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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. Christine Sakamoto
Board: Kaua'i County Council
Date: June 28, 2018
Subject: Public Testimony (S APPEAL 15-21)

Request for Investigation

Requester asked for an investigation into whether the Kaua'i County Council (Council) violated the Sunshine Law by a councilmember's remarks on an agenda item prior to public testimony, and by cutting off testifiers before the stated time limit for testimony.

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's email correspondence dated February 17, 2015, March 22, 2015, and May 25, 2018, and attached materials; a letter dated June 6, 2018, to OIP from the Deputy County Clerk, County of Kauai, on behalf of the Council and attached materials; and the transcript titled "02-11-2015 Public Hearing re Bill No 2573 Minutes," accessed at https://www.kauai.gov/Council/PublicHearings.

Opinion

The Council violated the Sunshine Law's requirement that "all interested persons" be given "an opportunity to present public testimony" on any agenda item through a councilmember's discussion of the agenda item prior to allowing public testimony, and through the same councilmember's effort to prevent a member of the public from

presenting testimony that he found objectionable. See HRS § 92-3 (2012). However, OIP's review of the transcript of the meeting indicated that no member of the public was ultimately prevented from presenting the oral testimony he or she wished to present, and thus OIP finds that the violations did not significantly impair the public's ability to influence the Council's discussion of the agenda item.

Statement of Reasons for Opinion

On February 22, 2015, the Council held a "Public Hearing"[1] ("Meeting") regarding "Bill No. 2573 – A BILL FOR AN ORDINANCE TO ESTABLISH A NEW ARTICLE UNDER CHAPTER 22, KAUA'I COUNTY CODE 1987, AS AMENDED, RELATING TO DECLARING A PUBLIC NUISANCE" (Bill). Specifically, the Bill proposed to broaden the category of public nuisance to include smoke and other effects from fireplaces or open fires.

Prior to accepting public testimony, Councilmember Gary Hooser, then Chair of the Public Safety Committee, spoke at length about what the bill was intended to do, how the bill might be amended to exclude imus,[2] smoke meat, and similar practices, and how the bill compared to a similar initiative on Maui. After his remarks and a brief recess, the Meeting reconvened and the Council began to hear public testimony.

By rule, the Council allows testifiers three minutes of oral testimony per agenda item. Many testifiers discussed the proposed bill in terms of a clash of cultures, both with respect to its perceived effects on Hawaiian culture, and as a conflict between local traditions generally and preferences of people originally from other

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[1] OIP notes that the Meeting at issue here was actually listed as a "public hearing" on the Council's website and in the title of the transcript, and the category of "public hearing" appears to be classified differently on the Council's website from Council meetings generally. Thus, although the Council did not argue that the Meeting was not a Sunshine Law meeting, OIP examined *sua sponte* the question of whether it was actually a contested case or other proceeding that might be exempt from the Sunshine Law under section 92-6, HRS. OIP found no reason to conclude that the Meeting was a contested case or otherwise exempt from the Sunshine Law under section 92-6, HRS. Although the Meeting was called a "public hearing," it comprised the Council's consideration of a Council bill, and more specifically the Council's hearing of public testimony regarding that bill. Further, nothing in the transcript OIP reviewed suggested that the Meeting was part of a contested case hearing or some other type of proceeding that might arguably be exempt from the Sunshine Law under section 92-6, HRS. Rather, it appears that the "public hearing" designation stems from the Council's internal classification of gatherings that would all be classified as meetings for the purpose of the Sunshine Law.

[2] An imu is an underground oven traditionally used in Hawaiian cooking.

states.[3] Several testifiers reached the three-minute mark while testifying. When that occurred, the Council Services Review Officer interrupted the testifier at the end of a sentence to announce, "Three minutes," and the testifier was allowed to briefly conclude his or her remarks. Other than that, no testifier was cut off during the course of his or her remarks until midway through the public testimony, when Mike Broyles was testifying (at page 19 of the transcript of the Meeting).

After beginning with remarks on the perceived culture clash behind the proposed bill during which he did not refer to specific individuals other than his own father, Mr. Broyles went on to say, "Unfortunately, sometimes the wrong kind of transplant comes ashore, one in the likes of Mr. Hooser. One with the special kind of arrogance. You see, it takes a special kind of arrogance . . ."

At that point Councilmember Hooser cut him off, stating in part, "We will hold your time. This is not the time or place to attack me or any Councilmember personally." After some back and forth, Councilmember Hooser further instructed him, "If you want to continue speaking, speak in a respectful tone. Do not address me personally any [sic] denigrate my character or my intent. You may continue. I will call a recess if we go down this path."

