (1) emails between its members regarding board business from November 2017 through April 2018; and (2) the minutes for the executive sessions held November 30, 2017 (November Executive Session); February 22, 2018 (February Executive Session), and June 29,

2017 (June Executive Session).[1]

According to HTA's public agendas for the respective meetings, both the November Executive Session and the February Executive Session were anticipated to be held "pursuant to § 92-5(a)(4), § 92-5(a)(8) and § 201B-4(a)(2) for the purpose of consulting with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities; and to discuss information that must be kept confidential to protect Hawai'i's competitive advantage as a visitor destination." Joining HTA's board members during the November Executive session were HTA's legal counsel, twenty-two members of HTA's staff, a legislator, and the representative of a company HTA was working with on two separate proposals to bring sporting events to Hawaii, which were the subject of HTA's discussion. In addition to HTA's members, its legal counsel and nineteen members of HTA's staff were present during the February Executive Session at which HTA discussed a third proposal to bring a sporting event to Hawaii.

Like the November and February Executive Sessions, HTA's June Executive Session, according to its agenda for that meeting, was

> pursuant to § 92-5(a)(4), § 92-5(a)(8) and § 201B-4(a)(2) for the purpose of consulting with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities; and to discuss information that must be kept confidential to protect Hawai'i's competitive advantage as a visitor destination.

Unlike the November and February Executive Sessions, the June Executive Session was devoted primarily to discussion of HTA's budget for the next fiscal year rather than to discussion of a specific deal or deals currently being negotiated.[2] In addition to HTA's members, present during the June Executive Session were HTA's legal counsel, 25 members of HTA's staff, and a legislator.

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[1] OIP had requested all executive session minutes and all written communications between members regarding board business, including emails and texts, that were maintained by HTA, for the six-month period preceding the date of the appeal, as well as the executive session minutes when HTA's annual budget for FY 2018 had been discussed.

[2] The meeting agenda indicated that the June Executive Session would also include a "Presentation by AEG Regarding an Update of Hawai'i Convention Center Recent Operational Activities and Sales Initiatives." However, OIP's review indicated that this item was not in fact discussed during the June Executive Session.

DISCUSSION

I. Executive Sessions

A. Purpose of Executive Sessions

It is undisputed that HTA is a board subject to the Sunshine Law. The Sunshine Law provides a limited list of authorized purposes for which a board may hold an executive session closed to the public in section 92-5(a), HRS. In addition to those, there are HTA-specific purposes allowing it to hold an executive session set forth in section 201B-4(a), HRS. Requester questioned whether the discussions held in HTA's executive sessions fell within one or more of those authorized purposes.

For all its executive sessions, HTA relied on Sunshine Law section 92-5(a)(4), HRS, which allows a board to go into executive session to "consult with [its] attorney on questions and issues pertaining to [its] powers, duties, privileges, immunities, and liabilities." HTA also relied upon its special executive session purpose (HTA Executive Session Purpose) found at sections 92-5(a)(8)[3] and 201B-4(a)(2), HRS, which together allow HTA to go into executive session for the purpose of receiving

> [i]nformation that is necessary to protect Hawaii's competitive advantage as a visitor destination; provided that information relating to marketing plans and strategies may be disclosed after the execution of the marketing plans and strategies.

HRS § 201B-4(a)(2).

1. November and February Executive Sessions

During the November and February Executive Sessions, HTA's discussion focused on proposed deals to bring specific sporting events to Hawaii, including discussion of how negotiations were going and of specific financial terms that would and would not be acceptable. OIP finds that such discussion falls squarely within the category of "[i]nformation that is necessary to protect Hawai'i's competitive advantage as a visitor destination," as premature disclosure of such proposed deals could give other destinations information as to what new marketing directions HTA was considering, and could also raise the cost of making deals for HTA by informing the other parties to a negotiation of HTA's bottom line. Thus, OIP concludes that

[3] Section 92-5(a)(8) allows a board to hold an executive session to consider "information that must be kept confidential pursuant to a state or federal law, or a court order." HRS § 92-5(a)(8). In this instance, the "state or federal law" HTA cited was section 201B-4(a)(2), HRS.

