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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: R. Brian Black
Public First Law Center
Board: Honolulu Police Commission
Date: December 19, 2024
Subject: Executive Sessions; Adequacy of Agendas; Discussion of Topics Not on Agendas (S APPEAL 22-01)

REQUEST FOR OPINION

Requester seeks a decision as to whether the Honolulu Police Commission (Commission) violated part I of chapter 92, HRS, the Sunshine Law, by failing to include sufficiently detailed purposes on its meeting notices for executive meetings anticipated in advance; failing generally to include sufficiently detailed agenda items on meeting notices and to list topics actually discussed at meetings; and engaging in executive discussions not allowed under the Sunshine Law.

Unless otherwise indicated, this opinion is based solely upon the facts presented in a letter from Requester to OIP dated July 22, 2021; a letter from the City and County of Honolulu (City), Department of the Corporation Counsel (CORP CNSL-HON) on behalf of the Commission dated September 20, 2021, with attachments; a letter from Requester to OIP dated November 5, 2021; a letter from CORP CNSL-HON to OIP dated November 22, 2021; a letter from OIP to Requester and CORP CNSL-HON dated November 24, 2021, with an enclosure to Requester only; a letter from Requester to OIP dated December 9, 2021; and a letter from CORP CNSL-HON to OIP dated December 23, 2021, with enclosures.

QUESTIONS PRESENTED

1. Whether the Sunshine Law allowed the Commission to discuss items not specifically listed on the agenda based on recurring catch-all agenda items.
2. Whether the Sunshine Law allowed the Commission to use a catch-all listing of all executive session purposes potentially applicable to the Commission to collectively cover all items discussed in executive session in lieu of stating the specific purpose or purposes it reasonably believed allowed each executive session agenda item to be discussed in executive session.
3. Whether the Commission's discussion of legislative bills and other matters in executive session all fell within an authorized executive session purpose.

BRIEF ANSWERS

1. No. The Sunshine Law did not allow the Commission to discuss items not specifically listed on the agenda based on recurring catch-all agenda items because section 92-7(a), HRS, requires that meeting notices include an agenda of all items to be discussed, including items to be discussed in executive session.
2. No. The Sunshine Law did not allow the Commission to use a catch-all listing of all executive session purposes potentially applicable to the Commission in lieu of stating the specific purpose or purposes it reasonably believed allowed each executive session agenda item to be discussed in executive session because section 92-7(a), HRS, requires that boards give notice of the purpose of an executive meeting when anticipated in advance.
3. No. The Commission's brief discussion of deferring legislative bills to the next meeting did not fall within any executive session purpose listed in section 92-5(a), HRS. Although the executive session minutes do not reflect any other discussion of legislative bills in executive session, OIP notes that the Commission's executive session discussion of other topics, not raised in this appeal since they were mostly not listed on the meeting agendas, did not appear to fall under any executive session purpose.

FACTS

The county police commissions are established by section 52D-1, HRS, and the Commission's duties and responsibilities are set out in section 6-1606 of the Revised Charter of the City and County of Honolulu. Those include reviewing and making recommendations to the mayor on the Honolulu Police Department's (HPD) proposed budget and five-year plan; receiving and investigating complaints against HPD or its officers; and hiring and evaluating the Chief of Police for HPD (Chief). The

Commission stated in its response to this appeal that it also sees itself as having a “role as a platform for public input and establishing a direct conduit to [HPD] . . . and the Chief.”

The Commission meetings at issue in this appeal took place in the first part of 2021, at which time Hawaii was still subject to emergency proclamations issued by then Governor David Ige pertaining to the COVID-19 pandemic. Governor Ige’s Seventeenth Proclamation Related to the COVID-19 Emergency dated December 16, 2020, and Exhibit F attached thereto, and the subsequent emergency proclamations applicable through the period at issue herein (Emergency Proclamations), all suspended the Sunshine Law to the extent necessary to enable boards to conduct meetings without board members or members of the public physically present in the same location, as section 92-3.7, HRS, allowing boards to meet remotely, had not yet been adopted. The Commission did not argue that its actions at issue in this appeal were authorized under the Emergency Proclamations, but rather that its actions were authorized by the Sunshine Law itself. Nonetheless, because the Emergency Proclamations were in effect throughout the time period at issue, in this opinion OIP will focus on the specific issues and agenda items raised in the appeal rather than raising all issues of potential concern under the Sunshine Law, since the Commission’s response addressed the specific issues raised by the appeal rather than other issues that it might have believed were authorized under the Emergency Proclamations.

Similarly, OIP will not specifically note instances in which due to changes in the law (including the expiration of the Emergency Proclamations), the Commission’s actions in 2021 are inconsistent with what the Sunshine Law’s current provisions would require.

