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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). OIP is authorized to issue decisions under the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA), pursuant to section 92F-42, HRS, and chapter 2-73, 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: Larry Geller
Board and Agency: Board of Land and Natural Resources; Department of Land and Natural Resources
Date: June 9, 2020
Subject: Unanticipated Executive Meeting (S APPEAL 18-05); and Disclosure of Executive Meeting Minutes (U APPEAL 18-15)

Request for Investigation

OIP is consolidating these two appeals, as permitted by section 2-73-15(g), HAR, which authorizes consolidation of appeals that have similar issues or facts, or when the parties are similarly situated.

S APPEAL 18-05: Requester asked for an investigation into whether the Board of Land and Natural Resources (BLNR) violated the Sunshine Law during its public meeting on December 8, 2017 (Meeting). He specifically asked whether BLNR inappropriately entered an executive session (Executive Session) because it was not noticed on the Meeting agenda (Agenda). Requester also complained that the Agenda contained inappropriately vague boilerplate language regarding executive

sessions.¹ In an email dated December 25, 2017, Requester asked that this appeal include a discussion on the underlying subject matter that BLNR went into the Executive Session for, *i.e.*, deliberation and taking action on the request for a contested case, and BLNR was given the opportunity to respond.

U APPEAL 18-15: Requester seeks a decision as to whether the Department of Land and Natural Resources (DLNR) properly withheld access under the UIPA to a copy of the Executive Session minutes (Executive Minutes).

Unless otherwise indicated, this opinion is based solely upon the facts presented in:

S APPEAL 18-05: Requester's email to OIP with attachments dated December 12, 2017; an email from Requester to OIP dated December 13, 2017; an email from Requester to OIP dated December 15, 2017, and attached email chain; a letter from BLNR to OIP dated January 2, 2018; a letter to BLNR from OIP dated September 17, 2019; an email from OIP to BLNR dated March 13, 2020; and a letter with enclosure from the Department of the Attorney General (Attorney General) on behalf of BLNR to OIP dated March 31, 2020; and

U APPEAL 18-15: Requester's email to OIP with attachments dated December 25, 2017; DLNR's letter to OIP dated January 17, 2018; and the Executive Minutes provided for OIP's *in camera* review.

Opinion

Meeting agendas must list executive sessions anticipated in advance, but the Sunshine Law allows boards to enter executive sessions not anticipated in advance when the Sunshine Law's procedures in section 92-4, HRS, are followed. During BLNR's public discussion at the Meeting of Agenda item D-4 (Item D-4), sections 92-4 92-5(a)(4), and 92-7(a), HRS, allowed it to vote to enter the Executive Session to

¹ Requester asked that OIP "educate" BLNR on its responsibilities under the Sunshine Law with regard to agendas and executive sessions in particular. OIP treats this as a request that OIP render the decisions reached herein.

Requester also suggested OIP consider discussing Sunshine Law compliance with the Attorney General; specifically, Requester suggested that when a Sunshine Law violation is apparent during a meeting, the Deputy Attorney General advising the board should be able to intervene. Attorney General intervention is already allowed under the Sunshine Law, and OIP previously found that an attorney may advise a board during a meeting if the attorney believes there may be a Sunshine Law violation, and that the potential need for an attorney to do so justifies the presence of an attorney in executive session generally. See OIP Op. Ltr. No. 03-17 at 5 (finding that an attorney's presence in an executive meeting may assist a board to comply with the Sunshine Law and prevent a board from inadvertently straying into discussion or deliberation of a topic not directly related to the executive meeting's purpose).

discuss with its attorney both Item D-4 and a request for a contested case made during the public discussion on Item D-4, even though the Executive Session was not listed on the Agenda, because the Executive Session had not been previously anticipated. However, the minutes of the Meeting (Minutes) show that BLNR failed to announce the purpose of the Executive Session prior to its vote, which was a violation of section 92-4, HRS.

The generic language at the end of the Agenda indicating that BLNR might enter an executive session did not violate the notice provisions of the Sunshine Law because it was not an Agenda item, and BLNR did not rely upon it as such. Rather, it was instructive in nature and served to advise the public of the possibility that BLNR could hold an unanticipated executive session to discuss an item that the Agenda indicated would be discussed in public session only.