HTA's November and February Executive sessions were properly closed to the public based on the HTA Executive Session Purpose set out in section 201B-4(a)(2), HRS. See HRS § 201B-4(a)(2). However, OIP notes that the statute makes clear that the need to protect Hawaii's competitive advantage applies only to marketing plans and strategies that have not yet been executed; HTA could not hold an executive session based on this purpose to discuss a sporting event or other marketing strategy for which it has already signed a contract or otherwise closed the deal.

Because OIP has concluded that HTA's November and February Executive Sessions were justified by section 201B-4(a)(2), HRS, OIP need not make a determination as to whether HTA was also consulting with its attorney during those executive sessions such that they were also permitted by Sunshine Law section 92-5(a)(4), HRS.[4] In the next section, OIP will discuss the applicability of the attorney consultation executive session purpose with respect to the June Executive Session.

2. June Executive Session

During the June Executive Session, HTA's discussion focused on its annual budget. While the discussion included details regarding subcategories and specific line items within the budget, and the budget process itself within HTA and at the Legislature, the minutes did not reflect that the session involved discussion of proposals that had not yet been executed.[5] Disclosure of HTA's discussion of its proposed annual budget during the June Executive Session would not entail the premature disclosure of marketing directions HTA was considering but had not yet decided on, or of HTA's bottom line in an ongoing negotiation, and any marketing plans and strategies revealed by HTA's discussion of specific subcategories and even line items within the budget would be plans and strategies already being executed, and thus would not require protection under the terms of the HTA Executive Session Purpose. Further, information about public spending is an area of high

[4] Starting in section B on page 6, OIP discusses the presence in executive sessions of non-board members, including the board's attorney.

[5] HTA's discussion included references to the need to renegotiate an existing contractual relationship that was due to expire during the coming fiscal year. The renegotiation of an existing contract could potentially involve "information necessary to protect Hawai'i's competitive advantage;" in this case, however, the minutes do not reflect that HTA's discussion revealed its negotiating position or other information that, if disclosed, could have impaired HTA's ability to protect Hawaii's competitive advantage.

public interest.[6] Thus, OIP finds that the discussion of HTA's annual budget in executive session was not justified by section 201B-4(a)(2), HRS.

Because the June Executive Session was not justified by the HTA Executive Session Purpose under section 201B-4(a)(2), HRS, OIP must now consider whether it was justified under the attorney-client purpose found in Sunshine Law section 92-5(a)(4), HRS. OIP's review of the minutes, however, indicates that the discussion did not involve any apparent legal questions or advice, HTA's attorney did not even speak at any point in the discussion, and HTA did not address any part of the discussion specifically to the attorney. OIP notes that the Hawaii Intermediate Court of Appeals has interpreted the attorney consultation executive session purpose broadly to protect the attorney-client privilege, and HTA's attorney was in fact in the room during the executive session. See Kauai v. OIP, 120 Haw. 34; 200 P.3d 403 (Haw. App. 2009). Nonetheless, the Court did not state that the applicability of the attorney-client privilege was unlimited, and OIP believes it would require stretching the attorney consultation executive session purpose beyond the standard set by Kauai v. OIP to apply it in a situation where the board's attorney, although in the room, did not speak and was not directly addressed or referenced during the course of the executive session. OIP therefore concludes that HTA's discussions during the June Executive Session did not fall within the attorney consultation executive session purpose.

Based on the determination that the June Executive Session was not justified by either of the purposes cited to justify it, OIP further concludes that the discussion therein should instead have been done in a public meeting.

