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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: Johann P. Lall
Board: Maui Planning Commission
Date: March 21, 2025
Subject: Written Testimony Submitted for Canceled Meeting (S APPEAL 23-10)

REQUEST FOR OPINION

Requester seeks a decision as to whether the Maui County Planning Commission (Commission) violated the Sunshine Law by failing to consider testimony submitted for a canceled meeting when the same agenda item was heard at a later meeting.

Unless otherwise indicated, this decision is based upon the facts presented in an email from Requester to OIP dated April 17, 2023, with attached materials; four emails from Requester to OIP dated April 18, 2023, each with an attached email thread and one with attachments; three emails from OIP to Requester dated April 18, 2023, each with an attached email thread; two emails from Requester to OIP dated April 19, 2023, each with an attachment and an attached email thread; an email from Requester to OIP dated April 25, 2023, with an attached email thread; an email from Requester to OIP dated April 26, 2023, with an attached email thread; an email from OIP to Requester dated April 27, 2023, with an attached email thread; two emails from Requester to OIP dated April 28, 2023, each with an attached email thread; an email from OIP to Requester dated April 28, 2023; a letter from OIP to the Commission dated May 1, 2023, with enclosures; an email from Requester to OIP dated May 2, 2023, with an attached email thread; an email

from the Maui County Department of Planning (Department) to OIP dated May 10, 2023, with an attachment; an email from Requester to OIP dated May 11, 2023, with an attached email thread; an email from OIP to the Department dated May 16, 2023; an email from Requester to the Department, the Commission, and OIP dated May 26, 2023, with an attached email thread; an email from Requester to the Department, the Commission, and OIP dated May 30, 2023, with an attached email thread; an email from OIP to Requester, the Department, and the Commission dated May 30, 2023, with an attached email thread; an email from Requester to OIP dated June 13, 2023, with attachments; a letter from the Maui County Department of the Corporation Counsel (Corporation Counsel), on behalf of the Commission, to OIP dated June 14, 2023, with enclosures; an email from Requester to OIP dated June 27, 2023, with an attached email thread; an email from Requester to OIP dated July 6, 2023, with an attached email thread; an email from OIP to Requester dated July 11, 2023, with an attachment and an attached email thread; an email from OIP to the Corporation Counsel dated July 11, 2023; an email from Requester to OIP dated July 11, 2023, with an attached email thread; an email from the Corporation Counsel to OIP dated July 14, 2023; an email from the Corporation Counsel to OIP dated July 14, 2023; an email from OIP to Requester dated July 14, 2023, with an attached email thread; and an email from Requester to OIP dated August 25, 2023, with an attached email thread.

QUESTIONS PRESENTED

1. Whether the Commission violated the Sunshine Law by its failure to distribute written testimony submitted for a canceled meeting before the canceled meeting was scheduled to take place.
2. Whether the Commission violated the Sunshine Law by its failure to distribute testimony received for a canceled meeting originally scheduled for February 7, 2023, before considering the issue on that meeting's agenda at the rescheduled meeting held on March 28, 2023.

BRIEF ANSWERS

1. No. The Sunshine Law does not require a board to distribute written testimony for a canceled meeting or a canceled agenda item. A board's failure to distribute written testimony rises to the level of a Sunshine Law violation when the board considers the agenda item the testimony was submitted for without having first made the testimony available to the board's members. HRS § 92-3 (Supp. 2024); OIP Op. Ltr. No. 03-06. A board thus cannot violate the Sunshine Law through its failure to distribute written testimony for an agenda item that it did not consider, either because the entire meeting was canceled or because that particular agenda item was canceled.

2. Yes. Even though Requester's testimony was submitted for a canceled meeting, because that meeting was immediately rescheduled (and then rescheduled again) and ultimately held seven weeks later, the Commission should have reasonably understood it to be intended for consideration as testimony for the rescheduled meeting at which the Commission held its public hearing on proposed rule amendments that was originally scheduled for the canceled meeting date. The Commission's failure to distribute the testimony before the rescheduled meeting, although unintentional, violated the Sunshine Law's testimony requirement. HRS § 92-3. Nonetheless, the Commission's subsequent action to schedule yet another public hearing on the same proposed rule amendments, for which it would distribute Requester's testimony and other testimony submitted previously, mitigated the public harm from that violation.