The Executive Minutes contain attorney-client privileged communications. DLNR was therefore authorized to withhold the Executive Minutes by section 92-9(b), HRS, which allows minutes of executive meetings to be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer, and section 92F-13(3), HRS, which allows agencies to withhold records to avoid the frustration of a legitimate government function. Here the legitimate government function would be protecting attorney-client privileged communications.

Statement of Reasons for Opinion

I. The Sunshine Law Requires Listing Agenda Items for Discussion in Executive Session Only When Anticipated in Advance

The Agenda included Item D-4, which read “Holdover of Revocable Permits for Water Use on the Islands of Hawai‘i and Kaua‘i. See Exhibit 3 for list of Revocable Permits.”² The Agenda did not list an anticipated executive session for Item D-4.

The seventh and last page of the Agenda included a statement that the “[b]oard may go into Executive Session pursuant to Section 92-5(a)(4), Hawai‘i Revised Statutes, in order to consult with its attorney on questions and issues pertaining to the Board’s powers, duties, privileges, immunities, and liabilities.” This language

² Requester did not allege that Exhibit 3 was not attached to the Agenda as filed, and the Agenda description without Exhibit 3 would likely not have provided sufficient notice under section 92-7, HRS, as Exhibit 3 listed and described the nine permits under consideration, including the one at issue, RP 7340 for Kauai Island Utility Cooperative. The exhibits were filed with the Agenda on the State calendar online ([see http://calendar.hawaii.gov/calendar/html/event/2017/12/8/?event=111217141&viewperiod=1¤tViewtype=2&viewtype=2&eventCollectionCode=dlnr_blnr](http://calendar.hawaii.gov/calendar/html/event/2017/12/8/?event=111217141&viewperiod=1¤tViewtype=2&viewtype=2&eventCollectionCode=dlnr_blnr), (last viewed June 9, 2020)), and on the DLNR website ([see https://dlnr.hawaii.gov/meetings/blnr-meetings-2017/](https://dlnr.hawaii.gov/meetings/blnr-meetings-2017/), (last viewed June 9, 2020)). OIP therefore presumes Exhibit 3 was also included with the Agenda in all locations it was required to be filed or sent.

was located after the last numbered Agenda item. It is at the bottom of the last page of the Agenda, together with other instructive language, including instructions for testifiers and persons requesting reasonable accommodations.

Requester complained that the Agenda did not list the Executive Session. Requester further complained that “boiler plate” executive session language at the end of the agenda was not in compliance with the Sunshine Law’s notice provisions. Requester argued that allowing this language on an agenda would enable BLNR to call secret meetings at its whim at any time during any meeting, contrary to the intent of the Sunshine Law. Requester also asserted that there was no litigation or contested case yet before BLNR, nor was there an issue of BLNR’s “powers’ etc. with regard to the agenda item under consideration. Even the boilerplate notice seems inapplicable.”

The Sunshine Law requires that boards file a meeting notice and agenda listing all items to be discussed for every meeting, including all executive sessions anticipated in advance:

The board shall give written public notice of any regular, special, emergency, or rescheduled meeting, or any executive meeting when anticipated in advance. The notice shall include an agenda that lists all of the items to be considered at the forthcoming meeting; the date, time, and place of the meeting; . . . and in the case of an executive meeting the purpose shall be stated.

HRS § 92-7(a) (Supp. 2019) (emphasis added).

