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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**

**Requesters:** Edmund K. Saffery, Esq. and Lynda L. Arakawa, Esq.  
**Board:** Kauai County Council  
**Date:** January 22, 2020  
**Subject:** Sufficiency of Agenda (S APPEAL 17-11)

**Request for Investigation**

Requesters represented then Councilmember JoAnn Yukimura and, on her behalf, asked for an investigation into whether the Kauai County Council (Council) violated the Sunshine Law by voting on the Kauai Salary Commission's (Commission) Resolution No. 2017-1 entitled "Resolution Relating to the Salaries of Certain Officers and Employees of the County of Kaua'i" (Resolution) at its meeting on February 22, 2017 (Meeting), which they allege had been inadequately noticed.

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's correspondence, dated May 27, 2017, and attached materials, including copies of the agenda for the Meeting (Agenda) and Resolution with the Commission's cover letter, dated February 2, 2017, transmitting the Resolution to the Council (Commission's Cover Letter).<sup>1</sup>

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<sup>1</sup> Also, in a conference call on June 19, 2017, OIP discussed this appeal with Requesters and Mauna Kea Trask, Esq., then County Attorney, County of Kauai. Mr. Trask did not submit a response to the Appeal.

## Opinion

The Council's Agenda for the Meeting provided sufficient public notice of the Resolution as a matter for the Council's consideration at the Meeting, and the Council was not required to specify in the Agenda that its action would be to consider and vote on the Resolution.

## Statement of Reasons for Opinion

The Resolution set forth the maximum annual salaries that the Commission established for nine County executive positions that were listed, as well as for the Council Chair and Councilmembers, to be effective as of July 1, 2017. The Agenda listed the Resolution under the heading "Communications" and stated that it was being transmitted "for Council information," as follows:

### G. COMMUNICATIONS:

1. C2017-55                      Communication (02/02/2017) from the Salary Commission, transmitting for Council information, the Salary Commission's Resolution No. 2017-1, Relating to the Salaries of Certain Officers and Employees of the County of Kaua'i, which was adopted by the Salary Commission at its January 19, 2017 meeting.

- Salary Commission Resolution No. 2017-1

The Agenda that was posted online included a link to copies of the Resolution and Commission's Cover Letter. In a telephone inquiry to OIP on February 22, 2017, Scott Sato, Deputy County Clerk, assured OIP that a copy of the Resolution was attached to the Agenda mailed to persons on the mailing list.

At the Meeting, Councilmember Yukimura unsuccessfully sought to defer the Council vote to approve the Resolution because she believed that there was a "need for more time to gather sufficient information regarding the Resolution" and that the Agenda "did not provide the public with proper notice that the Council would act on the Resolution." In an email dated February 23, 2017 to Mr. Sato, and an email dated March 7, 2017 to Councilmember Yukimura, OIP had informally advised that the Agenda was sufficient because the Sunshine Law does not require the agenda to state what action the Council will be taking on an agenda item.

Requesters submitted this appeal, asserting that OIP's informal advice was based on incomplete information since OIP was not informed that the Agenda described other listed items more accurately than it did the Resolution. Specifically, according to Requesters, while the Resolution was listed on the Agenda as a

communication from the Salary Commission “transmitt[ed] for Council information,” other Agenda items were more accurately listed as “transmitt[ed] for Council consideration” or “transmitt[ed] for Council consideration and confirmation.”

As examples of correctly noticed Agenda items in contrast to the Agenda item about the Resolution, Requesters identified the following two items listed on the Agenda that they felt accurately indicated the Council’s intended actions:

F. CONSENT CALENDAR:

1. C2017-52                      Communication (01/26/2017) from the Mayor, transmitting for Council consideration and confirmation, Mayoral appointee Alfredo C. Garces to the Fire Commission – Partial Term ending 12/31/2018. *(See Resolution No. 2017-17)*

. . . . .

3. C2017-54                      Communication (02/03/2017) from Councilmember Chock and Councilmember Kawakami, transmitting for Council consideration, a Resolution Requesting The Hawai`i State Legislature To Recognize November 28 As “Lā Kū`oko`a” In Honor of the Independence Day of The Hawaiian Kingdom. *(See Resolution No. 2017-18)*

(Emphasis in original).

To further support their argument that the Agenda item for the Resolution was misleading and insufficient, Requesters quoted from OIP Op. Ltr. No. 07-06:

Although it may be helpful to provide such notice [of intent to take action on item], OIP cautions that, where a board chooses to do so, **it may risk misleading the public if it does not provide that same notice for other items. OIP notes that the Agenda did not include language indicating the Commission’s intent to take action on any item or sub-item.**

OIP Op. Ltr. No. 07-06 at 3 n. 3 (parenthetical and emphases added by Requesters).

The Sunshine Law requires that a board provide public notice of any meeting at least six calendar days before the meeting, and the notice must include an agenda

that “lists all of the items to be considered” and “in the case of an executive meeting[,] the purpose shall be stated.” HRS § 92-7(a), (b) (Supp. 2018). The clear purpose of the Sunshine Law’s notice provisions is to give the public the opportunity to exercise its right to know and to scrutinize and participate in the formation and conduct of public policy. HRS §§ 92-1, -3 (2012). Given this purpose, OIP has interpreted section 92-7(a), HRS, to require that an agenda list each item for the board’s consideration with sufficient detail to allow a member of the public to reasonably understand the subject matter the board intends to consider at the meeting so that he or she can decide whether to attend and to participate through oral or written testimony. See, e.g., OIP Op. Ltrs. No. 03-22, 07-02, 07-06.

As OIP has previously concluded, the fact that an item is listed on the agenda indicates that the item is “before” the board for its consideration, which may or may not include deliberation and decision making by that board. OIP Op. Ltr. Nos. F16-01 at 7, 07-06 at 2. Consequently, as OIP has previously opined, the Sunshine Law does not require that an agenda specifically notice that a decision may be made on an item or the exact nature of that decision as long as it reasonably arises under the subject matter listed. Id. Consistent with its previous opinions, OIP finds that the Agenda, with the attached Resolution, provided sufficient detail of the Resolution to enable the public to decide whether to attend and participate at the Meeting.

By providing examples of other Agenda items and citing footnote 3 of OIP Opinion Letter No. 07-06, Requesters argued that the Agenda was deficient because it was inconsistent about noticing the Council’s consideration of agenda items. Specifically, there was no notice about the Council’s consideration of the Resolution, but there was notice about the Council’s consideration of other Agenda items such as the examples provided Requesters. Requesters cited dicta by OIP in footnote 3 of OIP Opinion No. 07-06, which advised “caution” against the “risk [of] misleading the public” when an agenda notices a board’s consideration for some items but not others. OIP Op. Ltr. No. 07-06 at 3 n. 3.

Although it would have been a better practice for the Council to follow OIP’s cautionary guidance, there is no actual Sunshine Law violation. First, contrary to Requesters’ assertions, OIP finds that the Agenda actually provided notice of the Council’s consideration of the Resolution in the copies of the Resolution and the Commission’s Cover Letter that were attached to the Agenda and stated that the Resolution was being “[t]ransmitted herewith for consideration by the County Council.” (Emphasis added).

Second, even if the Resolution and the Commission’s Cover Letter had not been attached, the substantive holding of OIP Opinion Letter No. 07-06 does not require an agenda to state what action, if any, a board may take on an item. Therefore, OIP concludes that the Agenda provided sufficient notice as required by the Sunshine Law and allowed the Council to consider and vote on the Resolution.

## 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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Lorna Aratani  
Staff Attorney

APPROVED:



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Director