Civil Beat Law Center for the Public Interest, nka Public First Law Center (Public First), submitted this appeal to OIP on July 22, 2021, regarding the

Commission's meetings held during the preceding six months.¹ The Commission responded through its Deputy Corporation Counsel on September 20, 2021, and provided (among other attachments) executive session minutes of three meetings for OIP's *in camera* review. Public First then submitted a reply to the Commission's response dated November 5, 2021. The Commission, again through its Deputy Corporation Counsel, sent a reply to Public First's reply to the Commission's response dated November 22, 2021. OIP sent a letter to Public First and the Commission dated November 24, 2021, setting a briefing schedule for any final statements by the parties. Public First submitted a final statement on December 9, 2021, and the Commission (through its Deputy Corporation Counsel) submitted a final statement on December 23, 2021.

I. Recurring Language Used in Multiple Agendas

A. Recurring Executive Session Language

For the first seven months of 2021, up to the time this appeal was filed, every Commission agenda used the same language to state the purpose of an executive session covering multiple agenda items, without further specifying which asserted purpose(s) applied to each executive session item. The stated purpose of the combined executive session used for every agenda was:

The following agenda items will be reviewed in executive session pursuant to: HRS 92-5(a), subsections (2), (4), (5), (6) and (8): to consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved; to consult with its attorneys on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities; to investigate proceedings regarding criminal misconduct; to consider sensitive

¹ Although this appeal concerns Commission agendas from 2021, OIP looked at a recent Commission agenda to see whether it has continued to use catch-all agenda items and other practices complained of in this appeal, or whether its agendas have improved since the period at issue. The agenda for the Commission's meeting of December 4, 2024, shows no apparent improvement as it uses the same or substantially the same recurring catch-all language complained of herein. Honolulu Police Comm'n, Agenda, (Dec. 4, 2024), <https://www4.honolulu.gov/docushare/dsweb/Get/Document-346131/agenda20241204%20final.pdf>. OIP further notes that the December 4 meeting agenda was posted on the Commission's own webpage, but does not appear to have been posted on the electronic calendar for the City. Events, City and Cnty of Honolulu, <https://www8.honolulu.gov/events/2024-12-04/> (last visited Dec. 17, 2024). OIP reminds the Commission that the Sunshine Law requires a board to post notice of every meeting "on an electronic calendar on a website maintained by . . . the appropriate county," among other things. HRS §92-7(b) (Supp. 2023).

matters related to public safety or security; to deliberate or make a decision upon a matter that requires the consideration of information that must be kept confidential pursuant to state or federal law, or a court order. During this meeting, there may be discussion with the Chief of Police and her staff regarding internal strategies and sensitive criminal investigation matters relating to public safety that disclosure could significantly risk the circumvention of law and undermine the effectiveness of the public's protection by the police.

The same language was used in the Commission's motion to go into executive session at each meeting during that time.

B. Recurring Agenda Items

In this appeal, Requester raised issues with the sufficiency of several recurring agenda items used repeatedly during the period in question. These include the following:

- (1) "Legal Update by Deputy Corporation Counsel, if necessary" (listed for executive session);
- (2) "Executive Officer's confidential report on matters that must be kept confidential" (listed for executive session); and
- (3) Chief of Police Report: "Report on departmental activities including but not limited to crime, traffic, upcoming departmental events, and/or other issues related to the Honolulu Police Department including an update on sufficiency of personnel response and resources related to COVID-19."

For some meeting agendas, the Chief of Police Report category included one or two subcategories with a more specific topic that was not the same at every meeting in addition to the recurring language quoted above, but otherwise these agenda items provided no further details as to what would be discussed. The items appeared in the meeting agendas for January 6 and 20, February 3 and 17, March 3 and 17, April 7 and 21, May 5 and 19, June 2 and 23, and July 7 and 21, 2021.

Requester also questioned several agenda items that were used once or more, but not at every regularly scheduled meeting of the Commission. The meeting agendas for March 3 and 17 and April 7, 2021, included "Discussion of Legislative Bills" as an executive session item without any further details such as the bills that would be considered. The meeting agenda for March 3, 2021, listed "Salary Commission" as a "New Business" item without further details.

Requester also questioned the adequacy of the Commission's agenda items for complaints, noting that the agenda for June 23, 2021, listed "Review of complaints

HPC Nos. 20-046 and 20-088” as an executive session item without any information beyond the complaint number. Although not specifically raised by Requester, in other instances the agenda description of complaints listed what appear to be charges rather than a description of the actual behavior giving rise to the complaint. For instance, the agenda for February 17, 2021, included such descriptions as “HPC No. 20-102, filed on November 2, 2020, complaint alleging overbearing conduct” and “HPC No. 20-104, filed on November 10, 2020, complaint alleging conduct unbecoming an officer and threatening.”