At the Meeting, during the discussion of water diversion on Kauai under Item D-4, a request was made by a testifier for a contested case. As noted in footnote 7, *infra*, BLNR thereafter voted to enter the Executive Session.³ In response to this appeal,

³ Requester was at the Meeting and objected to the Executive Session on the basis there had been no public notice, citing the absence of notice of an executive session on the Agenda. Requester’s objection is not reflected in the Minutes. The Minutes may be viewed online at DLNR’s website, Minutes for the Meeting of the Board of Land and Natural Resources of December 8, 2017: <https://dlnr.hawaii.gov/wp-content/uploads/2018/02/Minutes-171208.pdf> (last viewed June 9, 2020). The Minutes only reflect that Requester testified on another Agenda item pertaining to administrative rules. OIP did not review the entire Minutes because the sufficiency of the minutes was not raised for this appeal. OIP notes that Requester’s objection to the Executive Session during the discussion of Item D-4 was not reflected in the Minutes, but it is not necessary for OIP to substantiate that it was raised contemporaneously in order to consider it for this appeal, and minutes are not generally required to reflect the views of nonmembers of a board

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BLNR asserted that the Executive Session to discuss the request for a contested case made during discussion of Item D-4 was not anticipated in advance and so it could not have been included on the Agenda. BLNR explained that a contested case could be requested for anything on any BLNR agenda, and it would not be informative to the public to list the possibility of an executive session for each agenda item depending upon whether a contested case is requested.

OIP interprets section 92-7(a), HRS, as allowing a scenario like the one here in which, during its discussion of an item properly noticed for discussion in an open meeting,⁴ a board determines that there are legal issues encompassed within the noticed agenda item that it needs to discuss with its attorney, and, as further discussed in section II, infra, the board votes at the meeting to convene an executive session to consult with its attorney regarding the agenda item pursuant to section 92-5(a)(4), HRS. Based on BNLNR's response to this appeal and the Minutes and Executive Minutes, OIP finds that BLNR indeed could not have reasonably anticipated in advance that a member of the public would request a contested case on Item D-4 and that it would therefore have legal questions for its attorney related to that request in particular. OIP therefore concludes that BLNR properly noticed on the Agenda its discussion of Item D-4 but was not required to list the Executive Session for Item D-4 on its Agenda because it did not anticipate the need for the Executive Session in advance.

OIP further finds that the generic executive session language at the end of the Agenda was not intended by BLNR to be an Agenda item. It was meant instead to be instructive; and OIP is aware of other boards using similar language to give the public advance indication that the Sunshine Law allows for an unanticipated executive session on a noticed agenda item, depending upon what happens at the

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except to a limited extent in the form of testimony. See HRS § 92-9; see also OIP Op. Ltr. No. F14-02 at 3, citing OIP Op. Ltr. No. 03-13 at 6-7 (finding that the primary purpose for keeping minutes is to reflect what the board did, and that the Sunshine Law requires minutes to reflect the views of nonboard members who participated in the meetings in very general terms). If, however, the objections were responded to by BLNR members, then those discussions should have been reflected in the Minutes.

⁴ During a public meeting, a board sometimes wishes to call an unanticipated executive session on an item not already on the agenda. In such cases, the board must first comply with the provisions in section 92-7(d), HRS, which requires that a filed agenda may be amended to add an item by a two-thirds recorded vote of all members to which the board is entitled; "provided that no item shall be added to the agenda if it is of reasonably major importance and action thereon by the board will affect a significant number of persons." See e.g., OIP Op. Ltr. No. 07-02 at 4. This appeal does not involve amending the agenda and is exclusively controlled by the executive meeting provisions.

meeting. OIP concludes this language at the end of the Agenda did not violate the Sunshine Law's notice provisions as it was clearly meant to be instructive and not an actual Agenda item, and BLNR did not rely on the language to discuss any issues not specifically noticed elsewhere on the Agenda.⁵

II. Procedures for Meeting in Executive Session

OIP's *in camera* review of the Executive Minutes shows that legal questions were asked by BLNR, and a deputy attorney general responded on the applicability of certain laws. The Executive Session lasted approximately 22 minutes. On returning from the Executive Session, BLNR members stated their positions on the Kauai water diversion and a vote was taken to deny the request for a contested case.

Requester's appeal complained that the reasoning behind the BLNR members' stated positions was not apparent to the public. Requester argued that the testifiers and the public were entitled to witness a complete discussion before BLNR rendered a decision and noted that the Honolulu Star Advertiser reported⁶ approximately thirteen individuals and a few public interest groups testified on the Kauai portion of Item D-4. Requester further asserted that, considering the importance of this issue to the public, BLNR should have either held its complete discussion during its open meeting or scheduled an executive session on a future agenda.

