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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: Mr. John Carse
Agency: Department of Transportation
Date: June 1, 2020
Subject: Community Roundtable Discussions about Helicopter Tour Operations on Island of Hawaii (S APPEAL 19-3)

Request for Investigation

Requester alleged that the State of Hawaii Department of Transportation (DOT) violated the Sunshine Law by failing to provide public notice of the State of Hawaii Helicopter Noise Roundtable's (Roundtable) meeting on October 11, 2018 (October Meeting).

Unless otherwise indicated, this opinion is based upon the facts presented in Requester's letter, dated November 7, 2018; email correspondence, dated January 18, 2019, April 2, 2020 and May 4, 2020, from Daryl Fujita, Acting General Aviation Director, DOT, Airports Division (DOTA), to OIP in response to the Notice of Appeal (DOT's Response); and a telephone conversation with Mr. Fujita on April 1, 2020.

Opinion

The Roundtable is not a "board," as this term is defined by the Sunshine Law. Therefore, the DOT did not violate the Sunshine Law because the Roundtable's

discussions are not “meetings” that must comply with the Sunshine Law’s open meetings requirements, including public notice of its meetings.

Statement of Reasons for Opinion

DOT described the Roundtable as follows:

The roundtable that was first mentioned at the August 14th, 2018 community meeting in Hilo includes (2) representatives each from the State of Hawaii. Department of Transportation – Airports Division (HDOTA). Federal Aviation Administration (FAA), Hawaii Helicopter Association (HHA) and Hilo community members. The Hawaii Island community and Hawaii Island elected officials will recommend (2) community roundtable participants. There are no specific qualifications to be a part of the roundtable and HDOTA serves as an unofficial mediator of the roundtable. The goal of the roundtable is to improve on helicopter tour operations on Hawaii Island. Specifically, the roundtable is focusing on improving the strained relationship between the communities and the helicopter tour companies. This is a work in progress and I’d like to remind you that one meeting has taken place thus far.

How the Roundtable came about? - The Roundtable was recommended by a couple of individuals. The roundtable was not created by constitution, statute, rule, or executive order, however, more of the State’s good faith effort in helping the community. There are no rules, regulations, or any laws being proposed and/or drafted at these meeting.

DOT posted on its website the Roundtable’s bylaws and the minutes from its three meetings. DOT, State of Hawaii Helicopter Noise Roundtable, <https://hidot.hawaii.gov/airports/doing-business/state-of-hawaii-helicopter-noise-roundtable> (last visited May 28, 2020).

Requester alleged that DOT “held a closed [Roundtable] meeting without adequate public notice in violation of [the Sunshine Law].” According to Requester, in August 2018, after DOT announced and sought public comments about the Roundtable, he emailed to DOT “explaining the importance of these [Roundtable] meetings following open meeting laws, among other things.” Requester submitted to OIP an appeal complaining that “no written notice, including the agenda, time, or place of the [Roundtable’s] October meeting was provided.”

The Sunshine Law requires that “[e]very meeting of all boards shall be open to the public,” unless otherwise provided by law, and “[t]he board shall give written public

notice of any regular, special, emergency, or rescheduled meeting, or any executive meeting when anticipated in advance.” HRS §§ 92-3, -7 (2012, Supp. 2019). The Sunshine Law’s open meeting requirements apply to every “board,” as this term is defined by the Sunshine Law. Specifically, a “board” is:

- (1) an agency, board, commission, authority, or committee of the State or its political subdivisions;
- (2) which is created by constitution, statute, rule, or executive order;
- (3) to have supervision, control, jurisdiction, or advisory powers over specific matters; and
- (4) which is required to conduct meetings and
- (5) to take official actions.

OIP Op. Ltr. No. 01-01 at 10 (citing HRS § 92-3).

In DOT’s Response, DOT asserted that the Roundtable is not a board as defined by the Sunshine Law because the Roundtable is not created by constitution, statute, rule, or executive order and is not required to take official actions. Mr. Fujita informed OIP that the Roundtable held three meetings in 2018-19 and will not hold any further meetings.

OIP will first examine the second criterion in the definition of a “board” subject to the Sunshine Law: whether the Roundtable was “created by constitution, statute, rule, or executive order.” In its review of statutes or other sources of legal authority that may be relevant to the Roundtable, OIP considered section 261-13.6, HRS, which requires DOT to develop a helicopter master plan for each airport in the State and establish an advisory group to advise the DOT Director about all matters relating to the respective master plans. Mr. Fujita informed OIP that the Roundtable was not created to be the advisory group established under section 261-13.6, HRS. As explained in DOT’s Response, the helicopter master plan was invalidated in a lawsuit brought by helicopter operators and also in subsequent FAA opinions, so there is no master plan about which an advisory group can be established to advise the DOT Director.

OIP accepts DOT’s explanation and finds that section 261-13.6, HRS, is not a statute authorizing or requiring the creation of the Roundtable. OIP found no other statute, rule, or executive order that appeared relevant to the Roundtable, and none was provided by either party. In the absence of a legal authority establishing the Roundtable, OIP concludes that the Roundtable does not meet the criterion of the Sunshine Law’s definition of a “board” that is “created by constitution, statute, rule or executive order.” HRS § 92-3.

Because the Roundtable does not meet the second criterion set out in the statutory definition of a “board” subject to the Sunshine Law, OIP does not need to examine whether it meets any of the other criteria. HRS § 92-3. As the Roundtable is not a

“board,” its failure to follow the Sunshine Law’s notice requirement for its October meeting was not a violation.

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.

SPECIAL NOTICE: During the COVID-19 pandemic, Hawaii’s Governor issued his Supplementary Proclamation on March 16, 2020, which suspended the UIPA in its entirety. The suspension was continued until May 31, 2020, by the Governor’s Sixth Supplementary Proclamation dated April 25, 2020. On May 5, 2020, the Governor’s Seventh Supplementary Proclamation (SP7) modified the prior suspension of the UIPA in its entirety and provided that the UIPA and Chapters 71 and 72, Title 2, HAR, “are suspended to the extent they contain any deadlines for agencies, including deadlines for the OIP, relating to requests for government records and/or complaints to OIP.” SP7, Exhibit H. On May 18, 2020, the Governor’s Eighth Supplementary Proclamation (SP8) continued the modified suspension of the UIPA provided in SP7. SP8, Exhibit H.


The UIPA's part IV sets forth OIP's powers and duties in section 92F-42(18), HRS, which give OIP authority to resolve this appeal and have been restored by SP8, except for the deadline restriction. Thus, for OIP's opinions issued while SP8 is still in force, agencies will have a reasonable time to request reconsideration of an opinion to OIP, but a request for reconsideration shall be made no later than ten business days after suspension of the UIPA's deadlines are lifted upon expiration of SP8 after June 30, 2020, unless SP8 is terminated or extended by a separate proclamation of the Governor. Agencies wishing to appeal an OIP opinion to the court under section 92F-43, HRS, have a reasonable time to do so, subject to any orders issued by the courts during the pandemic, and no later than thirty days after suspension of the UIPA's deadlines is lifted upon expiration of SP8 after June 30, 2020, unless terminated or extended by a separate proclamation of the Governor.

OFFICE OF INFORMATION PRACTICES



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