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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). This is a memorandum opinion and will not be relied upon as precedent by OIP in the issuance of its opinions or decisions but is binding upon the parties involved.

MEMORANDUM OPINION

Requester: Ken Taylor
Board: County Council, County of Kauai
Date: September 11, 2019
Subject: Meeting of Councilmembers-Elect (S APPEAL 19-6)

Request for Investigation

Requester asked for an investigation into whether newly elected members of the Kauai County Council (COUNCIL-K) violated the Sunshine Law by holding a meeting to discuss selection of officers.

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's email with exhibits to OIP dated January 7, 2019; Requester's email to OIP sent June 15, 2019; OIP's notice of appeal with enclosures dated January 16, 2019; a letter from COUNCIL-K Office of the Council Clerk, Council Services Division (OCS-K) with enclosures dated January 17, 2019; and emails from OCS-K to OIP dated June 17, and August 15, 2019.

Opinion

Members-elect of COUNCIL-K did not violate the Sunshine Law when they met

publicly to discuss and take “straw votes”¹ on leadership because they were not yet sworn in for the upcoming term of office, and therefore not subject to the Sunshine Law for that term. The apparent failure of COUNCIL-K’s email notice system and the procedures for testimony were also not Sunshine Law violations as they pertained to the same meeting on leadership.

Statement of Reasons for Opinion

It is well established that the Sunshine Law applies to county councils. OIP Op. Ltr. No. 02-11 at 7, citing Att. Gen. Op. 86-5. Councilmembers become subject to the Sunshine Law at the time their terms of office commence. Id., at 10. According to section 3.03 of the Kauai County Charter (Charter), the term of office for newly elected Councilmembers in Kauai County begins at 12:00 meridian on the first working day of December following the election. See also OIP Op. Ltr. No. 02-11 at 7-10 (finding that, based on the State Constitution and election laws, and the respective charters for each county, councilmembers’ terms of office begin in accordance with the dates set by the county charters).

Requester’s complaints center around the selection of officers for COUNCIL-K’s 2018-2020 term. The actions complained of happened after the November 8, 2018, general election but before the commencement of the new term for COUNCIL-K members on December 3, 2018.

I. Meeting to Discuss Selection of Officers

The permitted interactions in section 92-2.5, HRS, list situations in which members of a board may discuss board business² outside of a properly noticed meeting. The permitted interaction at section 92-2.5(c), HRS, allows discussions between two or more members of a board, but less than the number of members which would constitute a quorum for the board, concerning the selection of the board’s officers in private without limitation or subsequent reporting. In light of this clear provision, OIP has opined that less than a quorum of a council, whether officially in office or not, may meet privately and without limitation or subsequent reporting to discuss selection of board officers. OIP Op. Ltr. No. 02-11 at 11.

Here, a quorum of newly elected, but not yet sworn in, members of COUNCIL-K discussed leadership in a noticed meeting, as explained in detail below. Like the

¹ Dictionary.com defines “straw vote” as “an unofficial vote taken to obtain an indication of the general trend of opinion on a particular issue.” See <https://www.dictionary.com/browse/straw-vote>.

² “Board 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, citing OIP Op. Ltrs. No. 15-02 at 4, 04-04 at 2, 04-01 at 7, and 01-01 at 31.

situation here, in the facts of Opinion 02-11, four incumbents and three “new-comers” were elected to COUNCIL-K in the November 3, 1998, election. Those seven newly elected members met twice in a “caucus” before they were sworn in. OIP Op. Ltr. No. 02-11 at 2. Unlike here, those caucuses were closed to the public. Id.

The Sunshine Law is silent on how to treat a quorum of board members who have not yet officially taken office and wish to meet privately to discuss selection of board officers. OIP Op. Ltr. No. 02-11 at 11. OIP has previously concluded that the Sunshine Law creates an inadvertent loophole: between the time that councilmembers are elected and the time they take office in accordance with a county charter, there is no requirement that they comply with the Sunshine Law. Id., at 12. Such a scenario would clearly not be allowed once the councilmembers officially take office. Id., at 14. OIP has therefore strongly recommended, based on the spirit and intent of the Sunshine Law, that a quorum consisting of members-elect of a board not meet privately prior to officially taking office to discuss selection of board officers. Id.