FACTS

The Commission had a meeting scheduled for February 7, 2023 (February 7 Meeting), at which it planned to hold a public hearing on proposed amendments to its Special Management Area Rules and Shoreline Rules (collectively Rule Amendments). On February 5, 2023, Requester emailed testimony to the Commission regarding a proposed rule to allow the Maui Planning Director to reduce fines without the Commission's approval. On February 6, 2023, the Acting Maui Planning Director sent a letter to the Commissioners informing them that the February 7 Meeting had been canceled due to a Sunshine Law problem with its posted notice, and that consideration of the Rule Amendments would be rescheduled for February 28, 2023. The public hearing for those rules was subsequently further pushed back¹ to the Commission's meeting scheduled for March 28, 2023 (March 28 Meeting).

The Commission received written testimony on the Rule Amendments from Requester and other testifiers on February 5 and 6, 2023 (Missing Testimony), after

¹ The Commission was required by section 91-3, HRS, to conduct a public hearing on the Rule Amendments. HRS § 91-3 (Supp. 2024). Because the Commission planned to hold the public hearing at a Commission meeting, it was also required to post notice as required under the Sunshine Law. HRS § 92-7 (Supp. 2024); OIP Op. Ltr. No. 01-06. Thus, in addition to posting notice as required by the Sunshine Law for the March 28 Meeting, the Commission posted its Notice of Public Hearing on February 24, 2023. This opinion is limited to the Commission's obligations under the Sunshine Law, as OIP lacks jurisdiction over the requirements of chapter 91, HRS.

the Department² had already distributed the Commission's board packet³ for the February 7 Meeting, so the Missing Testimony was not included in the board packet. Since the February 7 Meeting was then canceled, the Department could not distribute the Missing Testimony to Commissioners at the February 7 Meeting. Instead, the Department planned to post it online, together with all other written testimony received before the March 28 Meeting, and include it in the board packet for the March 28 meeting. However, due to an oversight, the Missing Testimony was not included in the board packet for the March 28 Meeting, or posted online.

On April 18, 2023, Requester appealed to OIP to ask whether the Commission violated the Sunshine Law by failing to consider his written testimony submitted February 5, 2023, for the March 28 Meeting. Requester asserted that the Department intentionally withheld his testimony from the Commission because his testimony raised concerns about possible violations of the current rules by Department staff.

After the Commission received the notice of appeal and determined that it had not included the Missing Testimony in the board packet for the March 28 Meeting or posted it online, the Commission scheduled a new public hearing for July 25, 2023, so that all written testimony submitted for that date and the previous dates could be compiled and included in the board packet for that upcoming meeting as well as posted online.

DISCUSSION

The Sunshine Law requires boards to “afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item.”

² The Department provides administrative support to the Commission. Department, Supported Boards & Commissions, <https://www.mauicounty.gov/1128/Supported-Boards-Commissions> (last visited March 11, 2025).

³ Documents compiled by a board and distributed to board members before a meeting for use at that meeting are considered a “board packet” that must be made available to the public, at least to the extent the materials are public under the Uniform Information Practices Act (Modified), chapter 92F, HRS, or can be redacted in a timely fashion. HRS § 92-7.5 (Supp. 2024). At all times relevant to this appeal, a board using a board packet was required to make it available to the public at least 48 hours prior to the relevant meeting, with no exception for distribution of public testimony, which meant that testimony received too late to include in the packet had to wait to be distributed at the meeting itself (when it would technically not qualify as a “board packet.”) Section 92-7.5, HRS, has since been amended to change that deadline to two business days prior to a meeting and to clarify that distribution of public testimony is not subject to the deadline. 2024 Haw. Sess. Laws Act 11, § 2 at 19.

