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The Office of Information Practices (OIP) is authorized to issue decisions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to sections 92F-27.5 and 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

OPINION

Requester: Brian
Board: Honolulu City Council
Date: May 19, 2020
Subject: Amendment of Agenda (S APPEAL 19-8)

REQUEST FOR OPINION

Requester seeks a decision as to whether the City Council, City and County of Honolulu (COUNCIL-HON), violated the Sunshine Law when COUNCIL-HON's Committee on Budget (Committee) added Bill 3 (2019), entitled "A BILL FOR AN ORDINANCE RELATING TO REAL PROPERTY TAX EXEMPTIONS" (Bill 3), as an item for discussion to its agenda during the Committee's meeting on February 27, 2019 (February Meeting).

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's email correspondence, dated February 27, 2019, including attachments; a letter, dated March 18, 2019 from Councilmember Joey Manahan, Committee Chair, to OIP, including attachments (COUNCIL-HON's Response); and the Committee's agenda (Agenda) and minutes (Minutes) for its February Meeting.

QUESTIONS PRESENTED

1. Whether the Sunshine Law allowed the Committee to add Bill 3 to its Agenda by filing an addendum to its Agenda (Addendum) five calendar days before its February Meeting.

2. Whether the Sunshine Law allowed the Committee to add Bill 3 to its Agenda during its February Meeting.

BRIEF ANSWERS

1. No. The Sunshine Law does not allow a board to amend its agenda by filing an addendum to a previously filed meeting agenda. See HRS § 92-7(d) (Supp. 2019) (allowing a board to amend its agenda, once filed, at its meeting only if certain requirements are met). Further, even if the Addendum had been a revised agenda intended to fully replace the previously filed Agenda, the Committee would have still acted improperly in filing it late, in violation of the requirement in section 92-7(b), HRS, that a notice be filed no later than six calendar days before a meeting.

2. No. Because Bill 3 was of reasonably major importance and the Committee's approval of it affected a significant number of persons, the Committee improperly added Bill 3 to its Agenda and voted to approve it at its February Meeting in violation of section 92-7(d), HRS.

While it could not belatedly cure the original violation, COUNCIL-HON took measures to mitigate the public harm from the violations when COUNCIL-HON referred Bill 3 back to the Committee and the Committee properly noticed Bill 3 on its agenda for its meeting on April 3, 2019 (April Meeting) and voted on it.

FACTS

COUNCIL-HON's Response described the Committee's actions to add Bill 3 to the Agenda as follows:

On February 21, 2019, the Budget Committee filed the agenda for the February 27, 2019 Budget Committee meeting with the Office of the City Clerk. Bill 3 was not listed on the agenda. On February 22, 2019, the Committee filed the agenda addendum with the Office of the City Clerk that proposed to add Bill 3 to the agenda for the Budget Committee meeting on February 27, 2019.

At the [February Meeting], pursuant to Hawaii Revised Statutes ("HRS") Section 92-7(d) (Supp. 2018), the Budget Committee added Bill 3 to the agenda . . . by two-thirds vote of the Budget Committee members. Subsequently, after taking testimony on Bill 3, the Budget Committee voted to report Bill 3 out for passage on third reading.

As posted on the online Calendar at the City and County of Honolulu website (Calendar), the Committee's Addendum was attached after or below the previously posted Agenda and stated:

ADDENDUM ITEM TO BE ADDED TO THE AGENDA (Note: Two-thirds vote required to add item)

FOR ACTION

1. **Bill 3 (2019) - Real Property Tax Exemptions.** Increasing the real property tax exemption for certain individuals. (Bill 3 passed second reading and public hearing held 2/13/19).

According to the Committee's Minutes, during its February Meeting, the Committee voted to add Bill 3 to its Agenda¹ as follows:

Prior to the commencement of the Order of Business, Committee Chair Manahan requested that pursuant to Hawaii Revised Statutes, Chapter 92, the item posted on the Agenda Addendum be placed on the committee's agenda for action. With no objections from the five members present (Manahan, Formby, Fukunaga, Pine, Tsuneyoshi), Bill 3 (2019) -- Real Property Tax Exemptions -- was added to the agenda following the action items.

After the Committee's February Meeting, Requester complained to OIP that the topic of Bill 3 was not "eligible to be added" to the Agenda because it "relates to property tax so it clearly is of significant importance and impacts a large amount of people." Requester appealed to OIP to investigate as to whether the Committee's addition of Bill 3 to its Agenda was improper so that the Committee should "re-do their vote."