B. Guests Present During Executive Sessions

Although the board's attorney's mere presence at the June Executive Session did not validate the use of the attorney consultation purpose in section 201B-4(a)(2), HRS, to justify the closed meeting, the attorney's presence throughout HTA's executive sessions was proper as further discussed in this section. But having up to 26 other nonmembers attend the board's executive sessions was questionable, and while not specifically raised in this appeal, will be discussed next to caution HTA that it could, in a future case, face a complaint that HTA has waived the executive character of the meeting.

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[6] OIP has consistently found a strong public interest in government spending under the Uniform Information Practices Act (Modified), chapter 92F, HRS, which it also administers and which, like the Sunshine Law, has the stated purpose of opening up governmental processes to public scrutiny. E.g. OIP Op. Ltr. No. 94-18; for the purposes of both laws, see HRS §§ 92-1 (2012) and 92F-2 (2012). Section 1-16, HRS, states that "[l]aws in pari materia, or upon the same subject matter, shall be construed with reference to each other." HRS § 1-16 (2009).

While OIP has recognized the need to allow nonmembers to attend executive sessions, it also noted the potential danger in having too many nonmembers attend an executive session because it may appear to exclude all but select members of the public from properly attending and participating in what should have been an open meeting on a matter that was not truly confidential. OIP addressed the attendance by nonmembers of a board's executive meeting in two opinions, OIP Opinion Letters Number 03-12 and 03-17 (Opinion 03-12 and Opinion 03-17). In Opinion 03-12, OIP found that the Sunshine Law did not prohibit a board from including a nonmember in an executive session, as "boards can more effectively conduct their affairs if they can obtain information in person in an executive meeting, rather than relying exclusively on written submissions from agency personnel," and that the Sunshine Law "clearly contemplates, expressly and implicitly, that non-board members will be participants in certain meetings closed to the public." OIP Op. Ltr. No. 03-12 at 6. However, OIP further found that "a board's discretion to designate who may attend an executive meeting is not unlimited," and cautioned boards "to not invite non-board members to attend executive meetings unless their presence is necessary to assist the board on one of the items listed in section 92-5(a), [HRS]." Id. As OIP explained in Opinion 03-17, "if an individual is present and not providing relevant information or recommendations, the meeting loses its 'executive' character and becomes a meeting to which only a portion of the public is invited." OIP Op. Ltr. No. 03-17 at 3.

OIP noted that a board might need to summon administrative staff to provide support for tasks such as taking minutes of executive meetings, and also include the board's attorneys, agency personnel, and other persons with special knowledge or expertise or performing a function relating to the subject of the executive meeting. OIP Op. Ltr. No. 03-12 at 6. Specifically with regard to attorneys, OIP found in Opinion 03-12 that a board may include all the attorneys representing it on a legal matter for its executive session discussion of that matter, but not its executive session discussion of other issues those attorneys are not working on. OIP further clarified in Opinion 03-17 that a board may include a board's primary attorney throughout its executive meeting, even when it is not specifically discussing legal matters. OIP Op. Ltr. No. 03-12 at 8-10 and OIP Op. Ltr. No. 03-17 at 5.

To prevent possible challenges to a board's executive session, OIP recommended "mak[ing] a record, when advisable, of the reason a non-board member is present in an executive meeting, preferably before the meeting." OIP Op. Ltr. No. 03-12 at 7. OIP further recommended that, in the event of an internal disagreement as to whether a nonmember's presence was necessary, the board should settle the matter by board vote. Id.

HTA did not record in its minutes the reason each nonmember was present for the executive sessions discussed herein. Some of the nonmembers present

during HTA's November and February Executive Sessions,[7] notably its executive director, its legal counsel, and the staff member taking minutes, were clearly necessary and justified in being present during HTA's executive sessions, as a general rule, under the standard set forth in Opinions 03-12 and 03-17. Certain other nonmembers, such as those members of staff and the representative of a business working with HTA who were specifically reporting on the negotiations under discussion, were clearly necessary during HTA's discussion of those negotiations, even if those same people might not be appropriately present for all HTA executive sessions on any subject. Others in attendance could raise question as to whether they were "present and not providing relevant information or recommendations" such that an executive session could be challenged as having lost its "executive" character. For instance, no justification was given for the presence of a legislator, or of the large number of staff members sitting in and not reporting something or answering questions. Again, OIP does not draw a conclusion here as to whether any attendee's presence in the November and February Executive Sessions was unnecessary or may have altered the executive character of those meetings, but instead raises the issue to alert HTA to the possibility of a challenge to a future executive session on that basis.