HRS § 92-3 (Supp. 2024). As OIP explained in its Opinion Letter Number 03-06 (Opinion 03-06), although:

the statute does not specify the manner in which testimony should be distributed to board members . . . that fact does not relieve the Board of its obligation to ensure that each Board member receives copies of written testimony before a decision is made on the issue. Written testimony would be meaningless if a board was able to refuse to distribute that testimony to its members simply because the statute does not specify the manner in which distribution is to be made, and such an interpretation of the statute would be contrary to the Sunshine Law's stated policy. The Board is empowered to determine how to best and most efficiently provide its members with copies of written testimony, including such testimony received electronically.

OIP Op. Ltr. No. 03-06 at 6. With regard to what must be treated as written testimony, OIP concluded that:

[t]he Sunshine Law does not state that, for a written submission to be considered by a board, it must be specifically identified as "testimony." To impose such a requirement on written submissions would be contrary to the intent and purpose of the statute. Indeed, section 92-3, Hawaii Revised Statutes, does not even contain the word "testimony," but requires boards to "afford . . . an opportunity to submit **data, views, or arguments**, in writing, on any agenda item." Haw. Rev. Stat. § 92-3 (1993) (emphasis added). Accordingly, the OIP rejects any contention that written submissions must include the word "testimony" before being considered to be such by a board. The OIP concludes that a board must accept any written submission received prior to the publicly noticed board meeting which, upon reasonable review, relates to a matter on the board's agenda and reasonably appears to have been intended for consideration by each member of the board.

OIP Op. Ltr. No. 03-06 at 6-7. OIP went on to conclude that the board's failure to distribute a piece of written testimony before deciding the issue the testimony addressed violated the Sunshine Law.

Here, there were two meetings where the Rule Amendments were on the agenda and for which the Sunshine Law may have required the Commission to provide its members with copies of the Missing Testimony: the February 7 Meeting and the March 28 Meeting. OIP will consider each of them in turn.

I. The Sunshine Law Does Not Require a Board to Distribute Written Testimony For a Canceled Meeting

OIP first considers whether the Sunshine Law required the Commission to distribute the Missing Testimony to its members prior to its February 7 Meeting. The Commission does not dispute that the Missing Testimony was reasonably recognizable as testimony on the Rule Amendments agenda item for the February 7 Meeting. Thus, the Commission was required to distribute the Missing Testimony to its members before considering the Rule Amendments at the February 7 Meeting.

The Commission did not distribute the Missing Testimony to its members prior to February 7, and as explained above in note 3, it could not have done so without violating the then-extant Sunshine Law ban on distributing a board packet less than 48 hours before a meeting. However, the Commission also did not consider the Rule Amendments at its February 7 Meeting, because the February 7 Meeting was canceled. OIP therefore finds that the Commission did not consider the Rule Amendments at the February 7 Meeting without having previously distributed the Missing Testimony, because it did not hold the February 7 Meeting. A board's failure to distribute written testimony rises to the level of a Sunshine Law violation only when the board actually considers the agenda item that testimony was submitted for without having first made it available to the board's members. A board thus cannot violate the Sunshine Law through its failure to distribute written testimony for an agenda item that it did not consider, either because the entire meeting was canceled or because that particular agenda item was canceled.⁴ OIP therefore concludes that the Commission did not violate the Sunshine Law through its failure to distribute the written testimony in advance of the canceled February 7 Meeting. Whether a board has a continuing obligation in such a case to distribute the written testimony received for a canceled meeting before considering the same agenda item at a future meeting is a separate question that OIP will consider next.

II. The Missing Testimony Reasonably Appeared to be Testimony for the March 28 Meeting and the Commission Should Have Distributed It

Whether a submission "relates to a matter on the board's agenda and reasonably appears to have been intended for consideration by each member of the board" is ultimately a factual inquiry that depends on the circumstances of the submission and of the agenda item for which it was intended. In Opinion 03-06, the question was whether the board should reasonably have recognized an email to one member as being testimony for its upcoming meeting. Here, instead, the

⁴ A board may be required to maintain submitted testimony for a canceled meeting or canceled agenda item under the retention schedule applicable to the agency it is attached to.

question is whether the Commission should reasonably have recognized the testimony submitted for a canceled meeting as also being intended as testimony for the same agenda item when it was actually considered at a future meeting.

