



DAVID Y. IGE
GOVERNOR

**STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES**

CHERYL KAKAZU PARK
DIRECTOR

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oiip@hawaii.gov
www.oiip.hawaii.gov

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: The Honorable Donald G. Couch, Jr.
Board: Maui County Council
Date: January 17, 2018
Subject: Council Members' Attendance at Candidate Forums (S RFO-G 15-3)
(Maui County reference number PAF 14-428)

Request for Opinion

Requester asked for an opinion as to whether a quorum or more of Maui County Council (Council) members could attend candidate forums in compliance with the Sunshine Law.

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's letter to OIP dated October 6, 2014.

Opinion

A quorum or more of Council members may attend a candidate forum in compliance with the Sunshine Law if the candidate forum is held as a guest meeting as set out in section 92-3.1(b), HRS, or as a regular Council meeting. HRS § 92-3.1 (Supp. 2017). Alternatively, if the candidate forum is not noticed as a Council meeting, the Sunshine Law would allow a quorum or more of Council members to attend and participate only if the Governor of the State of Hawaii (Governor) is also participating for any discussions of Council business. See HRS § 92-2.5(f) (2012).

Statement of Reasons for Opinion

Requester asked OIP to assume for the purpose of this opinion that

(1) candidate forums are public discussions or debates featuring candidates for elective office, including Council members who are running for re-election and their opponents; (2) candidate forums take place within a few weeks of an upcoming primary or general election; and (3) some of the candidates at candidate forums are questioned on Council business.

Requester also asked OIP to consider whether “any prohibition or limitation on Council members’ attendance at candidate forums based on the Sunshine Law may be a content-based restriction on political speech subject to strict scrutiny.” (Footnote omitted.)

The Sunshine Law does not have a special exception for discussion of board business at candidate forums or similar events, nor does it distinguish between Council members’ discussion of Council business as candidates for re-election and Council members’ discussion of Council business for other reasons.

Thus, the first question is whether the Council members’ attendance at the candidate forums would involve Council business, i.e., discrete matters within the Council’s authority that are on the Council’s agenda or are reasonably likely to appear on the agenda in the foreseeable future. See OIP Op. Ltr. No. 01-01 at 31. Regarding the question raised as to whether Sunshine Law limitations on Council members’ attendance at candidate forums could violate Councilmembers’ first amendment rights to freedom of speech, OIP has previously considered and made allowance for board members’ rights to freedom of speech and freedom of association by adopting a relatively narrow definition of “board business” notwithstanding the Sunshine Law’s general mandate to interpret its provisions to favor openness. Id. at 28-32. This relatively narrow definition ensures that the Sunshine Law’s restrictions on Council members’ and other board members’ discussions are limited to their discussions of those topics most central to their boards’ official business and thus most central to the Sunshine Law’s purpose of opening up the formation and conduct of official policy. See HRS § 92-1 (2012).

If no Council business will be discussed during a candidate forum, then the forum is considered a “chance meeting” at which “matters relating to official business are not discussed.” See HRS § 92-2 (2012) (definition of “chance meeting”). As such, the discussions during that forum would not be subject to the Sunshine Law, so any number of Council members could attend and take part in the forum to discuss matters not constituting Council business.

However, Requester asked OIP to assume that at a candidate forum there will be some questions posed to one or more current Council members regarding Council business. In accordance with that request and for the purpose of this opinion, OIP assumes that a candidate forum will include one or more Council members expressing views on current Council business to the audience, including any other Council members present at the forum; in other words, a candidate forum would involve discussion of Council business. Any communication regarding Council business among Council members would therefore need to take place in a manner authorized under the Sunshine Law, either as part of a properly noticed Council meeting (which could be a limited meeting under section 92-3.1, HRS) or as a permitted interaction in which section 92-2.5, HRS, specifically permitted such communication outside a Council meeting. See HRS §§ 92-2.5 and -3.