Requester alleged that COUNCIL-K’s members-elect held an illegal meeting. On November 26, 2018, the newly elected COUNCIL-K members for the 2018-2020 term held an “Organizational Meeting” (November 26 Meeting). The newly elected Councilmembers included four incumbents who were re-elected and three new members. The meeting notice was titled “2018-2020 Kaua’i County Council-Elect Meeting Notice and Agenda” (November 26 Agenda), and its items for discussion were:

Members elected to the Kaua’i County Council for the term commencing December 3, 2018 will conduct a meeting to discuss their Organizational Structure for the upcoming 2018-2020 Council Term. Items to be discussed are:

- Appointment of the Presiding Officers *Pro Tem* for the Organizational Meeting.
- Discussion of the selection of the Council Chair and Council Vice Chair for the 2018-2020 Council term.
- Discussion of the standing Committees of the Council, the Committee Chairs, the Committee Vice Chairs, and the Committee Members for the 2018-2020 Council term.
- Discussion of the Rules of the Council of the County of Kaua’i for the Organization of Committees and the Transaction of Business.

Prior to the meeting, attorney-of-the-day (AOD) advice was sought from OIP. In an email dated November 14, 2018, OCS-K asked whether the members-elect could caucus to discuss future selection of officers and indicated that the matters would not be voted upon until after swearing-in on December 3, 2018. OCS-K asked whether the members-elect should “post” (i.e., file a meeting notice) since they are not a “body” until after they are sworn in. OIP’s response, an email dated November 15, 2018, confirmed that OIP Opinion Letter Number 02-11 (Opinion 02-11) is still valid, and cited the conclusion:

While the OIP is of the opinion that it is not illegal for a quorum of newly elected members of a council to meet privately to discuss selection of officers prior to commencement of their terms of office, the OIP also believes this result arises from an unintended loophole in the Sunshine Law. Therefore, for the reasons set forth above, the OIP strongly recommends that a quorum of members-elect of a board not assemble privately prior to officially taking office to discuss selection of board officers, in keeping with the spirit of the Sunshine Law.

OIP Op. Ltr. No. 02-11 at 15-16.

In accordance with Opinion 02-11, COUNCIL-K’s response to this appeal stated that its previous practice was to post a notice and agenda when newly elected Councilmembers who have not yet been sworn in seek to caucus on leadership. COUNCIL-K explained that its intent was to follow the spirit of the Sunshine Law and, rather than have the members-elect meet privately to discuss leadership, do it in a noticed meeting and allow for testimony.

Based on guidance from OIP, OCS-K posted the November 26 Agenda on the County’s electronic calendar, on the COUNCIL K’s website, and at the meeting location, which is its normal practice for Sunshine Law meetings. The meeting was held on November 26, 2018, and OCS-K asserted that the spirit of openness in the Sunshine Law was followed because the members-elect filed a notice, took testimony, and prepared minutes for a meeting even though they were not required to.

Requester was at the November 26 Meeting and challenged it during his testimony. In response, the County Attorney (at that time, Mr. Mauna Kea Trask) explained the following, as shown in the minutes of the November 26 Meeting (November 26 Minutes):

OIP has opined in OIP Opinion Letter No. 02-11 that “it is not illegal for a quorum of newly elected members of a Council to meet privately to discuss selection of officers prior to commencement of the terms of office.” So that does not cover this, but if this elected body would want to, you could meet at Tip Top Motel Café and Bakery or wherever else

you want to go and figure this all out. However, in speaking with the Office of the County Clerk, it is likewise not illegal for you to meet here today and I will tell you why. The reason why is because the Sunshine Law and judicial decisions from the State of Hawaii interpreting the Sunshine Law really focus on what is called the “spirit” of the Sunshine Law, which is the open and available process for the public to be part of decision-making to understand what government is doing because the cornerstone of democracy is citizen participation. Although not required, I think it is in line in the spirit to have a meeting like this today. It is my understanding that communication has been made with OIP and the Office of the County Clerk has gotten—I do not want to say approval because they are not really necessary for approval, but they do have concurred that it is within the spirit of the Sunshine Law and they do not object to and they encourage meetings like this so people can participate meaningfully in the process. . . . I think none of the decisions that you will make today will be effectuated until you take official action on the 3rd at about 12:01 p.m. or shortly thereafter[.]

