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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: Librado Cobian
Board: Makakilo/Kapolei/Honokai Hale Neighborhood Board No. 34
Date: June 29, 2020
Subject: Board Members' Email Communication (S APPEAL 19-10)

REQUEST FOR OPINION

Requester sought a decision as to whether the Makakilo/Kapolei/Honokai Hale Neighborhood Board No. 34 (Board), violated the Sunshine Law when Board members exchanged email communications about Board business.

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's email correspondence to OIP dated April 15 and 29, 2019, and July 26, 2019, all three with attachments; and email correspondence dated April 22, 2019, to OIP from Board Chair Jack Legal (Chair Legal); email correspondence from the Neighborhood Commission Office (NCO) to OIP dated October 2 and 10, 2018, which forwarded strings of emails; email correspondence to the NCO dated October 2 and 11, 2018, from OIP; three email correspondences to OIP dated June 10, 2020, from the NCO which forwarded strings of emails related to the Board; and three email correspondences to OIP dated June 24, 2020, from the NCO.

QUESTIONS PRESENTED

1. Whether the Sunshine Law allowed the Board to exchange email communications about Board business.

2. Whether the Sunshine Law allowed Board member Keoni Dudley (Member Dudley) to communicate with other Board members by email about Board business.

BRIEF ANSWERS

1. No. The Sunshine Law did not allow Board members to exchange email communications regarding Board business. HRS §§ 92-2 (2012) (defining the terms “board” and “meeting”), -3 (2012) (requiring open meetings), and -7 (Supp. 2019) (requiring public notice of meetings). Because some members of the Board have engaged in a continued practice of using emails to discuss Board business despite advice from OIP and the NCO, OIP may refer the next verified occurrence to the appropriate authorities.

2. No. The Sunshine Law did not allow Member Dudley to communicate with other Board members by email about Board business. HRS §§ 92-2, -3, and -7. OIP had previously officially warned Member Dudley that his email communications to other Board members violated the Sunshine Law. However, Member Dudley has disregarded a prior OIP decision involving him. As a result, OIP will refer this matter related to Member Dudley’s actions to the Neighborhood Commission’s (Commission) Executive Secretary for the filing of a Complaint with the Commission.

FACTS

In his complaint, Requester attached copies of (1) an email, dated March 29, 2019, which Chair Legal received from a then-member of the Board named Dean with the subject, “Regarding Noise from Race Track next to a[n] airport,” and (2) Chair Legal’s reply email on the same date and on the same subject matter (collectively, Racetrack Emails). Two other Board members were listed as “cc” recipients of the Racetrack Emails, one of whom was Member Dudley.

On the same thread as the Racetrack Emails was an email dated March 30, 2019, concerning the proposed racetrack, which was sent by Member Dudley as both the sender and the sole recipient, and addressed “Aloha Jack,” who is presumably Chair Legal but was not shown as a recipient. Requester later supplemented his complaint, sending to OIP a copy of an earlier email, dated September 7, 2018, showing Member Dudley again as the sender and Chair Legal as the sole recipient. Requester asserted that he received the March and September emails (collectively, Member Dudley’s Emails) from another Board member who did not want to be identified and was not listed as a recipient of either email, but who had directly received both emails from Member Dudley. It appears, therefore, that both emails were blind copied to the unidentified Board member, who, along with Chair Legal,

would have been at least a second recipient of Member Dudley's Emails concerning the proposed racetrack.¹

Upon learning from OIP that Requester had filed this appeal alleging possible violations of the Sunshine Law, Chair Legal explained that "[w]hile it is true that I wrote that e-mail regarding SCR 108, I have not actually submitted any written testimony to WAM [Hawaii State Senate Ways and Means Committee]. It is also true that the community was not in favor of SCR108 due to possible noise and dust that the race track may create."

DISCUSSION

I. Board Email Communications

As OIP understands, Chair Legal's explanation indicates his belief that no Sunshine Law violation occurred, or no public harm resulted, because he had "not actually submitted any written testimony to WAM." However, the Sunshine Law requires that a board discuss board business only at a noticed meeting open to the public, except as specifically permitted by law. HRS §§ 92-2, -3, -7. As OIP has previously explained, "[b]oard 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. F19-03 at 9, n.9 (citations omitted).