II. Topics Commissioners Discussed Based on Contested Agenda Items

A. March 3 Meeting

At the meeting held March 3, 2021 (March 3 Meeting), the Commissioners heard public testimony and HPD reports, and discussed various items raised in the testimony and reports, all of which took up more than two-thirds of the total public meeting time of about one and a half hours. Of the items the Commissioners discussed, a report on body-worn camera use was reflected in a subcategory to the Chief of Police Report, “Body-Worn camera program update.” The Commissioners’ questions about various legislative measures that HPD reported on were reflected in another Chief of Police Report subcategory, “Legislative update on priority HPD bills,” with no further information such as bill numbers, titles, or topics. The Commissioners’ many questions arising from the Chief’s report on overtime policy and use, including questions about a recent investigation into overtime use, were not specifically reflected in any agenda item and were apparently assumed to be covered by the recurring Chief of Police Report language repeated in every agenda during the relevant period. Similarly, crime and police responsiveness to crime near a testifier’s church,² which the Commissioners discussed and questioned HPD about during the Chief of Police Report³ portion of the agenda, were not specifically reflected in any agenda item.

Under the “Salary Commission” agenda item, the Commission held a brief discussion: the Chair informed the other Commissioners that the Salary Commission was likely to recommend no salary increase for any City official, noted the option for the Commission to submit testimony asking that the Chief of Police’s salary be competitive with national standards, and asked if it was acceptable to the

² OIP notes that the Commission was aware prior to the meeting that it would receive testimony on this topic, since it telephoned the testifier in question, apparently by prior arrangement. The testifier also mentioned having been referred to the Commission by the City Department of the Prosecuting Attorney, which submitted written testimony apparently in response to his anticipated testimony.

³ The Commission argued that this topic was also related to another agenda item, “Chief of Police Evaluation (2020).”

other Commissioners to take no action in light of the Salary Commission's position. The other Commissioners indicated their acceptance by nodding.

The executive session minutes for the March 3 Meeting include nothing relating to legislation or suggesting that the topic of legislation was even raised.

B. March 17 Meeting

The executive session minutes for the meeting held March 17, 2021 (March 17 Meeting), reflect that the Commissioners discussed a joint training center in Mililani and the use of a Mokulele Air hangar for helicopters⁴ under the agenda item "Chief of Police report regarding sensitive matters relating to the public safety or security including an update on confidential matters relating to public safety and personnel related to COVID-19." That agenda item had no subcategories or other additional detail. Under it, Commissioners also asked about mandatory performance quotas, the frequency of officer evaluations, and discussions with the State of Hawaii Organization of Police Officers. Under the heading "Legal update by Deputy Corporation Counsel, if necessary," Commissioners discussed a review of the City Charter and several legal issues relating to HPD that were recently discussed by the City Council. However, nothing in the executive session minutes suggests that the topic of legislation was even raised.

C. April 7 Meeting

At the meeting held April 7, 2021 (April 7 Meeting), under the Chief of Police Report (which included only the recurring language quoted above on page 5), the Commission discussed the recent police shooting of Iremamber Sykap (Sykap) on April 5, 2021, a "free speech event" at Kapiolani Park, and HPD's policy on first amendment activities.

The minutes of the executive session for the April 7 Meeting do not include details of Commissioners' discussion or indicate their questions or remarks, relying instead on general statements of the topic discussed (such as that the Chair and Vice Chair "briefed commissioners on their meeting with Chief Ballard" without further detail). However, the topics reflected in the executive session minutes include an internal personnel complaint that was discussed under the heading of

⁴ OIP cannot discuss whether what the Commissioners considered was appropriate under the listed executive session purposes without at least stating what topics Commissioners actually considered. Because the executive session agenda item under which these issues were discussed was so vague that it did not actually state the topics Commissioners considered, OIP has found it necessary to reveal what those topics were. OIP nonetheless has refrained from disclosing details of what the Commissioners or other attendees stated about those topics.

“Executive Officer’s confidential report on matters that must be kept confidential” (which did not include subcategories or further detail as to what would be reported). The executive session minutes do not reflect any executive session discussion of legislation other than an announcement that “discussion of legislative bills” was deferred to the meeting scheduled for April 21, 2021.

D. June 2 Meeting

At the meeting held June 2, 2021 (June 2 Meeting), the “Chief of Police Report” subtopics included both the usual recurring language quoted above on page 5 and a second subtopic, “Conflict of interest policy.” The Interim Chief reported extensively on HPD’s annual training for officers and the Commissioners questioned him, also extensively, about the report. The Interim Chief noted that the presentation was being given as follow-up information in response to questions raised at the meeting held May 19, 2021.⁵ Commissioners also discussed recent incidents with the Interim Chief including street racing and the Sykap and Lindeni Myani shootings.

DISCUSSION

I. Whether Meeting Notices Met Sunshine Law Requirements

A. Notice of Items Considered by the Commission

The Sunshine Law clearly requires a board’s written meeting notice to include “an agenda that lists all of the items to be considered at the forthcoming meeting[.]” HRS § 92-7(a) (Supp. 2023). As OIP has previously explained, the agenda must be

sufficiently detailed so as to provide the public with reasonable notice of what the board intends to consider. The statute’s notice requirement is intended to, among other things, give interested members of the public enough information so that they can decide whether to participate in the meeting. A board can only discuss, deliberate, act on, or otherwise consider matters that were included on the board’s agenda, so the agenda as filed will generally define and limit the issues the board can consider at the meeting.

