SUMMARY OF THE HAWAII SUPREME COURT'S OPINION ON THE SUNSHINE LAW'S EXECUTIVE MEETING REQUIREMENTS
July 2019

On June 27, 2019, a unanimous Hawaii Supreme Court (Court) issued a lengthy opinion written by Chief Justice Recktenwald that provides greater clarity to the Sunshine Law's provisions concerning executive meetings closed to the public. The opinion reverses the circuit court's dismissal of a complaint challenging the Honolulu Police Commission's (Commission) executive meetings concerning former Police Chief Louis Kealoha's "status" after he was notified that he was the subject of a federal grand jury investigation. In Civil Beat Law Center v. City and County of Honolulu, SCAP-17-0000899 (June 27, 2019) (CBLC), the Court held that the Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes (HRS), "does not require that meetings related to personnel matters be closed to the public." Id. at 3, 21 (emphasis in original). Instead, the Court stated that the board's decision to close a meeting to the public is discretionary, provided that certain requirements are met, and that the Sunshine Law does not subject board members to criminal penalties for holding an open meeting. Id. at 22-23.

The Court explained that to properly invoke the personnel-privacy exception permitting a board to go into a closed executive session to discuss "the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee," it was necessary to also show that the "consideration of matters affecting privacy will be involved." HRS § 92-5(2); CBLC at 26. As the Court noted, "[e]ven though a matter involves the personnel status of an employee, it does not necessarily follow that a legitimate privacy interest was impacted." CBLC at 25. The Court concluded that "unless 'matters affecting privacy will be involved' in a board's discussion, personnel matters should presumptively be discussed in an open meeting." Id. at 26. Recognizing, however, that "the proverbial bell cannot be 'unrung' with regard to protecting individual privacy interests," the Court determined that boards may properly decide before its deliberations to close a meeting in order to avoid risking the invasion of fundamental privacy rights. Id. at 29, quoting OIP S Memo 14-7 at 7 (emphasis in Court's opinion).

Significantly, the Court rejected the use of the balancing test weighing the individual's privacy interest against the public interest as set forth in the Uniform Information Practices Act (Modified, chapter 92F, HRS (UIPA), to determine whether the personnel-privacy exception of the Sunshine Law was applicable. CBLC at 27. Instead, the Court discussed various factors to be considered on a case by case basis that may establish a legitimate expectation of privacy. As non-exhaustive examples, the court noted that "highly personal and intimate" information may include "medical, financial, educational, or employment records." Id. at 30. Citing an OIP opinion, the Court recognized that some circumstances may reduce or perhaps entirely defeat the legitimacy of a person's expectation of privacy in certain information, as in the case of a public official with significant discretionary or fiscal powers, or the president of the university. Id. at 31-32, citing OIP Op. No. 04-07. Additionally, laws and regulations may affect a person's expectations of privacy, most notably section 92F-12(a)(14), HRS, which mandates "disclosure of certain types of government employment information, such as employee names, job titles, and salary information." Id. at 32-33. Other factors that may affect reasonable expectations of privacy are whether the information would have been public under a formal disciplinary hearing or has already been made public. Id. at 32-34, citing OIP Op. Ltrs. No. 03-16 and 06-07.

Because the case was remanded to the circuit court for factual determinations, the Court provided additional guidance and instructed the lower court to first examine the executive meeting minutes to "determine to what extent the Commission's discussions and deliberations were 'directly related to' the purpose of closing the meeting pursuant to the personnel-privacy exception."[1] Id. at 47-48. If portions of the executive meeting minutes fell outside the scope of the personnel-privacy exception, or if the personnel-privacy exception was not properly invoked, then the circuit court should alternatively consider the attorney-client exception under section 92-5(a)(4), HRS. Id. at 48. Having recognized that the proverbial bell cannot be "unrung" once private or confidential information has been released to the public, the Court sanctioned the *in camera* review of executive meeting minutes to determine if a board exceeded the scope of any permissible exception to the open meeting requirement. CBLC at 29, 34, 49.

Notably, the Court distinguished the attorney-client exception under the Sunshine Law from the attorney-client privilege, and it limited the exception found at section 92-5(a)(4), HRS, to communications relating only to "questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities." Id. at 49-50. Unlike the expansive view previously expressed in County of Kaua`i v. OIP, 120 Haw. 34, 46, 200 P.3d 403, 415 (App. 2009), that seemed to apply the attorney-client privilege whenever an attorney was present, the Court cited to OIP's earlier opinions and took a narrower interpretation of the Sunshine Law's attorney-client exception, noting that "an attorney is not a talisman, and consultations in executive sessions must be purposeful and unclouded by pretext." Id. at 53.
The Court favorably cited OIP Op. Ltr. No. 03-12, even warning that "[i]f a non-board members, including the board's attorney remains in an executive meeting after his or her presence is no longer required for the meeting's purpose, the executive meeting may lose its 'executive' character." CBLC at 53-53, citing OIP Op. No. 03-12 at 6.

Finally, the Court discussed the potential remedies and instructed the circuit court to order the Commission to release the applicable executive meeting minutes, either in full or in redacted form, if a violation is found. CBLC at 54. Citing with approval OIP Op. Ltr. No. 06-07, the Court noted that executive meeting minutes "may be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer."[2] CBLC at 55 (emphasis added by Court). "Thus, for example, any portions of the executive meeting minutes concerning information that has already been made public by the Commission or its members must be made publicly available." Id. at 55.

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[1] While this summary focuses on the Sunshine Law implications, the Court's opinion also extensively discussed the standard for a motion to dismiss and the need for Kealoha to be joined as an indispensable party under HRCP Rule 19(a). Id. at 35-44.

[2] Because meeting minutes are considered "government records" under section 92F-3, HRS, of the UIPA, it is appropriate to apply the balancing test and standards of section 92F-13(1), HRS, to determine if disclosure of the records would constitute a clearly unwarranted invasion of personal privacy. Moreover, as the Court recognized, this UIPA disclosure standard is not applied to determine whether an executive meeting was properly convened under the Sunshine Law. CBLC, at 56 n.18.

Additionally, the Court interpreted the penalty provisions of section 92-11, HRS, of the Sunshine Law, which states that "[a]ny final action taken in violation of sections 92-3 and 92-7 may be voidable upon proof of violation." The Court determined that deliberations conducted in violation of the executive meeting exceptions in section 92-5, HRS, also violate the open meetings requirement of section 92-3, HRS. Consequently, discussions and deliberations that are not "directly related" to a permissible exception under section 92-5(b), HRS, could be voided. While not mandated to do so, the courts have the discretion to void the board's final actions upon proof of a violation.[3] Therefore, the Court concluded that "so long as Kealoha is joined as a party, if the circuit court finds that the Commission violated the Sunshine Law's open meeting provision at the January 18, 2017 meeting, the [circuit] court may void the Commission's retirement agreement with Kealoha." CBLC at 56. But if Kealoha cannot be joined, the Court instructed the circuit court to analyze the indispensable party factors under Rule 19(b) "to determine whether 'in equity and good conscience' the action may proceed in any form among Civil Beat and the Appellees, or whether it must be dismissed." CBLC at 44.

OIP has incorporated these highlights of the CBLC decision with other training material to create a new "Quick Review: Executive Meetings Closed to the Public" in a question and answer format, which is posted on the Sunshine Law Training page at oip.hawaii.gov.

[3] Note that section 92-11, HRS, requires a suit to void any final action to be commenced within ninety days of the board's action.