In response to Requester's appeal, COUNCIL-HON's Response stated:

On March 2, 2019, the City Council filed the agenda for the March 8, 2019 Council meeting with the Office of the City Clerk. Bill 3 was included on the agenda for third reading; however, there was a note on

¹ The video of the February Meeting shows that the Committee's vote to add Bill 3 was taken at the beginning of the meeting when Chair Manahan announced the vote and there were no objections by the five Committee members present. Chair Manahan noted that the Committee's vote to add an item to the agenda would require four Committee members voting in favor. Bill 3 was discussed at the end of the meeting. Honolulu City Council TV, 2019-2-27 BUD, February 27, 2019, https://honolulu.granicus.com/player/clip/936?view_id=3 (video of Committee's February Meeting, last viewed 05/12/20).

the first page indicating that Bill 3 had been cancelled and re-referred to the Budget Committee. Please see the Agenda for the March 8, 2019 Council Meeting attached hereto as Exhibit "A." At the March 8, 2019 meeting the Council did not address Bill 3.

Currently, Bill 3 has been re-referred to the Budget Committee. Assuming, *arguendo*, that the Budget Committee improperly placed Bill 3 on the [Agenda], the Budget Committee's action to report Bill out for passage on third reading is no longer an issue because Bill 3 has been re-referred to the Budget Committee. It is anticipated that should the Budget Committee wish to take further action on Bill 3 that it will be posted in an agenda that complies with the requirements of HRS Section 92-7.

After COUNCIL-HON referred Bill 3 back to the Committee for its reconsideration, the Committee listed Bill 3 on its agenda for its April Meeting. According to the Committee's minutes for its April Meeting, the Committee voted in favor of Bill 3 and reported to COUNCIL-HON its recommendation for Bill 3 to pass third reading. At COUNCIL-HON's meeting on April 17, 2019, COUNCIL-HON voted in favor of passing Bill 3 on third reading, and, at its meeting on May 14, 2019, COUNCIL-HON voted in favor of passing Bill 3 on final reading, notwithstanding the Mayor's Message 48 (MM 48), dated May 3, 2019, returning Bill 3 to COUNCIL-HON with the Mayor's veto.

DISCUSSION

I. Adding Bill 3 by Addendum to Agenda Before Meeting

The Sunshine Law requires a board to "give written public notice of any regular, special, emergency, or rescheduled meeting," which "shall include an agenda that lists all of the items to be considered at the forthcoming meeting" and other meeting information. HRS § 92-7(a) (Supp. 2019). The notice must be posted "[n]o less than six calendar days prior to the meeting . . . on an electronic calendar on a website maintained by the State or the appropriate county and . . . in the board's office for public inspection." HRS § 92-7(b) (Supp. 2019).

OIP finds that the Committee posted its notice (Notice) on the City's Calendar on February 21, 2019, which was the sixth day before its meeting on February 27, 2019. Thus, the Committee originally filed its Notice on time and complied with the Sunshine Law's statutory requirement to file a notice "no less than six calendar days prior to the meeting." *Id.* However, the timely filed Notice did not include Bill 3 as an agenda item.

Section 92-7(d), HRS, allows a board to add items to a filed agenda at its meeting only upon a two-thirds recorded vote of all members to which the board is entitled, and only in limited circumstances as further discussed below. HRS § 92-7(d). The Sunshine Law does not make any provision for filing an addendum or other supplement to a filed agenda, even six days or more prior to a meeting. As OIP has previously noted, however, a board may add an item to its agenda before its meeting by simply filing a new agenda that includes the added items, replacing the agenda as originally filed, on or before the sixth calendar day before the noticed meeting. OIP Op. Ltr. No. 06-05 (citing HRS § 92-7). In the present case, the Committee's filing of a new agenda on or before the filing deadline would have avoided the requirements for amending the agenda. See id.

However, instead of filing a new agenda by the sixth day before its February Meeting, the Committee posted the Addendum on the Calendar on February 22, 2019, which was only five days before its meeting on February 27, 2019. Thus, even if the Addendum had been a full replacement agenda rather than merely a purported supplement to the previously filed Agenda, OIP finds that the Addendum would not have met the Sunshine Law's time limit for a board to file its notice six days before its meeting. Id.