II. HTA Member Communications Outside a Meeting

The written communications between HTA members reviewed by OIP[8] took the form of emails involving two or more HTA members, as well as varying numbers of HTA staff or other persons. The emails reflected that the great majority of email discussions of HTA's board business involved no more than two members. Some topics came up more than once in two-member interactions during the period reviewed. However, for each such topic, the members discussing it did not vary from one time to the next – in other words, OIP found no instances where two members discussed a topic by email and then one of those members discussed the same topic with a third member so as to give rise to a serial communication involving more than two members total. See Right to Know Committee v. Honolulu, 117 Haw. 1, 175 P.3d 111 (Haw. App. 2008); see also OIP Op. Ltrs. No. 04-01 at 9 (stating that serial communications cannot be used to avoid Sunshine Law) and OIP Op. Ltr. No. 05-15 (determining that section 92-2.5(a), HRS, does not allow a board member to discuss the same council business with more than one other council member through a series of one-on-one discussions).

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[7] OIP has already concluded that the June Executive Session should have been held as a public meeting.

[8] OIP asked HTA for all the written communications between members it maintained, including emails and text messages, over the six-month period at issue, and HTA searched for and provided OIP with copies of all such communications.

The Sunshine Law allows two members of a board to discuss board business "as long as no commitment to vote is made or sought and the two members do not constitute a quorum of their board." HRS § 92-2.5(a). Two members do not constitute a quorum for HTA, and based on its review of the emails, OIP finds that no commitment to vote was made or sought in any of the emails. OIP therefore concludes that all email interactions involving only two HTA members were allowed by the Sunshine Law's two-person permitted interaction. See id.

A few emails were sent to all members. Based on its review, OIP finds that some of those clearly did not involve HTA's board business,[9] either because they were administrative matters not being considered by the board as a whole, such as a poll of which members were available to meet on a specified day,[10] or because they did not involve a specific matter[11] within HTA's jurisdiction, such as an email praising the women's tennis coverage on a particular channel. In two instances, however, HTA's chair emailed all other board members regarding specific matters within HTA's jurisdiction, which were thus potentially HTA's board business.

First, in an email sent January 30 from HTA's chair to all members, the substance of the email was a summary of the status and relevant considerations for the issue in question for the other board members to review before discussing the matter at an upcoming meeting. Because the email concerned an issue on HTA's agenda for consideration at an upcoming meeting, OIP finds that the email concerned board business. No replies to the email were solicited, and none were sent by other members. Thus, it appears that the Chair's intention was not to discuss the matter by email instead of in a meeting, but rather to ensure that other members were well prepared to discuss the matter in the upcoming meeting.

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[9] "Board business includes discrete matters over which a board has supervision, control, jurisdiction, or advisory power, that are actually pending before the board or that are likely to arise before the board." OIP Op. Ltr No. 15-02 at 4, citing OIP Op. Ltrs. No. 04-04 at 2, 04-01 at 7, and 01-01 at 31."

[10] OIP has previously stated that "using e-mail to for routine, administrative matters such as scheduling purposes may be permissible under the Sunshine Law." OIP Op. Ltr. No. 04-01 at 10.

[11] A May 2 email sent by HTA's chair to two other members as well as HTA staff made the general observation that HTA should only go in to executive session when important. Because this email was not related to any particular issue for which HTA was considering an executive session, OIP believes it was too general a statement to be considered HTA's board business. However, OIP cautions HTA that the question of whether to go into executive session on a specified issue would be HTA's board business, and therefore a similar email regarding an upcoming agenda item could have been a violation of the Sunshine Law.