OIP Op. Ltr. No. F16-02 at 3 (cleaned up).

⁵ It is evident that HPD and the Commission were aware of the Commission’s wish to hear about and discuss the topic of HPD’s officer training prior to the June 2 Meeting, since as the Interim Chief noted the HPD presentation responded to Commissioners’ questions at the previous meeting.

For an agenda item that is anticipated to be discussed in an executive meeting (from which the public may properly be excluded), OIP advises that the agenda should specify the items to be considered generally, but in as much detail as possible to allow a third party to determine the applicability of the claimed executive meeting purpose without defeating the lawful purpose for which the meeting is being held. Such a description will meet the statute's express notice requirements, noted above, and is consistent with the policies underlying the executive meeting provisions and the Sunshine Law in general.

OIP Op. Ltr. No. 06-05 at 6 (cleaned up).

With respect to the "sufficient nexus" standard heavily relied on by the Commission, OIP notes that this standard is specific to legislative boards such as the county councils, which do their work through numbered bills or resolutions, and whose notices must as a general rule include the number of any bill or resolution that will be considered. OIP has stated that for such boards, "in unusual circumstances there may be times when a bill or resolution is not specifically listed as an agenda item, and is not yet written, but is proposed at a meeting as a natural consequence of the discussions on an item that was properly listed on the agenda." OIP Op. Ltr. No. 02-09. To determine whether a new bill or resolution proposed at a meeting was the natural consequence of the discussions on a properly noticed item, OIP looks at whether there is "a sufficient nexus between the item on the agenda and the direction the discussion at the meeting ultimately takes to allow the public to present meaningful testimony." *Id.* Thus, the "sufficient nexus" standard is (1) applicable to legislative boards specifically, and (2) does not replace the general standard that a board's notice must have reasonably notified the public of the topics the board intends to discuss. It simply provides guidance as to when a legislative board may discuss a yet-to-be-drafted bill or resolution proposed as the natural result of its discussion of an existing and properly noticed bill or resolution. Non-legislative boards may also sometimes find that their discussion of a noticed topic leads naturally to a related topic, and the "sufficient nexus" standard may provide some guidance; however, OIP emphasizes that the standard is that the nexus between the agenda item and what was actually discussed must be sufficient "to allow the public to present meaningful testimony." For non-legislative boards, which do not need to do their business through numbered bills or resolutions, the "sufficient nexus" standard thus restates the general requirement that a board's notice must be "sufficiently detailed so as to provide the public with reasonable notice of what the board intends to consider" so the public can decide whether to attend and testify.

A board cannot get around the Sunshine Law's notice requirement by using a recurring agenda item that merely describes the general policy areas within the

board's authority, without specifying the individual topics of discussion, on the basis that this makes the agenda easier to write and because issues may come up at the last minute. To the contrary,

[g]eneral descriptions, "catch-alls," or items intended to preserve the board's ability to consider a matter unknown at the time that the notice is filed are . . . contrary to the intent and the spirit of the Sunshine Law and do not provide sufficient notice to allow a board to discuss, deliberate and decide the matter.

OIP Op. Ltr. No. 07-02 at 4 (citations omitted). Indeed, the use of a recurring agenda item with the same unchanging description at every meeting is something of a red flag that the item in question is a catch-all "intended to preserve the board's ability to consider a matter unknown at the time" and as such does not "provide sufficient notice to allow a board to discuss, deliberate and decide the matter." Such a recurring item may be suitable as a category heading that is followed by subheadings listing the actual topics the board will be considering, but by itself it fails to inform the public of what the board will actually consider.

Instead, a board (or its staff working on behalf of the board) must do the work of assessing in advance of a meeting what topics the board will want to consider at the meeting, which may be ongoing issues carried over from past meetings, topics suggested by board members or requested by members of the public (possibly in testimony at prior meetings), topics that will be reported on by third parties (such as HPD, which can be asked to provide those topics before the meeting). In the meetings at issue herein, it is clear that the Commission was aware of various issues prior to the relevant meetings, such as the issue of crime around a particular church and HPD responsiveness; the Sykap shooting (not for the April 7 meeting two days after the shooting, but for subsequent meetings); and HPD officer training. The Commission should have listed these topics as part of its agenda, rather than relying on its catchall Chief of Police Report language to cover those and whatever other issues the Commission chose to discuss.

If a third party (i.e., not a board member) reports to the board about an issue that arose too late to be included in the agenda, the board still has the option of listening to the report without asking questions or discussing that issue.⁶ Alternatively, when there is a truly unanticipated event that requires the board's response in less than the six days required to notice a regular meeting, the

⁶ If the issue is not of reasonably major importance and board action on it would not affect a significant number of persons, the board can add it to its agenda by a favorable vote of 2/3 of the members to which the board is entitled. See HRS § 92-7(d) (stating the requirements for adding an item to a previously filed agenda).