The Addendum did state that the topic of Bill 3 would be added to the Agenda at the February Meeting upon a vote in favor by two-thirds of Committee members, suggesting that the Committee realized that the Addendum, by itself, was inadequate to add Bill 3 to the Agenda under the Sunshine Law. While the Addendum may have been intended to give the public as much prior notice as possible of the Committee's anticipated vote to add Bill 3 to the Agenda at its February Meeting, OIP notes that by listing Bill 3, which failed to meet the criteria for items that may be added to the Agenda as further discussed in the next section, the Addendum gave a misleading impression that the Committee would be legally authorized to discuss Bill 3 so long as two-thirds of the Committee members voted in favor of doing so. See HRS § 92-7(d) (listing the criteria for a board to add a topic to its agenda during its meeting).

Consequently, OIP concludes that the Committee's posting of the Addendum five days prior to its February Meeting was not sufficient to add Bill 3 to the Agenda and instead misinformed the public that, at its February Meeting, the Committee could and would add Bill 3 to its Agenda upon a vote of two-thirds of its members.

II. Adding Bill 3 to Agenda by Committee Vote at February Meeting

OIP next discusses whether the Committee properly added Bill 3 to its Agenda at its February Meeting. Section 92-7(d), HRS, allows a board to add an item to its filed agenda at a meeting by a "two-thirds recorded vote of all members

to which the board is entitled; provided that no item shall be added to the agenda if it is of reasonably major importance and action thereon by the board will affect a significant number of persons.” HRS § 92-7(d). Determination of whether an item “is of reasonably major importance” and when board action thereon will “affect a significant number of persons” is fact-specific and must be made on a case-by-case basis. See OIP Op. Ltr. No. 06-05 (concluding that Hawaii County Council did not meet the criteria for adding a lawsuit to its executive session agenda).

COUNCIL HON’s Response stated that the “Budget Committee added Bill 3 to the agenda . . . by two-thirds vote of the Budget Committee members.” Regardless of whether two-thirds of all Committee members voted in favor of adding Bill 3 to the Agenda as required by section 92-7(d), HRS, Bill 3 did not qualify to be added to the Agenda during the February Meeting for the reasons discussed below.

The Addendum described Bill 3 as “[i]ncreasing the real property tax exemption for certain individuals.” Specifically, OIP finds that Bill 3 proposed to reduce the real property taxes to be paid by homeowners by increasing the exemption amounts that may be subtracted from the homeowners’ estimated property values that are subject to taxation. The Mayor’s veto message, MM 48, asserted Bill 3’s significant impact to City government by stating, “[a]s consistently opposed by the Department of Budget and Fiscal Services [B&F-HON], the proposed exemption would result in an overall \$10.3 million real property tax revenue loss and may impair the City’s ability to fulfill its ERS and other financial obligations.” Mayor Kirk Caldwell, Mayor’s Message 48 (5/3/19), <http://www4.honolulu.gov/docushare/dsweb/Get/Document-237100/mm48.pdf> (last viewed 5/12/20). B&F-HON’s Real Property Assessment Division (RPAD) provided data to the Committee showing that in 2019 there were 256,737 residential parcels. RPAD, Dept. Com. 232 (submitted for Committee’s April meeting), <http://www4.honolulu.gov/docushare/dsweb/Get/Document-236130/d232.pdf> (last viewed 5/12/20). Presumably many of these residential parcels are occupied by homeowners who pay real property taxes.

In view of the Mayor’s veto message and B&F-HON’s data, OIP finds that passage of Bill 3 would have an impact of major importance to the City and the public by lowering the City’s revenue from real property tax collection by a projected \$10.3 million dollars. OIP further finds that thousands of homeowners were potentially affected by Bill 3 because Bill 3 proposed to increase the tax exemption amounts and thus lower the amounts of real property taxes that these homeowners would be paying. OIP finds that Bill 3 was clearly of major importance and the Committee’s approval of Bill 3 affected a significant number of persons. Thus, OIP concludes that, under these criteria, Bill 3 did not qualify as a topic that could be added to the Agenda under section 92-7(d), HRS. OIP further concludes that the

Committee violated the Sunshine Law by improperly adding Bill 3 as an agenda item to its Agenda at its February Meeting and then voting to approve Bill 3.

