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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: Richard Minatoya
Board: Maui County Council
Date: June 21, 2018
Subject: Limitation on Oral Testimony (S APPEAL 15-23)

Request for Investigation

Requester asked for an investigation into whether the Maui County Council (Council) violated the Sunshine Law at its special meeting on March 3, 2015 (Meeting) by not allowing him to present his oral testimony in full within the three-minute time limit set by Rule 17 of the Rules of the Council (Rule 17).¹

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's e-mail correspondence dated March 4, 2015, including a written copy of the oral testimony he intended to present at the Council's Meeting; and a letter dated May 8, 2015, by Council Chair Mike White, which included copies of the Meeting Agenda and Minutes, a video recording of the Meeting, and Rule 17 (Council's Response).

¹ Rule 17 states that "[e]ach testifier shall be allowed to speak for three minutes on each item."

Opinion

Not counting the Council's earlier interruptions and recesses, the time for Requester's testimony totaled less than the three minutes afforded under Rule 17. In the final segment of his testimony, Requester was allowed to finish his testimony without further interruption. Thus, the Council gave Requester sufficient time "to present oral testimony on any agenda item" as required by the Sunshine Law. HRS § 92-3 (2012).

The Council also did not violate the Sunshine Law by attempting to restrict the content of Requester's testimony. Although the Council initially objected to Requester's testimony as being irrelevant to the agenda item, it apparently later conceded the relevancy and did not interrupt or otherwise attempt to restrict the final segment of Requester's testimony. Ultimately, therefore, the Council did comply with the Sunshine Law's mandate to afford Requester the opportunity to present oral testimony on any agenda item. Id.

Statement of Reasons for Opinion

I. Requester's Testimony

OIP reviewed both a transcript and video recording of the Meeting, as well as the Agenda. The only item listed on the Meeting Agenda was a committee report recommending the adoption of a resolution approving the appointment of John D. Kim as the Prosecuting Attorney (Resolution).² Requester's oral testimony began by

² The Meeting Agenda listed:

COMMITTEE REPORT:

NO. 15-4 - POLICY AND INTERGOVERN-
MENTAL AFFAIRS COMMITTEE:

Recommending the following:

1. **ADOPTION** of resolution approving the appointment of John D. Kim as the Prosecuting Attorney;
2. **FILING** of correspondence dated January 16, 2015, from the Department of the Corporation Counsel, transmitting a resolution disapproving the appointment of John D. Kim as the Prosecuting Attorney; and
3. **FILING** of Communication.

Meeting Agenda at 2.

referring to a “meeting between Councilmembers Guzman and Cochran with JD and First Deputy Prosecuting Attorney Robert Rivera” that was about Requester (Prosecutor Meeting). Meeting Minutes at 41. Chair White and other Council members interrupted Requester’s testimony with assertions that Requester was presenting irrelevant “personal attacks” against Council members, and Chair White called the first of two recesses. Id. at 40-41. Requester then continued his testimony, which was again interrupted by Chair White, who called a second recess.

After the second recess, Chair White informed Requester that he had “35 seconds remaining on [his] testimony,” and Requester was allowed to conclude his testimony without interruption. Id. at 41. During this third and final segment of his testimony, Requester stated: “I do not appreciate the fact that I was interrupted and did not have my full three minutes.” Id. at 42.

After Requester finished his testimony and moved away from the podium, Chair White gave Councilmember Guzman, who was then the Council Vice-Chair, a “chance to respond” to Requester’s testimony. Id. Councilmember Guzman and two other Councilmembers provided additional comments relating to Requester’s testimony about the Prosecutor Meeting. After receiving oral testimony, the Council voted to adopt the Resolution.

According to the Council’s Response, Requester testified in three segments for a total of 3 minutes and 47 seconds, including the time when the Council Chair and members were making comments concerning Requester’s testimony, but not including the time spent in recess. As the Council’s Response explained, “the County Clerk kept the time for all testifiers” and the “Clerk’s practice is to measure testimony from the moment the testifier begins speaking with the Chair’s permission until the Chair calls a recess or the testifier stops speaking.” Furthermore, “[a]ll comments by others during a testifier’s time are included as part of a testifier’s allotted time” and the Rules “do not allow the County Clerk discretion in resetting the clock or extending the time of an individual testifier because of any type of interruption.”

The Council’s Response also noted that Requester voluntarily ended testimony early because he did not exhaust the remaining 35 seconds that he was informed of beforehand. As the Council’s Response asserted, “If [Requester’s] testimony had been short of three minutes by any other measurement, the deficiency was the result of the testifier’s own choice.”

OIP calculated from its review of the video recording of the Meeting that Requester had testified for a total of slightly less than two minutes, after excluding the time for recesses and interrupting comments made by the Council Chair and other members.

II. Time Limits on Requester's Oral Testimony

The Sunshine Law does not specify a time limit for oral testimony, but rather requires that "[t]he boards shall also afford all interested persons an opportunity to present oral testimony on any agenda item," and authorizes "the board to provide for reasonable administration of oral testimony by rule." HRS § 92-3 (2012). OIP has previously opined that a County Council may put reasonable time limits on oral testimony pursuant to rules adopted under section 92-3, HRS. See OIP Op. Ltr. No. 02-02 (concluding that the issue of whether a board's time limits are reasonable must be decided on a case-by-case basis within the context of each set of circumstances). Here, Requester is not challenging the validity of the three-minute limit of the Rule 17, but alleges that he was not given the full three minutes to testify and thus was not afforded a reasonable opportunity to testify as required by the Sunshine Law.