Sunshine Law gives a board the option to hold an emergency meeting as provided in section 92-8, HRS.

Contrary to the Commission's apparent belief, the fact that someone brings an issue up in public testimony and expects the board to respond does not exempt the board from the Sunshine Law's requirement to limit its consideration to only those items listed on its agenda, as set out in section 92-7(a), HRS.⁷ "The Sunshine Law prohibits board members from discussing, deliberating, or deciding matters that are not on the agenda. Thus, if a board hears public statements regarding matters not on the agenda, the board members cannot respond by discussing those matters." OIP Op. Ltr. No. 05-02 at 3 (citation omitted). Similarly, a board's responsibility over an area of policy such as public safety does not exempt it from the Sunshine Law's notice requirements and allow it to consider matters not on the agenda. Instead, "the board must either amend its agenda to include the matter or delay its discussion of the matter until a future meeting so that the matter can be placed on that meeting's agenda." *Id.* at 4 (footnote omitted). However, "board members may respond with purely administrative information about a non-agenda matter, such as stating that the matter will be considered for inclusion on the next agenda or informing the public that the deadline for submitting proposals or comments on the issue is a particular date." *Id.*

The Commission also appears to assume that if a member of the public raises an issue in testimony, that must mean the issue was reasonably related to an agenda item; essentially, the Commission asserted that because the Sunshine Law requires a board to accept public testimony reasonably related to an agenda item, the specific issues a board can consider at its meeting are determined by what the public brings up in testimony rather than the actual language of the agenda. The Commission argued that its meetings "are looked upon by some as the only mechanism for the public to express their concerns to HPD," and that its use of broad recurring agenda items supports its preferred model of using meetings as a forum for the public to raise all issues of concern in testimony, so that the

⁷ Unlike the Commission, neighborhood boards are specifically authorized by statute to "receive public input on issues not specifically noticed for consideration" and to discuss (but not take action on) "[a]ny matter raised as part of the public input agenda[.]" HRS § 92-81(b), (c) (2012). The existence of this neighborhood board provision, together with the lack of a similar statutory authorization for the Commission and other Sunshine Law boards, shows the Legislature's intent that absent specific statutory authorization to do so, a Sunshine Law board cannot discuss an issue not on the agenda even if it is raised in public testimony. Such a specific statutory authorization would be unnecessary if the Sunshine Law already allowed boards to discuss issues not on the agenda but raised in public testimony.

Commission can then immediately ask the Chief to respond to those issues.⁸ However, the Commission's strained interpretation of the Sunshine Law's public testimony requirement would effectively nullify the Sunshine Law's notice requirement by eliminating any obligation to inform the public in advance of what topics the Commission will discuss at a meeting so that other members of the public, who may also be interested in a topic, can arrange to submit their own testimony and attend the meeting at which the topic will be discussed.

The Commission pointed to issues raised in public testimony, which the Commission argues were therefore appropriate for its members to discuss. In fact, the testimony the Commission highlighted was not reasonably related to the items on the meeting agenda, so the Commission could listen to it (although it was not required to), but could not itself discuss the issues raised by the testimony. For instance, the Commission argued that for the June 2 Meeting agenda item "Selection process for next Chief of Police," the "testimony related to this agenda item include[d] issues of training, officer involved shootings, community and minority relation, transparency and accountability," and that it was "clear from the public testimony that such issues are related to the agenda item 'Selection process for the next Chief of police update.'" OIP finds that the Commission's argument is not a reasonable reading of the agenda item. The key word in that agenda item was "process;" the item reasonably notified the public that the Commission would be discussing the process to be used to select the next Chief, but it did not authorize the Commission to discuss specific candidates, much less to discuss police-involved shootings, community relations, and accountability on the theory that everything related to HPD is somehow related to the Chief. Thus, the Commission was not required by the Sunshine Law to allow the extensive public testimony, which the Commission asserted was offered under this agenda item, about officer involved shootings and other topics. The mere fact that the Commission received public testimony did not authorize the Commission to consider the various issues raised by the public in that testimony. OIP notes further that since the Sykap shooting happened in early April of 2021, the Commission was well aware prior to its April 21 Meeting and subsequent meetings that that shooting would be an issue of great interest to the public and one the Commission itself was likely to want to discuss. Its omission from those agendas was a choice by the Commission. OIP concludes

⁸ Whatever might be the merits of running meetings as an open forum wherein the public raises issues of concern so that HPD can respond to and the Commission can discuss those issues, such a model is fundamentally inconsistent with the Sunshine Law's notice requirements. OIP notes, however, that to achieve its goal of acting as a forum for the public to raise issues for HPD and the Commission to respond to, the Commission could ask the public to submit desired topics in advance for future meeting agendas, perhaps specifying that topics received too late to appear on the agenda for one meeting will be considered for inclusion at the next. The Commission could also provide a soapbox period at the end of the meeting for the public to offer comments on items not listed on the agenda, and then select topics for its next meeting based on the comments received.

that the Commission's discussion of police involved shootings and related issues, allegedly justified by the "Selection Process for the Chief of Police" agenda item, violated the Sunshine Law.

