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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 decision 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 DECISION

**Requester:** The Maui News  
**Board:** County Council, County of Maui, Policy and Intergovernmental Affairs Committee  
**Date:** November 4, 2015  
**Subject:** Executive Session (S APPEAL 14-5)

### Request for Investigation

Requester asked for an investigation into whether the Maui County Council's Policy and Intergovernmental Affairs Committee (PIA) violated the Sunshine Law when it went into an executive meeting closed to the public.

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's e-mail to OIP dated August 16, 2013; a letter to OIP from Maui Corporation Counsel Patrick K. Wong with attachments to OIP dated August 30, 2013; letters to OIP from Deputy Corporation Counsel Linden H. Joesting dated September 13, 2013, and October 24, 2013; pleadings and other documents associated with County of Maui v. State of Hawaii Office of Information Practices, Civil No. 13-1-1079 (2) (2nd Cir. Ct.); and redacted minutes of the PIA's executive meeting of August 14, 2013, provided by Deputy Corporation Counsel Moana Lutey for OIP's *in camera* review on October 7, 2015.

**Decision**

The PIA's executive meeting of August 14, 2015, was in compliance with the Sunshine Law.

**Statement of Reasons for Decision**

The PIA held a public meeting on August 14, 2014. The agenda item at issue (Item 41) read:

**PIA-41                      COUNCIL INVESTIGATION OF OLD  
WAILUKU POST OFFICE**

**DESCRIPTION:** The Committee is in receipt of a Miscellaneous Communication, dated July 9, 2013, from the County Clerk, transmitting certified copies of the following:

1. Resolution 13-83, entitled "AUTHORIZING THE POLICY AND INTERGOVERNMENTAL AFFAIRS COMMITTEE TO CONDUCT A FORMAL INVESTIGATION OF THE DEPARTMENT OF MANGAGEMENT; DEPARTMENT OF FINANCE; BUDGET OFFICE, OFFICE OF THE MAYOR; DEPARTMENT OF PUBLIC WORKS; AND DEPARTMENT OF THE CORPORATION COUNSEL", [sic] which was adopted by the Council on July 5, 2013. The Resolution authorizes the Policy and Intergovernmental Affairs Committee to conduct an investigation into the potential misuse of County funds appropriated for the rehabilitation of the Old Wailuku Post Office.
2. Policy and Intergovernmental Affairs Committee Report 13-78.

**STATUS:** The Committee may consider its options for initiating an independent financial or performance audit, and establish procedures and guidelines for the Committee's investigation. The Committee may also consider the filing of the Miscellaneous Communication and other related action.

According to the meeting minutes, which appear to be a transcript of the meeting, for Item 41, the Chair stated during the public portion of the meeting:

The Chair . . . will ask the Committee to consider executive session under 92-a-4 [sic] to consult with Corporation Counsel on couple of scenarios that the Chair. . .feels it's important that the Committee at least have an opportunity to consider regarding the strategy of how we move forward.

Following some discussion by members, the Chair further stated:

And part of the executive session will be to . . . discuss the strategies and options of how the Committee may want to move forward, and I prefer to use the Statute at this point in time for executive session purposes regarding the privileges of the Committee in, in doing this for including the various options of the Auditor component, as well as other options as it regards to the Corporation Counsel also.

. . .

And, and it is. . .and at the appropriate time it will all then also be brought up back in open session for the community and the public to be fully informed and aware of how we shall be proceeding. But I believe it's enough. . .of validity to, for us to consider executive session regarding the strategies, the privileges, especially the privileges of the Committee to perform its task assigned by Council. And you know, if Corporation Counsel, when our attorneys get uncomfortable that we may be straying from the parameters of proper executive session, then of course we'll adjourn and go back to open session. But I believe there's some things we need to discuss in executive session regarding how we're going to proceed, and I want the Members to be informed of the options so that we can then move forward in open session in an appropriate manner.

A Councilmember then asked whether the Chair wanted to hold some special meetings regarding Item 41. The Chair responded "I prefer, that we discuss as part of the strategy in executive session so that. . .you know, I think that its more, more. . .that would be more appropriate place at this time." The Chair then stated that he "will entertain a motion for executive session regarding Policy Item 49 [sic], and the Chair will cite Hawaii Revised Statutes 92-5(a)(4), which is to consult with legal counsel on questions and issues pertaining to the powers, duties, privileges, immunities, and liabilities of the County, the Council, and this Committee." The PIA then voted to enter an executive meeting.

The Sunshine Law requires that "[e]very meeting of all boards shall be open to the public . . . unless . . . closed pursuant to sections 92-4 and 92-5[.]" HRS § 92-3 (2012). Despite its general requirement of openness in section 92-3, HRS, the Sunshine Law does allow boards to hold executive meetings closed to the public under section 92-4, HRS, which states:

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 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).

A board may hold an executive meeting closed to the public under section 92-4, HRS, for one or more of eight purposes listed in section 92-5(a), HRS. One of those purposes is applicable here. It allows a board to enter an executive meeting “[t]o consult with the board’s attorney on questions and issues pertaining to the board’s powers, duties, privileges, immunities, and liabilities[.]” HRS § 92-5(a)(4) (2012). The Sunshine Law further requires that “[i]n no instance shall the board make a decision or deliberate toward a decision in an executive meeting on matters not directly related to the purposes specified in [section 92-5(a), HRS.]”