A board is not generally required to distribute the written testimony received at a previous meeting when the same agenda item is heard again in the future, or to save written comments on a topic that is not on an upcoming agenda to distribute as written testimony if the topic appears on an agenda at some time in the future. As a general rule, it is up to a would-be testifier to submit written testimony when an agenda is posted with an item the testifier wishes to address, and a testifier should not expect the board to maintain files of all previous submissions on a topic, either testimony from prior meetings or general correspondence, and treat them as new testimony every time that topic is on a meeting agenda.

However, testifiers' expectations are likely to be different when the original meeting (or just the agenda item) for which the testimony was submitted was canceled and rescheduled within a short period of time, as happened here. In such a situation, testifiers may reasonably expect that the board will still look at their written testimony submitted for the canceled meeting before ultimately considering the issue. Of course, that expectation cannot be unlimited; if the board did not reschedule a meeting or agenda item when it was initially canceled and did not finally consider it until six months later, events in the intervening time might affect the testimony and the board could reasonably assume that testifiers interested in the issue would want to provide up to date testimony.

In this case, when the February 7 Meeting was canceled the Commission was already making plans to reschedule it, with February 28 initially proposed as a meeting date and then the March 28 Meeting finally scheduled. The Commission did not consider the Rule Amendments at another meeting in the seven weeks between the canceled February 7 Meeting and the March 28 Meeting. Further, the Commission itself stated that it intended to compile the Missing Testimony, and all other testimony submitted for the February 7 Meeting and in the intervening period, for the Commissioners' consideration at the March 28 Meeting. OIP therefore finds that even though Requester's testimony was originally submitted for the canceled February 7 Meeting, it was reasonably intended for consideration as testimony for the March 28 Meeting where the Commission finally held its public hearing on the Rule Amendments.

It is undisputed that the Commission did not include the Missing Testimony in the board packet for the March 28 Meeting or post it online with the other testimony for that meeting. Requester asserted that the Department deliberately withheld his testimony from the Commission, whereas the Commission asserted that the Department, acting on behalf of the Commission, inadvertently failed to

include the Missing Testimony (which included Requester's testimony) when compiling all the testimony submitted over the nearly two-month period from when notice was posted for the February 7 Meeting until the March 28 Meeting. OIP notes that a board's intent is largely irrelevant to determining whether it failed to distribute written testimony for an upcoming meeting to its members in violation of the Sunshine Law's testimony requirement, although a board's intention could be relevant if a lawsuit was brought under section 92-11, HRS, seeking to void an action taken by the board.⁵ In any case, OIP finds the Commission's explanation reasonable and probable. It does not require a stretch of the imagination to accept that a staffer trying to pull together testimony submitted for multiple meeting dates over the course of two months, during which the Commission also held other meetings and received testimony on other topics, could have overlooked the Missing Testimony (which was received too late to be included in the February 7 Meeting's board packet). OIP finds that the Commission's omission of the Missing Testimony from the March 28 Meeting's board packet and the testimony posted online was unintentional.

Because the Commission failed to distribute the Missing Testimony, including Requester's testimony, to its members by the March 28 Meeting, OIP concludes that the Commission thereby violated the Sunshine Law's written testimony requirement. However, based on the Commission's scheduling of an additional public hearing on the Rule Amendments to consider the Missing Testimony (and any further testimony submitted for the new date), OIP further finds that the Commission acted effectively to minimize the public harm stemming from its failure to consider the Missing Testimony for the March 28 Meeting.

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.

⁵ The parties were informed at the time this appeal was opened that such an action must be brought within ninety days of the action it seeks to void. It would thus be untimely at this point. HRS § 92-11 (2012).

This opinion constitutes an appealable decision under section 92F-43, HRS. A board may appeal an OIP decision by filing a complaint with the circuit court within thirty days of the date of an OIP decision in accordance with section 92F-43. HRS §§ 92-1.5, 92F-43 (2012). The board shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court's review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-43(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR. This rule does not allow for extensions of time to file a reconsideration with OIP.

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

OFFICE OF INFORMATION PRACTICES



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APPROVED:



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