Similarly, at the March 3 Meeting the recurring Chief of Police agenda item for a "Report on departmental activities including but not limited to crime, traffic, upcoming departmental events, and/or other issues related to the Honolulu Police Department including an update on sufficiency of personnel response and resources related to COVID-19" drew testimony complaining about police unresponsiveness to crime outside a particular church. The Commission argued that HPD's responsiveness to crime near that church was clearly related to the agenda item, and entitled Commissioners to question the Chief about policing levels generally and crime outside that church, because the agenda clearly mentioned "crime." To the contrary, for a board overseeing a law enforcement agency whose primary purpose is to fight crime, "crime" as an agenda item is excessively vague and fails to give any real notice to the public of what will actually be considered. In a very general sense, one could say that almost any testimony presented is related to "crime," and the Commission's use of this vague recurring agenda item probably did lead the public to expect that testimony could be offered on anything relating at all to crime, or to traffic, or to "other issues related to the Honolulu Police Department." However, because the agenda item was too vague to authorize the Commission to discuss anything at all in the absence of additional detail, OIP concludes that the Commission's discussion of various issues raised by the public in testimony and by HPD in its reports, allegedly justified by this agenda item, violated the Sunshine Law.

The recurring executive session agenda item "Legal Update by Deputy Corporation Counsel, if necessary" likewise gives no notice to the public of what legal issues the Commission will actually discuss with its counsel at the meeting. Although the public does not have the right to be present to hear discussions held in executive session, the public does have the right to testify on agenda items discussed in executive session. OIP finds there is no way the public could provide meaningful testimony in the absence of any information about what actual events, litigations, claims, or other legal issues will be reported and considered by the Commission. Thus, OIP concludes that the Commission's discussion of any issues

raised under the “Legal Update” agenda item violated the Sunshine Law.⁹

The recurring executive session agenda item “Executive Officer’s confidential report on matters that must be kept confidential” also gives no notice to the public of what issues the Executive Officer will report, and the Commission will consider, at the meeting. Again, the public has the right to testify on agenda items discussed in executive session, and OIP finds that the public could not provide meaningful testimony without knowing anything about the issues to be discussed. OIP therefore concludes that any topics discussed by the Commission under this agenda item violated the Sunshine Law.

Based on OIP’s review of the executive session minutes, it does not appear that the Commission actually heard about or discussed anything under the recurring executive session agenda item “Discussion of Legislative Bills.” However, at the March 3 Meeting the Commission did hear about and discuss legislative bills in open session, under the “Chief of Police Report” recurring agenda item. OIP finds that neither the “Chief of Police Report” agenda item nor the executive session item “Discussion of Legislative Bills” gave sufficient public notice of the specific topics raised in legislation and discussed by the Commission, since neither agenda item listed any of the specific legislative measures to be discussed or the topics addressed by those measures.¹⁰ OIP therefore concludes that the Commission’s March 3 discussion of legislative measures violated the Sunshine Law.

Under the March 3 Meeting agenda item for “Salary Commission,” a Commissioner briefly reported the Salary Commission’s general stance that salaries

⁹ The Commission asked OIP for guidance on how to notice items in its response to this appeal. OIP notes that Public First, in its letter dated November 5 at pages 2-3, responded to the Commission’s request by listing applicable OIP online guidance and opinions already available for the Commission to consult. OIP agrees that the listed formal opinions and online guidance are directly applicable to the issues in this appeal, and strongly recommends that the Commission consult OIP’s Agenda Guidance for Sunshine Law Boards in particular. Off. of Info. Practices, Agenda Guidance for Sunshine Law Boards (August 2024), <https://oip.hawaii.gov/wp-content/uploads/2024/08/Agenda-Guidance-for-SL-Boards-2024-Final.pdf>. Relevant to this and other executive session agenda items, the Agenda Guidance for Sunshine Law Boards includes examples of how to balance the need for confidentiality so as not to frustrate an executive session’s purpose with the requirement to provide adequate notice to the public, including an example of how a police commission can notice its executive session discussion of a complaint against an officer.

¹⁰ OIP’s Agenda Guidance for Sunshine Law Boards includes examples of how to notice legislative measures by including bill number, title, and a brief description. OIP also recommends that the Commission read OIP’s Quick Review: Sunshine Law Options to Address State Legislative Issues and Measures (August 2022), <https://oip.hawaii.gov/wp-content/uploads/2022/08/QR-SL-Legislative-Options-2022.pdf>, which offers multiple options for a Sunshine Law board to handle discussion of and testimony on legislative measures.

should remain unchanged, and recommended that the Commission take no action regarding the Chief's salary (to which the other Commissioners agreed by nodding their heads). OIP finds that in the context of the Commission's agenda the item "Salary Commission" could reasonably be assumed to refer to the Salary Commission's stance with respect to HPD, and further finds that since the Commission's discussion of the item was brief and amounted to nothing more than a recognition of the Salary Commission's general stance and agreement that it meant the Commission would not need to take action regarding the Chief's salary, the description "Salary Commission" was minimally adequate to inform the public about what the Commissioners actually considered. Thus, OIP concludes that the Salary Commission discussion did not violate the Sunshine Law. However, OIP warns the Commission that the agenda item would not have been sufficient to notify the public if the Commissioners had actually taken up the issue of potential changes to the Chief of Police's salary, and OIP strongly recommends that in the future, such an agenda item should also include "Changes to Chief of Police's salary" (and any other relevant positions) to allow for such a discussion.