The Sunshine Law allows boards to hold executive sessions if the requirements in section 92-4, HRS are met:

§92-4 Executive meetings. A board may hold an executive meeting closed to the public upon an affirmative vote, taken at an open meeting, of two-thirds of the members present; provided the affirmative vote constitutes a majority of the members to which the

⁵ OIP distinguishes BLNR's instructive language at the end of the Agenda about the possibility of an unanticipated executive session from situations where an agenda item itself is deficient. OIP has previously found that agendas must list specific items or matters, but general phrases such as "unfinished business" and "new business" do not comply with the law. OIP Op. Ltr. No. 06-05 at 6, citing Op. Att'y Gen. No. 85-2 (Haw. 1985) (footnote omitted). Therefore, generic "executive session" entries on a board's agenda that provide no notice of the item being considered or the purpose for which the executive meeting is being held do not meet the notice requirements in section 92-7, HRS. OIP Op. Ltr. No 06-05 at 7.

⁶ See Star-Advertiser staff, State renews permit to divert water to hydroelectric plants on Kauai, Honolulu Star Advertiser (Dec. 11, 2017), <https://www.staradvertiser.com/2017/12/10/hawaii-news/state-renews-permit-to-divert-water-to-hydroelectric-plants-on-kauai/> (last viewed June 9, 2020).

board is entitled. A meeting closed to the public shall be limited to matters exempted by section 92-5. The reason for holding such a meeting shall be publicly announced and the vote of each member on the question of holding a meeting closed to the public shall be recorded, and entered into the minutes of the meeting.

HRS § 92-4 (2012).

Section 92-5(a), HRS, lists the seven purposes for which a board may enter an executive meeting. Section 92-5(a)(4), HRS, the only executive meeting purpose relevant here, allows a board to hold an executive session “[t]o consult with the board’s attorney on questions and issues pertaining to the board’s powers, duties, privileges, immunities, and liabilities[.]”

BLNR entered the Executive Meeting to discuss with its attorney its powers, duties, privileges, immunities, and liabilities regarding the request for a contested case on Item D-4. OIP finds that section 92-5(a)(4), HRS, allowed BLNR to enter the Executive Meeting to consult with its attorney, which the Executive Minutes show that it did.

Section 92-4, HRS, required BLNR to “publicly announce” the “reason” for holding an executive meeting. OIP Op. Ltr. No. 04-14 at 6, citing HRS § 92-4 (stating, in relevant part, that “[t]he reason for holding [an executive] meeting shall be publicly announced and the vote of each member on the question of holding a meeting closed to the public shall be recorded, and entered into the minutes of the meeting.”)⁷ The Minutes do not indicate that BLNR made such an announcement, and this raises the question of whether BLNR properly announced the reason for the Executive Session during the Meeting prior to the vote.⁸ A board cannot enter an executive session without making a public announcement of the reason for holding the executive session. OIP Op. Ltr. No. 04-14 at 6, citing HRS § 92-4 (stating, in relevant part, that “[t]he reason for holding [an executive] meeting shall be publicly announced and the vote of each member on the question of holding a meeting closed to the public shall be recorded, and entered into the minutes of the meeting.”)

It appears from Requester’s appeal that he knew BLNR was entering the Executive Session to discuss the request for a contested case under Item D-4. However, there

⁷ The Minutes state that the vote was unanimous and this is an acceptable way for memorializing votes under the Sunshine Law because it is clear that every board member listed on page one of the Minutes as present for the Meeting voted in favor of entering the Executive Session.

⁸ OIP considers the minutes to be an accurate representation of what happened at the meeting. See section 92-9(a), HRS (requiring minutes be a true reflection of what happened at the meeting) and n. 3 supra.

is no provision in the Sunshine Law excusing a board from announcing the purpose of an executive session before entering into it, and as stated above, the minutes do not indicate that such an announcement was actually made. Because a board cannot go into executive session without making a public announcement of the reason for holding the executive session, BLNR's failure here to announce the purpose of the Executive Session was not in compliance with section 92-4, HRS.⁹ OIP Op. Ltr. No. 04-14 at 6.