OIP cautions COUNCIL-HON that most official legislative measures, either bills or resolutions, will rarely, if ever, fall within the scope of the insignificant matters that the Sunshine Law allows to be added to an agenda at a meeting by two-thirds vote of all members to which a board is entitled. This is especially true of those involving taxation. Boards “are constrained at all times by the spirit and purpose of the Sunshine Law, as stated in HRS § 92-1.” Kanahele v. Maui County Council, 130 Hawaii 228, 248, 307 P.3d 1174, 1194 (2013). The purpose of the Sunshine Law is “to protect the people’s right to know.” HRS § 92-1 (2012). The provision allowing a board to add an item to its agenda under limited conditions is an exception to the Sunshine Law’s general rule of openness and, as such, must be strictly construed. Id. By their nature, official legislative proposals are generally of “reasonably major importance” and “affect a significant number of persons” and thus are generally unsuitable to be added to the filed agenda during a meeting.² HRS § 92-7(d).

COUNCIL-HON did act to mitigate the public harm from the Committee’s violations when COUNCIL-HON referred Bill 3 back to the Committee. The

² In October 2019, the Civil Beat Law Center for the Public Interest (Plaintiff) filed in the State of Hawaii Circuit Court for the First Circuit (Court) a complaint alleging that COUNCIL-HON violated the Sunshine Law when its Committee on Public Safety and Welfare (PSW Committee) amended its agenda in order to consider a resolution about the Honolulu Police Department’s (HPD) involvement in the protests at Mauna Kea. Civil Beat Law Center for the Public Interest v. City & County of Honolulu and Honolulu City Council, Civ. No. 19-1-1695-10 (1st Cir. Ct.). Plaintiff filed a Motion for Partial Summary Judgment on January 24, 2020, which asked the Court to find that COUNCIL-HON violated the Sunshine Law on July 25, 2019, when its PSW Committee added to its agenda a matter relating to Mauna Kea.

COUNCIL-HON and the City and County of Honolulu (City) (collectively Defendants) argued that the added agenda item was not to discuss matters relating to Mauna Kea, but rather was a narrowly directed request to HPD for a report to COUNCIL-HON on HPD’s involvement with protesters at Mauna Kea. Defendants further asserted that any action on the resolution would not affect any member of the public, as it was a request from the City’s legislative branch to the administrative branch to prepare a report on a particular event and did not approve or disapprove any further action of the HPD, did not approve or disapprove any further funding, and did not take a city or policy position regarding Mauna Kea. Finally, the Defendants argued that the resolution did not violate the purpose and spirit of the Sunshine Law because it was not a legislative act, nor would approval or disapproval of it establish COUNCIL-HON policy. Defendants described the resolution as an internal request that could have been done by a phone call, email, or a short conversation in the hallway. On April 2, 2020, the Circuit Court issued an order granting Plaintiff’s motion for partial summary judgment.

Committee then properly noticed Bill 3 on its agenda for its April Meeting and voted on this properly noticed agenda item at the April Meeting. While this re-referral does not cure the original violation or undo the Committee's premature discussion of Bill 3 without sufficient public notice, OIP notes that COUNCIL-HON did take this action to mitigate public harm to the extent possible.

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.

SPECIAL NOTICE: During the COVID-19 pandemic, Hawaii's Governor issued his Supplementary Proclamation on March 16, 2020, which suspended the UIPA in its entirety. The suspension was continued until May 31, 2020, by the Governor's Sixth Supplementary Proclamation dated April 25, 2020. On May 5, 2020, the Governor's Seventh Supplementary Proclamation (SP7) modified the prior suspension of the UIPA in its entirety and provided that the UIPA and Chapters 71 and 72, Title 2, HAR, "are suspended to the extent they contain any deadlines for

agencies, including deadlines for the OIP, relating to requests for government records and/or complaints to OIP.” SP7, Exhibit H. On May 18, 2020, the Governor’s Eighth Supplementary Proclamation (SP8) continued the modified suspension of the UIPA provided in SP7. SP8, Exhibit H.

The UIPA’s part IV sets forth OIP’s powers and duties in section 92F-42(18), HRS, which give OIP authority to resolve this appeal and have been restored by SP8, except for the deadline restriction. Thus, for OIP’s opinions issued while SP8 is still in force, agencies will have a reasonable time to request reconsideration of an opinion to OIP, but a request for reconsideration shall be made no later than ten business days after suspension of the UIPA’s deadlines are lifted upon expiration of SP8 after June 30, 2020, unless SP8 is terminated or extended by a separate proclamation of the Governor. Agencies wishing to appeal an OIP opinion to the court under section 92F-43, HRS, have a reasonable time to do so, subject to any orders issued by the courts during the pandemic, and no later than thirty days after suspension of the UIPA’s deadlines is lifted upon expiration of SP8 after June 30, 2020, unless terminated or extended by a separate proclamation of the Governor.

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