The meeting agenda for June 23, 2021, listed "Review of Complaints HPC Nos. 20-046 and 20-088" as an agenda item, without further information. In other meeting agendas, complaints were listed with both a complaint number and the charges (such as "complaint alleging overbearing conduct" and "complaint alleging conduct unbecoming an officer and threatening"), but no detail as to what the conduct complained of might have been. OIP finds that listing a complaint by its number only, with no additional information, clearly fails to notify the public of the nature of the complaint so that people could submit meaningful testimony. OIP further finds that in some instances listing a complaint number with the addition of the charges also fails to provide sufficient notice of what the complaint concerns to allow people to submit meaningful testimony. For instance, "complaint alleging conduct unbecoming an officer" or "overbearing conduct" could cover any number of different actions by the officer concerned. Other listed charges, though, such as "discourtesy-profanity" or "unnecessary use of police issued equipment-oleoresin capsicum," do provide a minimally sufficient level of detail to notify the public as to the nature of the complaint. OIP concludes that in instances where a complaint was listed by number only, or included only charges that were not themselves sufficient to explain what behavior the complaint alleged, the Commission's

consideration of those complaints was inconsistent with the Sunshine Law's requirements.¹¹

B. Notice of Purpose for Discussing Item in Executive Session

The Sunshine Law requires that "in the case of an executive meeting the purpose shall be stated" in the meeting notice and agenda. HRS § 92-7(a). As another instance of recurring language used in every meeting agenda, the Commission's listed purpose for the agenda items noticed for executive session is, as quoted above starting on page 4, a list of all potential purposes that might apply to the Commission and was used for the combined list of executive session agenda items rather than stating the purpose of each item individually. The question raised by this appeal is thus whether a board can meet the Sunshine Law's notice requirement by listing all the executive session purposes that may possibly apply to the board together, as the collective purpose for all items discussed in executive session, without specifying which purpose applies to which executive session topic and without limiting the list to those purposes that are at least arguably applicable to one of the topics listed for executive session.

OIP has previously concluded that the "use of generic 'executive session' entries on a board's agendas would provide no notice of the item being considered or the purpose for which the executive meeting is being held" and thus does not comply with the Sunshine Law. OIP Op. Ltr. No. 06-05 at 7. OIP has already addressed the Commission's use of recurring generic executive session agenda items, but notes that not all the executive session agenda items OIP reviewed were problematic. Some executive session agenda items were unique to a particular meeting and provided notice of the specific topic to be considered. However, for the required statement of the purpose of an executive session, the Commission used the same catch-all language in every meeting agenda. OIP finds that the recurring catch-all purpose language was a generic executive session entry of the type OIP Opinion Letter Number 06-05 referred to, and that it effectively provided the public with no notice of the purpose for which any executive session agenda item was discussed in executive session. By consistently listing five of the eight executive session purposes provided by statute, and excluding only those clearly inapplicable to the Commission's work, the Commission told the public only that at least one of the executive session purposes listed in section 92-5(a), HRS, was the basis for its

¹¹ The Commission did not argue that the complaints at issue herein were heard as part of the Commission's adjudicatory function (such as a contested case) and thus exempt from the Sunshine Law under section 92-6, HRS. OIP notes that if the Commission's consideration of such complaints was part of a contested case hearing or otherwise qualified as an adjudicatory function authorized under the Hawaii Revised Statutes, the Sunshine Law's notice and other requirements would not apply. HRS § 92-6 (2012).

executive session discussion of each executive session agenda item. The Sunshine Law requires a board to do more than simply point to the list of possible statutorily authorized purposes and let the public guess at which may apply; it requires stating “the purpose,” in the singular, of an executive session. If the Commission itself is unable to point to an authorized purpose that it believes allows it to discuss a topic in executive session, then the Commission should not be listing that topic for executive session.

OIP therefore concludes that the Commission’s use of a generic list of all potentially applicable executive session purposes to cover all items discussed in executive session, without specifying which purpose applied to each agenda item, violated the Sunshine Law’s requirement that a board’s notice include the purpose of an executive session. This conclusion is not meant to imply that a board violates the Sunshine Law if it lists multiple purposes for discussing a topic in executive session and OIP or a court ultimately concludes that although the executive session was proper under a different purpose, at least one of the listed purposes was inapplicable. Rather, a board must exercise good faith in notifying the public of each purpose it believes authorizes its executive discussion of a particular topic, and it cannot meet that obligation by listing all or a majority of the executive session purposes for every topic regardless of whether there is any good faith argument for their applicability to a particular topic.