In summary, OIP concludes that BLNR entered the Executive Meeting to discuss an item noticed on its public Agenda with its attorney, a purpose allowed under section 92-5(a)(4), HRS, after a proper vote. However, even though it is possible the public knew during the Meeting why BLNR was entering the Executive Session, the Minutes show BLNR failed to announce its reason for the Executive Session and thus failed to comply with the announcement requirement in section 92-4, HRS.

III. Executive Minutes May Be Withheld from Public Disclosure

Requester made a request to DLNR dated December 12, 2017, for a copy of the Executive Minutes. DLNR sent a Notice to Requester dated December 20, 2017, which denied access to the Executive Minutes under section 92F-13(2) and (3), HRS. Those provisions read as follows:

§92F-13 Government records; exceptions to general rule.

This part shall not require disclosure of:

- ...
- (2) Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable;
- (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function[.]

HRS § 92F-13(2), -(3) (2012). Requester appealed the denial and asserted that disclosure of the Executive Minutes would be an imperfect remedy but it would aid the public in understanding what BLNR did in Executive Session.

The UIPA generally mandates the disclosure of minutes of meetings of government boards. See HRS § 92F-12(7) (2012) (agency shall make available “[m]inutes of all agency meetings required to be public”). This general mandate does not apply to

⁹ Section 92-11, HRS, provides that any final action taken in violation of the Sunshine Law's open meetings and notice provisions in sections 92-3 and 92-7, HRS, are voidable upon proof of violation. However, a lawsuit to void must be brought within ninety days of the action, and that time has passed.

minutes of executive meetings that are properly closed to the public. HRS § 92-9(b) (“minutes of executive meetings may be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer”).

The Executive Session was called so that BLNR could consult with its attorney regarding the contested case that had been requested under Item D-4. For this appeal, DLNR argued that “although the exception noted in HRS § 92F-13(2) may not apply in this situation, HRS § 92F-13(3) clearly does” because the Executive Minutes contain attorney-client privileged communications that are generally protected from public disclosure.

For executive meetings properly held under the Sunshine Law, a board may withhold the executive minutes under the UIPA’s frustration exception because disclosure would defeat the purpose of holding the meeting closed to the public in the first place. OIP Op. Ltr. No. 06-07 at 3, citing HRS § 92F-13(3). Based on its *in camera* review of the Executive Minutes, OIP finds that the purpose of the Executive Session, to consult with BLNR’s attorney, was proper, and that it would be frustrated by disclosure of the Executive Minutes because disclosure would make public confidential attorney-client communications and would likely inhibit BLNR from seeking legal advice in the future. See OIP Op. Ltr. No. F14-01 at 6 (finding that confidential and privileged attorney-client communications under Rule 503, Hawaii Rules of Evidence, are protected from public disclosure under section 92F-13(2), (3) and (4), HRS). OIP therefore concludes that sections 92-9(b) and 92F-13(3), HRS, allow BLNR to withhold the Executive Minutes.¹⁰

Right to Bring Suit to Enforce Sunshine Law and to Void Board Action and Right to Bring Suit Under the UIPA

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.

Requester is entitled to seek assistance from the courts when Requester has been improperly denied access to a government record. HRS § 92F-42(1) (2012). An action for access to records is heard on an expedited basis and, if Requester is the

¹⁰ Section 92F-13(4), HRS, was not invoked by DLNR so OIP does not opine as to its applicability.

prevailing party, Requester is entitled to recover reasonable attorney's fees and costs. HRS §§ 92F-15(d), (f) (2012).

For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

This decision constitutes an appealable decision under section 92F-43, HRS. A board or agency may appeal an OIP decision by filing a complaint within thirty days of the date of an OIP decision in accordance with sections 92-1.5 and 92F-43, HRS. The board or agency shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b) (2012). 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.

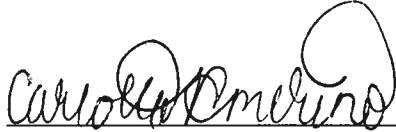
This letter also serves as a notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

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 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, HRS, which give OIP authority to resolve these appeals 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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