The Sunshine Law does not prevent board members from reviewing relevant information in advance of a meeting. Indeed, a summary of the status of an issue and relevant considerations for an upcoming meeting could appropriately be sent to all board members prior to a meeting by someone on the board's staff, such as the chief executive or operating officer or executive assistant, and (assuming no further interaction) that would not constitute a discussion of board business among board members potentially in violation of the Sunshine Law. However, an email from one board member to all other board members about board business is a "discussion" for the purpose of the Sunshine Law, even if no further back and forth among members ensues. OIP therefore must conclude that this email violated the Sunshine Law. OIP notes, however, that the violation was apparently unintentional and, given that an HTA employee could have shared effectively the same background information with all board members without running afoul of the Sunshine Law, had minimal impact on the public.

Second, an email sent February 21 from HTA's chair to all members attached HTA's response to the Legislative Auditor's audit of HTA, with a brief explanation of the timing of the audit and response process. As with the January 30 email, no replies were solicited and none were made. HTA's response to the audit is certainly a specific matter within HTA's jurisdiction; thus, the question becomes whether it was pending before or was likely to arise before the board, and thus was HTA's board business.

The time frame available for HTA to respond to the Audit Report was short, and it fell during a time when HTA was not scheduled to meet. According to the final Audit Report,[12] the Legislative Auditor provided HTA a draft copy of the Audit Report on February 15 and HTA provided its response to the Legislative Auditor on February 21, 2018, signed by HTA's board chair and its chief executive officer. HTA did not have any board or committee meetings scheduled between those dates.[13] Based on OIP's review of the relevant email correspondence provided to OIP, it appears that HTA's chair worked with HTA's staff to prepare HTA's response, and that one other board member was advised that HTA had received the draft copy of the Audit report. There is no indication that the remaining HTA members were involved in or even aware that HTA was preparing a response to the Audit Report until the completed response was actually sent to them at the end of the day on

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[12] OIP reviewed the Audit Report online at http://files.hawaii.gov/auditor/Reports/2018/18-04.pdf (last visited September 21, 2018).

[13] HTA had a Marketing Standing Committee meeting on February 14 and a regular meeting on February 22 and nothing in between, and the minutes and agendas for those meetings reflect that a response to the audit was not on the agenda or discussed at either of those meetings. HTA Meetings and Minutes, https://www.hawaiitourismauthority.org/who-we-are/board-of-directors/meetings-minutes/ (last visited September 21, 2018).

February 21. Based on the evidence reviewed, OIP finds that HTA's response to the Audit Report was not something HTA considered as a board; rather, it appears to have been implicitly delegated to HTA's staff as overseen by HTA's chair. Although at first blush HTA's response to the Audit Report might appear to be the type of issue HTA would have reviewed and approved as a board, in fact that was not the case here. Because it was never pending before or considered by HTA as a board, HTA's response to the Audit Report was not HTA's board business, and therefore OIP concludes that the February 21 email from HTA's chair to its other members attaching HTA's response to the Audit Report did not violate the Sunshine Law. OIP notes that HTA could have altogether avoided raising the question of whether a Sunshine Law violation had occurred if an HTA employee, rather than HTA's chair, had been the one to send HTA's response to the Audit Report to HTA's members.

In summary, when board business is the topic, two or more board members are deemed to have engaged in a "discussion" if they communicate about it through emails, texts, conversations, or other any communications, although the discussion may still be proper under one of the Sunshine Law's permitted interactions set out in section 92-2.5, HRS. To efficiently provide information to board members while avoiding the potential for Sunshine Law violations, HTA should utilize its staff, and not the board chair or other members, to transmit to board members any reports, summaries, proposals, or other information regarding board business.

RIGHT TO BRING SUIT

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. This rule does not allow for extensions of time to file a reconsideration with OIP.

This letter also serves as notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES

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APPROVED:

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