Requester’s appeal stated that, after the executive meeting, the PIA voted (1) to write a letter to ask the county auditor to intervene in the matter; and (2) to exempt the Department of the Corporation Counsel (Corporation Counsel) from the investigation. After the meeting, Requester further asserted that the PIA members talked about “strategizing” on how to move forward with the issue. The relevant portions of the minutes of the continuation of the public meeting after the executive meeting quote the Chair as stating:

Members, regarding Item 41, the Chair wanted to make some comments. The Chair, with no objection, would like the Committee ... well, the Chair would like to inform the Committee, with no objections, that I will be forwarding to the County Auditor, Mr. Taguchi, a request for consideration to perform an audit regarding the Old Wailuku Post Office as prescribed by authorization of the resolution to this Committee regarding financial and performance; and in that letter, the Chair intends to ask the Auditor to respond within two weeks, and in that response if he agrees to perform the audit, to give us indication of how he may wish to move forward and any other information that will assist the Committee in tightening up a schedule of how we can then proceed and conclude our review for final Council consideration. Regarding that com ... scheduling, again one of the key components at this time the Chair is looking, of course, at is the Auditor agreeing to our request. I’m hoping he can move forward. We’ll allow him some

flexibility to come up with the amount of time he needs, if he chooses to move forward.

The second thing, Members, that I would like to ask you to consider this afternoon is, it is your Chair's position at this time that I would like to have the Department of Corporation [sic] to be deleted from the Committee's review and investigation. The Chair's position is that the Department, upon request, provides advice and counsel. The Department does not make any final decisions regarding CIP projects or the final expenditure of, of public funds. They provide us with advice, and the Administration with advice, and counsel. So with no ...if there's any questions for the Chair. Mr. Couch?

[A member asked whether the Chair would like a motion.]

I'm informing you of my intention as your Chairman. Part of the request for the opting out the Department of Corporation Counsel, I believe timing is of a . . . is important, and so your Chair's approach to this matter is that I'm going to recommend to this Committee that the Chair will present a proposed resolution that I will be sending to Ms. Baisa for posting. Part of that resolution to opt out the Department of Corporation Counsel will also be a request to discharge this Committee from further consideration of that request to waive the Rules of the Council and have the Council make its decision at that Council meeting.

...

Okay. I will take that and as your Chair, I will move forward with the forwarding that request to Mr. Taguchi regarding the audit as well as prepare a proposed resolution for consideration for discharge and final Council decision making regarding the opting out of the Department of Corporation Counsel. Is there any further, more questions? I think once we get that two squared away, we'll be able to tighten up the timetable and inform the Administration of our schedule and request their assistance to work with the Committee so we can move towards a quicker resolution than later.

The PIA then voted to defer Item 41.

Requester asked whether section 92-5(a)(4), HRS, which was invoked by the PIA prior to entering the executive meeting, extends broadly, and whether some of the PIA's deliberations of Item 41 should have been done in public. The Hawaii Intermediate Court of Appeals has recognized that, while the Sunshine Law serves an important purpose, there are compelling reasons for respecting and preserving

the attorney-client privilege that is afforded to public agencies. Cnty of Kauai v. Office of Info. Practices, 120 Haw. 34, 44-45, 200 P.3d 403, 413-414 (2009) (Kauai v. OIP); *citing*, Hui Malama Aina O Koolau v. Pacarro, 4 Haw. App. 304, 314, 666 P.2d 177, 183-84 (1983).

OIP has reviewed the redacted executive minutes provided for *in camera* review.<sup>1</sup> It is clear from these minutes that the PIA's attorney, the First Deputy Corporation Counsel, was in the executive meeting, and that he was being asked legal questions to which he provided responses throughout the meeting. These discussions do appear to be attorney-client privileged discussions between the PIA and its attorney. At the very end of the executive meeting, some scheduling was discussed, but the Chair reiterated those remarks when the PIA went back into public meeting. Using Kauai v. OIP as a guide, because the executive meeting discussions included consultation with its attorney, OIP finds that the PIA's executive meeting was in compliance with sections 92-4 and 92-5(a)(4), HRS.

### **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

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<sup>1</sup> The Corporation Counsel responded to this appeal on behalf of the PIA. It initially provided OIP, for *in camera* review, with over 14 pages of completely redacted executive session minutes from which no information about what happened at the executive meeting could be ascertained. The Corporation Counsel declined OIP's subsequent requests for unredacted minutes, or for less redacted minutes, and instead filed County of Maui v. State of Hawaii Office of Information Practices, Civil No. 13-1-1079 (2) (2nd Cir. Ct.) (Maui v. OIP). That lawsuit for injunctive relief challenged OIP's authority to review attorney-client privileged documents *in camera* and sought to prevent OIP from taking adverse action against Maui County. On October 8, 2015, the Corporation Counsel provided OIP with a minimally redacted copy of the executive session minutes for OIP's *in camera* review, which withheld only the attorney's statements and thus provided sufficient information to resolve this appeal. The court's order granting a stipulation to dismiss Maui v. OIP was filed on October 27, 2015.

(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 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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