Notwithstanding the threat of being cut off, Mr. Broyles was allowed to continue his testimony, during which he continued to refer to Councilmember Hooser by name and explain that "[t]his proposed bill is evidence of Mr. Hooser's mindset, to me." He was not cut off again and no recess was called. Mr. Broyles, Requester, and another individual were also given an additional opportunity to speak after all other testifiers had been given the chance to speak, at which time Mr. Broyles spoke for what appeared to be longer than three additional minutes without interruption.

After the Meeting, Requester filed this appeal seeking OIP's determination of whether the Council violated the Sunshine Law through Councilmember Hooser's remarks prior to beginning public testimony, and through cutting off testifiers.

I. Councilmember's Remarks Prior to Public Testimony

Requester argued in her appeal that the remarks prior to beginning public testimony did not fall within the item listed on Meeting's agenda because they touched on possible amendments to the proposed bill rather than being limited to the proposed bill as introduced. The Sunshine Law does not bar a board from amending a bill or otherwise evolving its approach when considering an item listed on its agenda, and the remarks at issue here were clearly directly related to the

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[3] It is not OIP's intent in this opinion to endorse the testimony discussed or to make a determination as to whether the arguments raised in testimony are fair, or accurate, or present a sound basis for policy decisions, as such considerations are not generally relevant to the Sunshine Law's right to present public testimony.

proposed bill and were thus well within the bounds of the agenda item. See HRS § 92-7(a) (2012). The relevant Sunshine Law issue raised by Requester's appeal is instead whether the remarks, and the interruption of testifiers that Requester also complained about, infringed on the public's right to present oral testimony.

The Sunshine Law requires boards to "afford all interested persons an opportunity to present oral testimony on any agenda item."[4] HRS § 92-3 (2012). The Sunshine Law's provisions "requiring open meetings shall be liberally construed[.]" HRS § 92-1(2) (2012). Thus, OIP must liberally construe the Sunshine Law's oral testimony requirement.

OIP has previously stated that public testimony must be taken before the board's discussion of an item. OIP Op. Ltr. No. 06-01 at 2 n. 2. Here, Councilmember Hooser spoke at length about the agenda item at hand before allowing public testimony to begin. Thus, the question is whether the councilmember's remarks constituted discussion of the item prior to taking public testimony.

OIP does not believe it follows from Opinion Letter Number 06-01 that the Sunshine Law's testimony requirement is automatically violated whenever a board member says anything about an agenda item before public testimony. A passing remark, for example, or administrative information unrelated to the substance of the bill, clearly would not infringe on the public's right to potentially influence a board through oral testimony. A brief remark related to the substance of the bill, such as a statement by a chair that the board had received written testimony expressing concerns about the breadth of the bill and the chair planned to recommend an amendment to address that, would also be unlikely to infringe on the public's right to testify. However, in this case the remarks made to the other councilmembers and the public prior to public testimony were not brief or administrative, but instead were so lengthy and substantive that OIP must find that they constituted a discussion of the bill prior to accepting public testimony, and thus violated the public's right to present oral testimony as set out in section 92-3, HRS. OIP does not believe that the violation had a significant impact on the public's ability to influence the Council through testimony, though, given that there was no back and forth among the councilmembers at that time: this is not a case where all or even most of the Council's consideration of an item preceded the public testimony on that same item. Thus, OIP believes there was minimal public harm from the violation.

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[4] The Sunshine Law further allows boards to "provide for reasonable administration of oral testimony by rule." HRS § 92-3. In this case, the Council evidently has an existing rule allowing it to limit oral testimony on an agenda item to three minutes per person, which it applied here and which Requester is not contesting in this appeal. See OIP Op. Ltr. No. 02-02 (reasonable time limit permitted under Sunshine Law).

II. Restriction of Testimony

Requester specifically complained that Councilmember Hooser interrupted testifiers to ask if they had heard his earlier remarks about the bill not being intended to affect specified practices. OIP's review of the transcript indicates that Councilmember Hooser did either ask such a question, or reiterate his proposed amendment, for some testifiers; however, he did so only after those testifiers had concluded their remarks. Because those questions or clarifications were made only after each testifier had concluded his or her own testimony, OIP finds no Sunshine Law violation stemming from them. See HRS § 92-3; see also OIP Op. Ltr. No. 07-10 (questions addressed to testifier or clarification of what aspect of agenda item is of particular interest to a board do not violate Sunshine Law).

However, as set out above, in one instance Councilmember Hooser did interrupt a testifier, Mr. Broyles, who was still testifying and had not yet reached the three-minute mark. Because the testifier was ultimately able to speak for well over three minutes in all, OIP does not find that his ability to present oral testimony was restricted with respect to the length of time he was permitted to testify. OIP does find that the councilmember's interruption of his testimony and subsequent statements were an attempted restriction of what the testifier could say in his testimony. The councilmember characterized the testifier's description of him as "the wrong kind of transplant" with "a special kind of arrogance" as a personal attack and instructed the testifier not to address him personally or denigrate him if he wished to continue to testify. The question presented, then, is whether that attempted restriction violated the testifier's right to present testimony.