II. Whether Executive Session Discussion Fell Within Authorized Purpose

Requester questioned whether the Commission exceeded the scope of any applicable executive session purpose in its executive session discussion of legislation at the March 3 Meeting, March 17 Meeting, and April 7 Meeting.

Based on its review of the executive session minutes¹² for those meetings, OIP finds that at the April 7 Meeting the Commission deferred the “discussion of legislative bills” to the meeting scheduled for April 21, 2021. Other than that, the topic of legislation was not raised in the Commission’s executive session discussions at those meetings.¹³ OIP concludes that the Commission’s announcement that discussion of legislative bills would be deferred until April 21, 2021, did not fall under an executive session purpose and should have been done in public session.

OIP further notes that the Commission’s executive session discussions included many topics that were not listed on the agenda and for which it was not clear that any executive session purpose would apply. For instance, at the March 17 Meeting the Commissioners discussed a Joint Training Center in Mililani, the use of the Mokulele Air hangar for helicopters, and mandatory performance quotas

¹² Although the adequacy of minutes was not raised as an issue in this appeal, OIP notes that the executive session minutes in particular generally fail to meet the Sunshine Law’s requirements for written minutes because they do not “give a true reflection of the matters discussed at the meeting and the views of the participants” as required by section 92-9(a), HRS. In many instances it is not possible to determine whether discussion strayed beyond an authorized purpose because the discussion is simply not recorded. For instance, in the executive session minutes for the March 3 Meeting, the statement that “Commissioners reviewed and discussed with [the Chief] her self-evaluation for her 2020 evaluation,” which is the entire record of a discussion that apparently took over an hour, is not an accurate reflection of the hour-plus discussion and entirely fails to state the views of the participants or even who spoke. Similarly, for the complaints addressed during the executive session, the executive session minutes list the complaint number, parties, and action taken, but they show no discussion whatsoever by Commissioners and do not show the vote by member.

As stated earlier, because the Emergency Proclamations potentially affected the Sunshine Law’s normal application during the period in question, OIP will not find violations in this opinion beyond the issues raised by the appeal. Nonetheless, OIP reminds the Commission that its minutes must meet the Sunshine Law’s requirements, including giving “a true reflection of the matters discussed at the meeting and the views of the participants,” which for written minutes such as the ones the Commission used for the meetings at issue here means at a minimum reflecting who spoke and paraphrasing what each member said. OIP further reminds the Commission that it has the option of using recorded format minutes, i.e., a recording of the meeting accompanied by a written summary of the events of the meeting with time stamps indicating when discussion began of each item and when motions and votes were made. HRS § 92-9(b) (2012).

¹³ The repeated inclusion of this agenda item, which the Commission apparently did not even mention in its executive sessions, suggests that it was another catch-all, used during the legislative session to cover the possibility that the Commission might want to discuss legislation. As discussed above in section I.A, such a catch-all does not provide the required public notice of what a board actually intends to consider at a meeting.

for HPD officers and the frequency of officer evaluations. As OIP has previously stated, because the partial Sunshine Law exemption in the Emergency Proclamations was in force at the time of these meetings, OIP's focus in this opinion is the Sunshine Law questions explicitly raised in this appeal. Nonetheless, OIP warns the Commission that such discussions not only violate the Sunshine Law's notice requirement (since as discussed above in section I.A, they were done pursuant to a recurring catch-all agenda item that failed to state the actual topics of discussion), but also appear unlikely to have been authorized by one of the statutory purposes for which a board may hold an executive session.

OIP also reminds the Commission of the Sunshine Law's requirement that "provisions for exceptions to the open meeting requirements shall be strictly construed against closed meetings." HRS § 92-1 (2012). This means that the executive session purposes listed in section 92-5(a), HRS, must be interpreted narrowly rather than broadly. The executive session purpose allowing a board "[t]o consider sensitive matters related to public safety or security," in particular, cannot be read broadly to apply to any topic related to public safety, but a board must instead be able to demonstrate that the topic is of a nature such that it could not be discussed publicly without compromising public safety or security. The possibility of compromising public safety is the thing that makes "sensitive matters related to public safety or security" sensitive, not merely the fact that the topic relates to public safety and security and is potentially controversial. As an example, certain HPD internal policies may be withheld from the public under the Uniform Information Practices Act (Modified), chapter 92F, HRS, on the basis that their disclosure would significantly risk circumvention of the law and thus would frustrate a legitimate government function. E.g., OIP Op. Ltr. No. 95-13. If the Commission's discussion of a topic was expected to require going into the details of HPD internal policies that could themselves be withheld under the UIPA on the basis that their disclosure would risk circumvention of the law, the Commission could appropriately notice that discussion for executive session "[t]o consider sensitive matters related to public safety or security." Most topics discussed by the Commission, however, would not be expected to fall within a narrow reading of this executive session purpose.

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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