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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:** Leo Caires  
**Board:** Hana Advisory Committee  
**Date:** March 3, 2020  
**Subject:** Notice of Request for Permit (S APPEAL 19-2)

**Request for Investigation**

Requester asked for an investigation into whether the Hana Advisory Committee to the Maui Planning Commission (HAC) violated the Sunshine Law by failing to provide adequate public notice of its discussion of a request for a special management area (SMA) permit.

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's emails to OIP dated October 30 and November 8, 2018, and attached materials, and emails from a Deputy Corporation Counsel to OIP on behalf of the HAC dated December 5 and 18, 2018, and attached materials.

**Opinion**

The Sunshine Law does not apply to "adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9[, HRS.]" HRS § 92-6(a) (2012). Because the SMA Permit Hearing was an exercise of HAC's adjudicatory function and was governed by section 91-9, HRS, OIP concludes that the SMA Permit Hearing was exempt from the Sunshine Law's requirements. Thus, even if HAC had failed entirely to give any kind

of notice of the SMA Permit Hearing, that failure could not violate the Sunshine Law, because the Sunshine Law does not apply to such hearings.

### **Statement of Reasons for Opinion**

Chapter 205A, HRS, and the administrative rules adopted thereunder (SMA Rules), required the applicant for SMA permit SM1 2013/0010 (Permit) to notify his neighbors of the Permit application and upcoming hearing by sending copies of a Notice of Public Hearing on the Permit (SMA Notice) to owners and recorded lessees of real property within 500 feet of the relevant property. Requester's mother (Recipient), who was one of those owners, received via certified mail a partially illegible SMA Notice for the Permit.

HAC considered the Permit application, along with another SMA permit application and several administrative items, during its meeting of October 29, 2018 (SMA Permit Hearing). In addition to the SMA Notice that was mailed by the applicant and that forms the basis for Requester's complaint, HAC itself posted a separate notice and agenda for the meeting as a whole (Sunshine Law Notice) in accordance with the Sunshine Law's notice provisions. See HRS § 92-7 (2012) (setting out Sunshine Law notice requirements); Hana Advisory Council, Agenda (October 29, 2018), <https://www.mauicounty.gov/ArchiveCenter/ViewFile/Item/25362>. Requester has not asserted that the Sunshine Law Notice was illegible or otherwise inadequate.

HAC asserted that the SMA Permit Hearing was a contested case hearing governed by section 91-9, HRS. OIP finds that the SMA Permit Hearing was indeed a contested case hearing governed by section 91-9, HRS, and as such was an adjudicatory function being exercised by HAC. As HAC correctly argued, the Sunshine Law does not apply to "adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9[, HRS.]" HRS § 92-6(a). Because the SMA Permit Hearing was an exercise of HAC's adjudicatory function and was governed by section 91-9, HRS, OIP concludes that the SMA Permit Hearing was exempt from the Sunshine Law's requirements. Thus, even if HAC had failed entirely to give any kind of notice of the SMA Permit Hearing, that failure could not violate the Sunshine Law, because the Sunshine Law does not apply to such hearings. A failure to give notice might be a violation of the SMA Rules or other applicable laws, but the question of whether those laws were violated would be beyond OIP's jurisdiction.

OIP further notes that even if the Sunshine Law had applied to the SMA Permit Hearing, HAC actually met the Sunshine Law's notice requirements through posting the Sunshine Law Notice. The Sunshine Law only requires a board to mail or email its notices of meetings to persons who have previously asked to receive such notices, and Requester does not allege that Recipient had ever asked HAC to send her notices of its meetings. See HRS § 92-7(e) (requiring a board to mail or

email its notices to persons who have requested notification of meetings) (Supp. 2018). Thus, even if the Sunshine Law's notice requirements had applied to the SMA Permit Hearing, HAC would have met those requirements, as it had no duty to mail a copy of the Sunshine Law Notice to Recipient.

In summary, a deficiency in the SMA Notice, a type of notice required by the SMA Rules but not by the Sunshine Law, might be a violation of the SMA Rules or other applicable laws, but deciding that question would be beyond OIP's jurisdiction.

### **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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Director