When bringing this appeal, Requester further alleged that the discussion at the November 26 Meeting became decision-making because the agenda for the December 3, 2018, meeting following the inauguration ceremony (December 3 Meeting) included discussion of a resolution for appointment of the chair and vice chair. In essence, Requester argued that a decision was made at the November 26 Meeting to choose the chair, vice chair, and committee officers and members, and this was merely ratified at the December 3 Meeting. As further evidence, Requester noted that the Inaugural program listed Mr. Arryl Kaneshiro as Council Chair and Mr. Ross Kagawa as Vice Chair, but this could not have been known at the time of printing unless a decision had already been made by the members-elect on or before the November 26 Meeting. Requester further argued that, given that four of the members-elect were incumbents, there was a Sunshine Law violation whether they were acting as part of the then-current Council or the one to be sworn in on December 3.

The November 26 Minutes reflect the following:

Councilmember-Elect Cowden: Felicia Cowden. Just to clarify, we are not officially voting on decisions today, right? We are just talking about it?

Mr. Trask: Correct.

Councilmember-Elect Cowden: There are no decisions that are made, so as a Council-Elect, we are not actually taking action. We are just

having a public conversation as opposed to sequential private conversations or whatever way it ends up happening, right?

Mr. Trask: Yes.

Councilmember-Elect Cowden: It is bringing it out in front of everyone, but no decisions are being made and no real action is happening.

Mr. Trask: Correct. This is the preferred alternative to two (2) equally viable processes, but I think this is more favored by OIP because it is open.

It is apparent later on in the Minutes that the members-elect discussed leadership, made motions, and held “straw votes.”

Based on OIP’s precedent, Opinion 02-11, OIP finds that the members-elect were just that, newly elected but not yet sworn in members for COUNCIL-K’s upcoming term to commence on December 3, 2018. As OIP has previously concluded, prior to being sworn in, newly elected members of a county council are not yet subject to the Sunshine Law.³ OIP Op. Ltr. No. 02-11 at 10. Because OIP previously concluded that it is not illegal for a quorum of newly elected members of a council to meet privately to discuss selection of officers prior to commencement of their terms of office, it also would not be a violation for them to, in keeping with the spirit of the Sunshine Law, meet publicly and with a filed notice, to discuss leadership. *Id.*, at 15. Further, because OIP has recommended that a quorum of members-elect of a board not assemble privately prior to officially taking office to discuss selection of board officers, OIP finds the actions taken by COUNCIL-K’s members-elect to discuss leadership for the upcoming term in a public meeting evidenced the intent of the members-elect to follow the spirit of the Sunshine Law and was consistent with OIP’s advice in Opinion 02-11. Consequently, OIP concludes that the

³ Requester argued that the four incumbent members-elect violated the Sunshine Law whether they were acting as members of the outgoing or the incoming council. Unlike most boards subject to the Sunshine Law, county councils are legislative bodies that start a new term after every election cycle and swear every member in for the new term, even continuing members (*i.e.*, incumbents who are re-elected). Opinion 02-11 involved private discussions of leadership for the upcoming term by four re-elected incumbents and three newly elected members, and OIP found that such a discussion did not violate the Sunshine Law. Opinion 02-11 was specifically about a leadership discussion by members-elect of COUNCIL-K that had not yet been sworn in. Discussion of leadership for a future term of a county legislative body is not even within the authority of the outgoing councilmembers as they serve their last few days in office, so it could not be their “board business” (*see* footnote 2, *infra*), and this is why Opinion 02-11 found no violation of the Sunshine Law for either the re-elected incumbents or the newly-elected-not-currently-serving members.

organizational discussion held at the November 26 Meeting was not in violation of the Sunshine Law. Their discussions, including “straw votes,” do not violate the Sunshine Law due to the loophole discussed in Opinion 02-11.

II. Notice

Requester alleged he did not receive a notice of the November 26 Meeting, and that the members-elect tried to have a noticed meeting without the public knowing about it. OCS-K’s email to OIP dated August 15, 2019, explained that there had been instances when the new email server “prevented distribution to outside E-mail addresses, but we have continuously worked on resolving the issue[.]”