OIP has previously opined that "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 Op. Ltr. No. F19-03 at 10. However, the discussion may still be proper under one of the Sunshine Law's permitted interactions set out in section 92-2.5, HRS. Id. at 11. One of those permitted interactions allows two members of a board to discuss board

¹ Unrelated to Racetrack Emails or Member Dudley's Emails, Requester also amended his complaint to include an email, dated April 29, 2019, which he received from Member Dudley and he alleged is "in appropriate, [sic] un-ethical and un-acceptable email communications from a Neighborhood Board Member." Because Requester's amended complaint is only against Member Dudley, OIP does not have the authority to address this specific allegation solely against one board member because OIP's authority under the Sunshine Law is limited to "responding to complaints filed by any person concerning the failure of any board to comply with [the Sunshine Law]." HRS § 92-1.5 (2012) (emphasis added); see also Hawaii Administrative Rules (HAR) § 2-71-11(3) (2012) (providing that a person may submit an appeal to OIP when "[t]he person seeks to determine a board's compliance with" the Sunshine Law). A complaint against a single board member should be directed to the Commission.

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) (2012).²

OIP reviewed the Board’s notice for the meeting on April 24, 2019, and it included an agenda item for “Discussion on Racetrack as Identified in City Council Resolution 18-2655-Librado Cobian[.]” OIP therefore finds that the Racetrack Emails concerned “board business” because the proposed racetrack was a subject the Board expected to consider at an upcoming meeting. The Racetrack Emails could have qualified for the two-person permitted interaction if the exchange was limited only to Chair Legal and one other Board member. Instead, both emails listed two other Board members as recipients, so the two-person permitted interaction does not apply. Although Chair Legal argued that no harm occurred because the Board did not submit legislative testimony on the proposed Racetrack, there is no Sunshine Law provision retrospectively allowing a board’s discussion of board business outside of a public meeting when the board did not take any action resulting from the discussion.

In light of OIP’s conclusion in OIP Opinion Letter Number F19-03 that “an email from one board member to all other board members about board business is a ‘discussion’ for the purpose of the Sunshine Law,” OIP finds that the exchange of the Racetrack Emails was a discussion of the Board’s business outside of a public meeting. After reviewing the facts presented by Chair Legal, OIP finds that no permitted interaction in section 92-2.5, HRS, allowed such a discussion by three or more Board members to occur outside of a public meeting. Therefore, OIP concludes that the Board’s discussion by its exchange of Racetrack Emails violated the Sunshine Law’s open meeting requirement. HRS § 92-3.

OIP notes this Board has had a history of improperly using emails to discuss Board business outside of meetings. In a prior Sunshine Law Memorandum Opinion, S MEMO 12-12, OIP had found that email messages among Board members constituted improper Board discussion of official business in violation of the Sunshine Law’s open meeting requirement. S MEMO 12-12 at 1-2. On October 2 and 10, 2018, the NCO had emailed OIP’s Attorney of the Day service regarding whether certain emails between Board members violated the Sunshine Law. In response, OIP advised the NCO that the emails were improper discussions of board business outside a noticed meeting in violation of the Sunshine Law. The NCO on March 9, 2020, April 8, 2019, and September 28, 2018, warned the Board by email that it should not be discussing Board business by using emails.

² Based on the information provided by the parties, no other permitted interaction in section 92-2.5, HRS, applied to permit the discussion of Board business outside of a properly noticed meeting in the Racetrack Emails or Member Dudley’s Emails.

Based on the number of instances where this Board and certain individual members have used emails to discuss Board business, OIP may refer to the appropriate authorities any future instances where the Board has used email to discuss Board business in violation of the Sunshine Law.

II. Member Dudley's Emails

After reviewing Requester's complaint and Member Dudley's Emails, OIP further finds substantial evidence that the latter's emails were sent to other Board members as blind copies. As discussed above, even though Member Dudley was the only visible sender and sole recipient for the March email, he apparently sent it as a blind copy to Chair Legal because of the email's salutation, "Aloha Jack." Moreover, both of Member Dudley's Emails had been obtained by Requester from another Board member who had been emailed them directly from Member Dudley but was not listed as a recipient.