OIP previously opined that a board does not necessarily violate the Sunshine Law by asking questions of a testifier or letting a testifier know what aspect of an agenda item is of particular interest to the board. See OIP Op. Ltr. No. 07-10 (concluding that a board's instruction to a person regarding the scope of an agenda item had the effect of restricting the person's ability to present oral testimony). In the present case, however, the Council members' interruptions during Requester's testimony attempted to restrict him from testifying about the Prosecutor Meeting, which Councilmembers initially claimed was irrelevant to the agenda item. Thus, OIP believes that the time for Council's interruptions during Requester's testimony should not be considered when assessing whether the Council gave Requester a reasonable opportunity to testify. By OIP's calculations, therefore, Requester had testified for just under two minutes, which is less than the three minutes allowed by Rule 17.

While the Council's interruptions and recesses may have caused Requester to feel compelled into summarizing and shortening his oral testimony, Requester voluntarily concluded his testimony and did not ask for additional time to continue testifying. Other than reminding Requester of his remaining time to testify, the Council did not interrupt the final segment of Requester's testimony. Thus, OIP concludes that the Council did give Requester sufficient time to present oral testimony, as required by section 92-3, HRS.

The more important issue, however, which OIP addresses below, is whether the Council violated the Sunshine Law by making the comments that interrupted and sought to restrict Requester's testimony on an agenda item.

III. Restrictions on the Content of Requester's Oral Testimony Relating to an Agenda Item

In OIP's opinion, the predominant issue in the present case is whether it was proper for the Council to attempt to restrict Requester's testimony about the Prosecutor Meeting. When Requester began to speak about this topic in his testimony, Chair White interrupted him to instruct that "[y]ou may speak to your belief in Mr. Kim's abilities to conduct the office, and, and I'll allow you to proceed under that basis." Meeting Minutes at 40. Requester responded: "Mr. Chair, I respectfully request that I be able to give my testimony, which is on point, and which is my right under the Sunshine Law." *Id.* According to the Council's Response, by testifying about the Prosecutor Meeting, Requester "repeatedly veered into subjects beyond the agenda item while making inflammatory and disparaging statements personally directed at individuals present in the Council Chamber."³

The Sunshine Law requires that persons be given "an opportunity to present oral testimony on any agenda item." HRS § 92-3 (emphasis added). Thus, OIP previously opined that a board may not restrict testifiers from testifying on issues that fall within the general subject matter of an agenda item. *See* OIP Op. Ltr. No. 07-10 (concluding that the board cannot limit oral testimony concerning requirements of a settlement agreement when the testimony was reasonably related to the agenda item regarding the same settlement agreement). As explained in Opinion Letter No. 07-10, OIP "must construe the public's right to 'present oral testimony on any agenda item' liberally to favor public testimony." *Id.* at 4.

If the Prosecutor Meeting had been a topic irrelevant to the agenda item before the Council, then under the Sunshine Law, the Council would have had the discretion to restrict Requester's testimony on this topic as being outside of the agenda. *See* OIP Op. Ltr. No. 05-02 (concluding that a board can decline to accept testimony regarding non-agenda items). On the other hand, the Council would not have been able to respond to matters that are not on the agenda and thus would not have been allowed to discuss the Prosecutor meeting themselves. *Id.* (concluding that the Sunshine Law prohibits board members from responding to testimony on matters that are not on the agenda).

The Council's subsequent actions indicate that the Council eventually conceded the relevancy of Requester's testimony. Specifically, after Requester's testimony about

³ The Council's Response also asserted that the Requester's "irrelevant and loud personal attacks were disruptive" and the Chair had the "prerogative and duty to implement measures to ensure proper decorum during the meeting." Although the Chair "could have had the [Requester] removed from the Chamber for his disruptive conduct," the Chair instead sought "[t]o promote openness to the greatest possible degree, [and] chose to warn [Requester] and allow him to finish." Having reviewed the Meeting recording, OIP finds that Requester's actions were not so disruptive, if at all, to arise to the level that would have allowed the Council to restrict his testimony for this reason alone.

the Prosecutor Meeting, the Council briefly discussed this matter when Chair White gave Councilmember Guzman a “chance to respond” to Requester’s testimony about the Prosecutor Meeting and other Councilmembers provided additional comments relating to Requester’s testimony. Meeting Minutes at 42.

Although the Council members had initially sought to restrict Requester’s discussion of the Prosecutor Meeting during the first two segments of his testimony, they apparently conceded its relevancy to the agenda item and did not attempt to restrict his discussion of it during the final segment of his testimony. Thus, OIP concludes that the Council did comply with the Sunshine Law’s mandate to afford Requester the opportunity to present oral testimony on any agenda item. HRS § 92-3.

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.

OFFICE OF INFORMATION PRACTICES

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