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MEMORANDUM OPINION

Requester: Jeff Garland
Board: State Procurement Policy Board
Date: February 20, 2009
Subject: Amended Agenda and Adequate Notice (S INVES-P 07-27)

Request for Investigation

Requester asked the Office of Information Practices (“OIP”) to investigate whether the State Procurement Policy Board (“Board”) properly noticed its January 18, 2007, meeting. He asked whether the agenda, entitled “Amended Agenda,” provided sufficient notice for the Board’s discussion and action on a petition of Akaku, Maui Community Television (“Akaku”).

Unless otherwise indicated, this opinion is based solely upon the facts presented in the December 21, 2006, meeting agenda; the January 18, 2007, meeting agenda; Requester’s email message to OIP dated January 19, 2007; a letter from the Chair of the Procurement Policy Board dated January 31, 2007; and a phone conversation with Pat Ohara, Deputy Attorney General, on January 29, 2008.

Opinion

The January 18, 2007, “Amended Agenda” sufficiently detailed the Akaku Petition to apprise the public of the Board’s meeting topics.

Background

The State Procurement Policy Board held a meeting on December 21, 2006, at which it was unable to address all of the items listed on the agenda. The Board thus agreed to continue the meeting. The Board’s agenda for the December 21, 2006, meeting listed three items relating to Akaku: a petition for the adoption of a rule; a petition for the modification of a rule; and a civil suit filed by Akaku. According to the Board, “there was insufficient time to hear all of the testimony, so

no decisions were made on the petitions... the Board voted to reconvene the December 21 meeting to January 18, 2007.”

The Board then filed a document entitled “Amended Agenda” for its January 18, 2007, meeting. The “Amended Agenda” was not voted upon at any meeting. It included all of the items from its December 21, 2006, meeting plus three more items. Two of the three were executive sessions and the third was to consider a petition of Akaku. The agenda states:

Consideration of Petition of Akaku: Maui Community Television for Declaratory Order that “funds collected and disbursed by the cable franchisees pursuant to order or rule of the Department of Commerce and Consumer Affairs are not ‘public funds’ within the meaning of Haw. Rev. Stat. 103D-102” and “the State Procurement Code does not apply to services for providing public educational and governmental cable services.”

Later that evening, the Board heard testimony on the petition of Akaku. After a lengthy discussion, and question and answer period, the Petition of Akaku was denied.

Statement of Reasons for Opinion

The Sunshine Law requires a board to give written public notice of any meeting when anticipated in advance. Haw. Rev. Stat. § 92-7(a) (Supp. 2007). The notice shall include an agenda which lists all of the items that the board intends to consider at that meeting. *Id.* OIP has interpreted this requirement to mean that the agenda must list each item with enough detail to reasonably allow the public to understand the subject of the matter to be considered. OIP Op. Ltr. No. 07-06 at 2-3; OIP Op. Ltr. No. 03-22 at 6. Among other things, the statute’s notice requirement is intended to provide interested persons with enough information to decide whether to attend the meeting and whether to participate through oral or written testimony. *Id.*

The amendment of an agenda is governed by a specific process under the Sunshine Law. The Sunshine Law allows a board to change the agenda, once filed, only by a two-thirds vote of all members to which the board is entitled; provided that no item added is of reasonably major importance and action thereon by the board will not affect a significant number of persons. Haw. Rev. Stat. § 92-7(d). Since the “Amended Agenda” for the January 2007 meeting was done outside of the Sunshine Law process, the title may have been misleading.

Likewise, “continuing” a meeting also has a specific meaning under the Sunshine Law. “Continuing” a meeting differs from holding a new meeting. It requires a board to agree upon and announce a day and time for the continued meeting. Haw.

Rev. Stat. § 92-7(d). OIP has found previously that continued meetings can be confusing to a board and lead to violations of the Sunshine Law. OIP Op. Ltr. No. 01-06 at 6-7. This meeting should not have been “continued” if the business was simply to be taken up at the next regularly scheduled board meeting. The board could have simply ended its December meeting and filed an agenda for the January meeting identifying ongoing as well as new items for discussion.

OIP finds that although the title “Amended Agenda” may have been misleading, it did not render the notice insufficient under the Sunshine Law. To avoid confusion in the future, OIP recommends the Board take up any new matter of reasonably major importance and affecting a significant number of persons through a **new** agenda and thus call a **new** meeting. Haw. Rev. Stat. § 92-7(d) (Supp. 2007)(emphasis added).

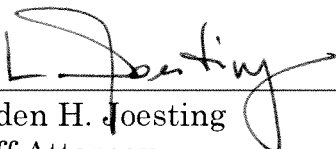
OIP therefore finds that the “Amended Agenda” although incorrectly titled, sufficiently detailed the Akaku Petition to apprise the public of the Board’s meeting topics.

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. Haw. Rev. Stat. § 92-12 (1993). The court may order payment of reasonable attorney fees and costs to the prevailing party in such a lawsuit. *Id.*

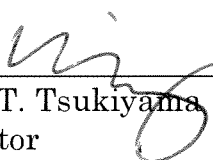
Where a final action of a board was taken in violation of the open meeting and notice requirements of the Sunshine Law, that action may be voided by the court. Haw. Rev. Stat. § 92-11 (Supp. 2007). A suit to void any final action must be commenced within ninety days of the action. *Id.*

OFFICE OF INFORMATION PRACTICES



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