Member Dudley's sending emails as blind copies did not in any way reduce the resulting Sunshine Law violations. An email directly sent to a recipient as a blind copy, or an email directly sent to a recipient as a "cc," is still a direct communication from the sender to the recipient for the purpose of determining whether there has been a discussion under the Sunshine Law. The difference between listing a recipient as a primary recipient, a "cc" recipient, or a blind copy recipient may carry implications as to whether the recipient is expected to take action on the email and whether the sender wants all recipients to be aware of each other, but it does not change the emails' effect under the Sunshine Law. It does, however, have one notable effect in the event of a Sunshine Law complaint, and that is to make communications in violation of the Sunshine Law less apparent when those communications are reviewed. For the same reasons as discussed with respect to the Racetrack Emails, OIP finds that Member Dudley's sending of emails to more than one other Board member, even as blind copies, constituted an improper discussion of board business outside of a public meeting in violation of the Sunshine Law. OIP Op. Ltr. No. F19-03 at 10.

Also as discussed above, in S MEMO 12-12, OIP found that email messages among Board members constituted improper Board discussion of official business in violation of the Sunshine Law's open meeting requirement. S MEMO 12-12 at 1-2. Notably, S MEMO 12-12 also specifically involved Member Dudley sending email messages to all Board members concerning Board business.

While the Sunshine Law's provisions including enforcement provisions generally apply to a board as a whole rather than to its individual members, the Sunshine Law does provide in appropriate circumstances for an individual person's repeated violations to be considered to be willful and potentially subject to criminal and other sanctions. See HRS § 92-13 (2012) (providing that "[a]ny person who

willfully violates any provision of [the Sunshine Law] shall be guilty of a misdemeanor, and upon conviction, may be summarily removed from the board unless otherwise provided by law”).

Member Dudley received an official warning in S MEMO 12-12. He has disregarded prior warnings and has continued with email communications with other Board members regarding Board business. OIP notes that Member Dudley was not presented with an opportunity to personally respond to this appeal, as it was brought against the Board as a whole, and OIP in any case lacks the authority to enforce the Sunshine Law against an individual board member, as discussed above. However, OIP finds his continued use of emails in what appears to be a deliberate circumvention of the Sunshine Law sufficiently concerning that OIP is referring Member Dudley’s actions to the Commission’s Executive Secretary for the filing of a Complaint under section 2-18-101, Rules and Procedures of the Neighborhood Commission (2017) (RPNC) to investigate his actions and consider whether they warrant removal from the Board.³

Right to Bring Suit to Enforce Sunshine Law and to Void Board Action

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.

³ The Neighborhood Plan includes a provision for removing neighborhood board members from office:

§2-18-101 Complaints. (a) Any person, board, board member, the executive secretary or the Commission may file a complaint against a board, a current boardmember, or a board committee member for alleged violation(s) of this plan as follows:

- (1) The executive secretary, at any time, by written recommendation to the Commission;
- (2) The Commission, at any time, by adoption of a resolution;
- (3) A board or board member, upon the filing of a complaint with the Commission office on a form provided by the Commission office within forty-five calendar days after the alleged violation(s); or
- (4) A member of the public, upon the filing of a complaint with the Commission office on a form provided by the Commission office within forty-five calendar days after the alleged violation(s).

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.

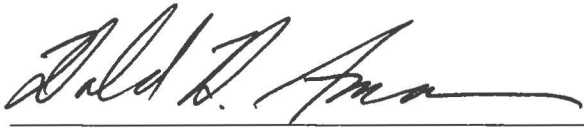
This letter also serves as notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

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 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) at Exhibit H, continued the modified suspension of the UIPA provided in SP7. On June 10, 2020, the Governor's Ninth Supplementary Proclamation (SP9) at Exhibit H, continued the modified suspension of SP8, Exhibit H.

The UIPA's part IV sets forth OIP's powers and duties in section 92F-42, HRS, which give OIP authority to resolve this appeal and have been restored by SP7 through SP9, except for the deadline restriction. Thus, for OIP's opinions issued while SP9 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 SP9 after July 31, 2020, unless SP9 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 SP9 after July 31, 2020, unless terminated or extended by a separate proclamation of the Governor.

OFFICE OF INFORMATION PRACTICES



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