On the one hand, a board is not required to tolerate willful disruption of a meeting, nor is it required to allow testimony that is unrelated to the agenda item at hand, so abuse or personal invective directed at board members or others is something that a board is not generally obligated to allow under the guise of testimony. Swearing, threats, use of slurs, or repeatedly speaking out of order could all be considered a willful disruption of a meeting that a board would not be required to tolerate. See HRS § 92-3. On the other hand, as OIP has previously stated,

> To carry out the Sunshine Law's intent, OIP is statutorily required to liberally construe the law's provisions to favor open meetings and to strictly limit the exceptions to the general rule of open meetings. See Haw. Rev. Stat. § 92-1 (1993). [Footnote omitted.] Consistent with these instructions, OIP must construe the public's right to "present oral testimony on any agenda item" liberally to favor public testimony. Haw. Rev. Stat. § 92-3. Thus, where it is at least arguable that an agenda item could be read to cover a particular issue, a board must accept proffered testimony on that issue. Further, a board must determine the relevant subject matter based on the specific wording it used on the agenda and may not add additional limitations or phrases

> after the fact in exercising its power to require that testimony be limited to the agenda item at hand.

OIP Op. Ltr. No. 07-10 at 4.

In the present instance, the testifier had the floor to present his testimony and was not swearing, making threats, using slurs, or otherwise behaving in a way that was obviously disruptive to the meeting. What the councilmember apparently objected to in the testimony was that the testifier had mentioned him by name and characterized him as an arrogant transplant.[5] While this was clearly not intended as a positive characterization, OIP does not believe that the testifier's statement could fairly be described as personal invective or another form of intentional disruption of the meeting. The question, then, is whether the testifier's remarks regarding the councilmember were at least arguably relevant to the agenda item under discussion. See OIP Op. Ltr. No. 07-10 at 4.

As discussed above, many testifiers had already discussed the proposed bill in terms of a perceived culture clash, and some specifically suggested that "transplants" from other states were a motivating force behind the bill. Those testifiers were not prevented from expressing that viewpoint, and indeed that line of testimony clearly met the standard of being at least arguably relevant to the bill. The difference in this case was evidently that the testifier specifically identified the councilmember as being such a transplant. Again, while OIP recognizes that an argument directed at the perceived faults of a named board member may be both unfair and a poor basis for the formation of public policy, the Sunshine Law's public testimony requirement does not hinge on the soundness of an argument made in testimony, but instead on whether it is arguably relevant to the agenda item at issue and not an intentional disruption of the meeting. OIP does not find that the testifier's mention of the councilmember took his testimony beyond the bounds of arguable relevance; rather, his testimony regarding what he perceived to be the motivation behind the bill, like the similar testimony from other testifiers, was at least arguably relevant to the bill and thus permissible as testimony. See OIP Op. Ltr. No. 07-10 at 4.

Notably, this was not a situation where the Council decided after some discussion that the contested testimony was relevant and would be allowed. To the contrary, the councilmember's final statement on the matter was, "Do not address me

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[5] The councilmember also objected on the basis that the testifier was "rais[ing] the race issue," which the testifier disputed. As noted previously, the Sunshine Law's public testimony requirement does not depend on whether testimony is fair, or presents good arguments, but on whether it is relevant to the agenda item under discussion. Thus, in the absence of racial slurs or similar forms of speech that may rise to the level of intentionally creating a disturbance, the question of whether testimony has racial undertones is not relevant to a determination of whether the testimony should have been allowed under the Sunshine Law.

personally any [sic] denigrate my character or intent. You may continue. I will call a recess if we go down this path." From OIP's review of the transcript, it does not appear that the testifier was actually cowed by this instruction, as he said immediately afterward, "Alright, you can call your recess," and then continued to refer to the councilmember by name several more times while discussing his "mindset" as he perceived it. Nonetheless, the public's right to present oral testimony should not depend on a member of the public's willingness to resist a board member's direction and testify on a relevant subject he has been specifically instructed not to address.

Thus, OIP concludes that the Council did violate the Sunshine Law's requirement to allow oral testimony through a councilmember's attempted restriction of the subject matter a testifier could address, but the violation did not have a significant impact on the public's ability to testify to the agenda item at hand since the testifier to whom the restriction was directed nonetheless provided the testimony of his choice. Thus, the violation caused minimal public harm.

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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APPROVED:

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