The Sunshine Law’s relevant notice provisions require that, for county boards, no less than six calendar days prior to the meeting, the board shall post the notice on an electronic calendar on a website maintained by the appropriate county, post a notice in the board’s office for public inspection and at the meeting site when feasible, file a copy with the appropriate county clerk’s office, and maintain a list of names and postal or electronic mail addresses of persons who request notification of meetings and shall mail or electronically mail a copy of the notice by the means chosen no later than the time the agenda is required to be electronically posted. HRS § 92-7 (2019). Had the November 26 Meeting been a meeting for which the members-elect were required to follow the Sunshine Law, the apparent failure of the County’s email notice system would have been a Sunshine Law violation that would have required cancellation of the meeting. However, because the members-elect were not yet sworn in for the 2018-2020 term, they were not yet subject to the Sunshine Law and their effort to nonetheless follow the Sunshine Law’s notice requirements did not make those notice requirements legally enforceable as to the November 26 Meeting. Thus, failing to properly email notice of the November 26 Meeting was not a Sunshine Law violation.

Requester further alleged that the December 3 Notice indicated that the meeting would start at 12:00 p.m. or shortly thereafter, but the Inaugural program showed a 1:00 p.m. start time, and this was confusing. Requester stated “this did make a difference to those who came to testify [at] 1:00 instead of noon when inaugural festivities were already under way.” OIP reviewed a copy of the Inauguration program and finds it is clearly what it purports to be – a program of a ceremonial event, and not a Sunshine Law notice. OIP finds there was no confusing or misleading language on the Inauguration program that would lead a member of the public to believe that it was a Sunshine Law agenda that would have allowed for public testimony under sections 92-3 and 92-7, HRS.

III. Testimony

The November 26 Agenda stated near the top that “[e]ach speaker shall have a total of three (3) minutes to speak on the items for discussion listed below.” In his

submittal dated June 15, 2019, Requester alleged that because there were four items on the November 26 Agenda the public should have been allowed three minutes on each item. The minutes also show that the testifiers were given a total of three minutes to testify on all agenda items. The Sunshine Law does require that boards allow members of the public the opportunity to provide oral and written testimony, and it allows boards to provide for reasonable administration of testimony by rule. HRS § 92-3 (2012). OIP has previously held that rules placing time restrictions on testimony must be applied per item. OIP Op. Ltr. No. 06-01 at 2. For example, if a board adopts a rule limiting testimony to three minutes, it must allow three minutes for each agenda item the person wishes to testify on. However, as discussed above with respect to notice, because at the time of the November 26 Meeting, the members-elect were not yet subject to the Sunshine Law, the failure to allow testimony was not a Sunshine Law violation.

IV. Issues Outside OIP's Jurisdiction

Requester argued that nothing in the County Charter gives the members-elect authority to set a meeting before the first working day of December, even if it meets the requirements of the Sunshine Law. Requester further alleged that he asked the following questions at the meeting and got no satisfactory answers:

1. Since not sworn in, where in the Charter does it give you the right to call a meeting?
2. Normally the chair sets or approve[s] the agenda, so who has the authority to set the agenda and where does this authority come from?
3. Who called or set this meeting?
4. Who has the right to call this meeting to order and again where does that authority come from?
5. Where is the cameraman, so all can see the replay of this meeting?

Requester's submittal of June 15, 2019, stated his belief that Opinion 02-11 did not hold that a council may break other rules and regulations, such as the Charter, so long as the Sunshine Law is followed. OIP's jurisdiction to interpret the Sunshine Law and the Uniform Information Practices Act (Modified), chapter 92F, HRS, is found in sections 92-1.5 and 92F-42, HRS. These issues raised by Requester appear to pertain to Kauai County laws, or to COUNCIL-K's own rules or procedures, none of which are within OIP's jurisdiction as set forth in sections 92-1.5 and 92F-42, HRS. OIP will not make a determination as to whether those laws, rules, or procedures were not followed because OIP lacks jurisdiction to do so.

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.

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 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.

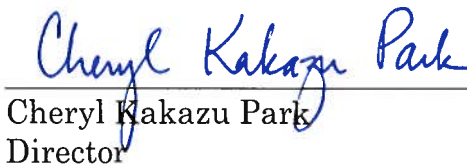
This letter also serves as a notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES



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APPROVED:



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