OIP first addresses the possibility of conducting the candidate forum as part of a Council meeting. Given the nature of such an event, OIP believes the best option for conducting a candidate forum as part of a Council meeting is for the Council to file notice of a candidate forum as a guest meeting, a form of limited meeting set out in section 92-3.1(b), HRS, rather than to notice and conduct it as a regular Council meeting. Indeed, OIP supported the final form of H.B. 2239 during the 2014 Legislative session, which (as Act 221) created the 'guest meeting' form of limited meeting specifically to allow for candidate forums, town halls, and similar events. Any number of Council members from less than a quorum up to the full Council could attend a guest meeting candidate forum, and they would not be required to adhere to a set agenda (a guest meeting notice does not have to include an agenda) or to accept public testimony. HRS § 92-3.1(b). Thus, the organization hosting the event could retain control of the schedule and the questions, and Council members would have the flexibility to attend or not attend, regardless of how many other Council members will be there.

Several limited meeting requirements apply to a guest meeting just as to any other type of limited meeting: no decisions can be made at the meeting, the meeting must be videotaped (and the tape made available to the public) unless OIP waives that requirement, and minutes must be kept. HRS §§ 92-3.1(c) and -9 (2012). In addition, there are the following limitations applicable specifically to the guest meeting type of limited meeting: a council can only attend one guest meeting a month hosted by the same organization or group; guest meetings must be in the state of Hawaii; and a guest meeting cannot be used to circumvent the purpose of the Sunshine Law. HRS § 92-3.1(b).

If a candidate forum is not noticed as a Council meeting of some sort, then any discussion of Council business by Council members in the course of the candidate forum would have to fall within one of the Sunshine Law's permitted interactions. The only permitted interaction that would allow a quorum or more of Council members to take part in a discussion of board business outside a meeting is section 92-2.5(f), HRS, allowing a board's members to discuss board business with the

Governor without limitation or subsequent reporting, so long as the discussion does not relate to a matter over which the board is exercising its adjudicatory function. HRS § 92-2.5(f). Thus, any number of Council members could discuss Council business in a candidate forum in which the Governor was part of the discussion; however, such a situation seems unlikely to occur during a candidate forum dealing with Maui County issues.¹ It should be noted that there is no similar permitted interaction allowing a board's members to discuss board business with the Mayor of Maui or any other county.

The other permitted interactions that could conceivably apply to Council members' participation in a candidate forum would only allow less than a quorum to attend. If the number of Council members attending a candidate forum was more than two but less than a quorum, their attendance could fall within section 92-2.5(e), HRS, which permits less than a quorum of members to attend an informational meeting or presentation. That permitted interaction does not require prior steps such as assigning members to attend, but the Council members present at the candidate forum would need to report their attendance, and the Council business that was discussed, at the next Council meeting. HRS § 92-2.5(e).

If no more than two Council members were to attend a candidate forum, their participation could fall within section 92-2.5(a), HRS, the permitted interaction allowing two members to discuss board business so long as no commitment to vote is made or sought. In that case, they would not need to report their attendance at a subsequent Council meeting, since they would be relying on section 92-2.5(a), HRS, as their justification and that section does not require giving a report.

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.

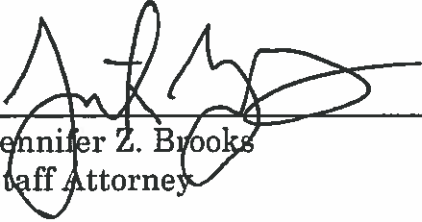
Where a final action of a board was taken in violation of the open meeting and notice requirements of the Sunshine Law, that action may be voided by the court. HRS § 92-11 (2012). A suit to void any final action must be commenced within ninety days of the action. Id.

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

¹ The possible relevance of this permitted interaction to an event such as the State of the State or a political rally is beyond the scope of this opinion request, and would in any event depend on the specific facts of the situation.

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.

OFFICE OF INFORMATION PRACTICES



Jennifer Z. Brooks
Staff Attorney

APPROVED:



Cheryl Kakazu Park
Director