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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: Ms. Brenda Ford
Board: County Council, County of Hawaii
Date: May 4, 2018
Subject: Sufficiency of Agenda (S APPEAL 15-5)

Request for Investigation

Requester asked for an investigation into whether the County Council, County of Hawaii (Council), violated the Sunshine Law because its agenda for its August 6, 2014 meeting (Agenda) provided inadequate public notice of the Council's consideration of Resolution 486-14 (Resolution). Although Requester acknowledges that OIP was unable to timely issue an opinion within the time period during which a suit could have been filed in Court to stay the Council's action, Requester believes that OIP's opinion will nonetheless provide helpful guidance to the Council in the future.

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's email correspondence, dated August 14, 2014, including attached materials, and the Council's response to this Appeal, a letter, dated September 4, 2014, prepared by Molly Stebbins, then Corporation Counsel, County of Hawaii (County's Response).

Opinion

The Council did not comply with the Sunshine Law's notice requirements because its Agenda failed to provide adequate public notice of the Resolution.

Statement of Reasons for Opinion

The Sunshine Law requires a board to file written public notice of any meeting at least six calendar days before the meeting. HRS § 92-7(a), (b) (Supp. 2017). The notice must include an agenda that "lists all of the items to be considered" at that meeting. HRS § 92-7(a). The clear purpose of the Sunshine Law's notice provisions is to give the public the opportunity to exercise its right to know and to participate in the formation and conduct of public policy. See HRS §§ 92-1, -3 (2012).

Given this purpose, OIP interprets section 92-7(a), HRS, to require that an agenda list each item a board intends to consider with sufficient detail to allow a member of the public to reasonably understand the subject matter the board intends to consider at the meeting so that he or she can decide whether to attend and to participate through oral or written testimony. See OIP Op. Ltr. No. 03-22; OIP Op. Ltr. No. 07-02; see also Op. Att'y Gen. No. 85-2 at 4 (all matters should "be listed on the agendas . . . to give interested members of the public reasonably fair notice of what the [board] proposes to consider.").¹

The Agenda listed the following item for the Council's consideration at its meeting:

Res. 486-14

DIRECTS THE CLERK OF THE COUNTY OF HAWAII TO TAKE NECESSARY ACTION TO PLACE THE CHARTER AMENDMENT PROPOSED BY ORDINANCE NO 14-98 ON THE 2014 GENERAL ELECTION BALLOT

Action will include submitting the ballot question to the State Chief Election Officer and publishing the full text of the amendment in two newspapers of general circulation in the County.

Reference: Comm 977

Intr. by: Mr. Yoshimoto

Because the Resolution's title listed on the Agenda does not describe the specific Charter amendment proposed by Ordinance No. 14-98 (Ordinance), a member of the public would need to research and read the Resolution itself to learn that the Ordinance "proposes an amendment to the Hawai'i County Charter relating to the term of appointment for the County Clerk of the County of Hawai'i." Requester

¹ The Office of the Attorney General was charged with administration of the Sunshine Law from 1975 through 1998.

complained that the Agenda did not adequately describe this item for the Council's consideration and asked OIP "to determine whether or not the public was sufficiently advised of the content of Resolution 486-14 in the agenda and the resolution to be able to determine if the public wished to testify."

In the County's Response, the County asserted that the Agenda "clearly describes the purpose of the Resolution 486-14 which was to direct the County Clerk to take action necessary to place Charter amendment proposed by Ordinance No. 14-98 on the 2014 General Election ballot" and the Agenda "does not contain details of the content of Ordinance No. 14-98 because the purpose and content of Ordinance No. 14-98 were not relevant to the objective of the resolution." According to the County's Response, the Council was considering this Resolution only because a resolution is a necessary step in the procedure required by the Hawaii County Charter (Charter) for including the proposed charter amendment on the ballot of an upcoming general election.²

While the Agenda clearly described the action that the Council was considering to place the proposed Charter amendment on the ballot, it failed to provide any description of the amendment being proposed. The Agenda only lists the Resolution's title, and the Resolution's title only lists the Ordinance number and offers no further clue about what is the proposed Charter amendment to be included on the ballot. Consequently, there was inadequate information for a member of the public to determine what particular proposal was being considered for placement on the ballot.

In contrast, when the Council was first considering the Ordinance as legislative measure Bill No. 253, the Council's agendas listed the Ordinance's title, which was: AN ORDINANCE TO INITIATE AN AMENDMENT TO ARTICLE III, SECTION 3-6 OF THE HAWAI'I COUNTY CHARTER (2012 EDITION), RELATING TO THE

² The County's Response cited section 15-2 of the Charter:

Upon adoption of an ordinance proposing amendments or revisions of this charter, or upon the determination by the clerk that a petition for proposed amendments or revisions of this charter contains the required number of signatures, **the council shall by resolution provide that the proposed amendments or revisions be submitted to the electors of the county for approval at the next general election.** Any such resolution shall provide for the publication of the full text of the proposed amendments or revisions in a daily newspaper of general circulation in the county at least forty-five days prior to submission to the electors of the county as well as via an electronic medium, such as the Internet. (emphasis added in County's Response).

TERM OF APPOINTMENT FOR THE COUNTY CLERK.”³ There is no dispute that the Ordinance’s title listed on the Council’s prior agendas gave the public sufficient notice of the proposed charter amendment while the Council was considering it as a legislative measure. If a similar description had been used for the Agenda, there would have been adequate public notice as to the specific proposed Charter amendment being considered for placement on the general election ballot.

Because the Agenda did not describe the specific proposed Charter amendment that is covered by the Resolution under the Council’s consideration, OIP concludes that the Agenda’s description of the Resolution was insufficient and thus a technical violation of the Sunshine Law. OIP recognizes, however, that this resulted in nominal harm to the public as the merits of the already adopted Ordinance were not at issue and the Council’s approval of the Resolution was a necessary procedural step to providing public notice by publishing the full text of the proposed Charter amendment in advance of being placed on the general election ballot. Nevertheless, OIP cautions the Council that, in the future, it should provide a sufficient description of any proposed Charter amendment so that the public knows from the agenda itself the specific proposal that will be considered for placement on an election ballot.

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

³ Requester informally described this proposed charter amendment as seeking to change the County Clerk’s term in office from “at-will” to 4 years.

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