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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: Elizabeth Stack
Board: Liquor Commission, City and County of Honolulu
Date: June 28, 2018
Subject: Oral Testimony Reconsideration Hearing (S APPEAL 15-10)

Request for Investigation

Requester asked for an investigation into whether the Liquor Commission, City and County of Honolulu (LIQC-HON) violated the Sunshine Law at its meeting on October 16, 2014 (Meeting) by not taking testimony about the item listed on its agenda (Agenda) as "Request for Reconsideration of Commission's decision to approve application" (Recon Request).

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's email correspondence dated October 28, 2014, including an attached letter to OIP dated October 23, 2014; Requester's email correspondence dated March 27, 2018; Lee Stack's¹ email correspondence dated November 10, 2014, and April 18, 2018, with attachment; and LIQC-HON's correspondence dated December 16, 2014, April 25, 2018, and May 8, 2018, including the Meeting minutes (collectively LIQC-HON's Response). The Meeting minutes took the form of a transcription of the Meeting (Transcript).

¹ Lee Stack is the Requester's son and was also present at the Meeting to provide testimony.

Opinion

LIQC-HON's consideration of the Recon Request was within the scope of its "adjudicatory functions," which are exempt from the Sunshine Law's meeting requirements pursuant to section 92-6(a)(2), HRS. Thus, LIQC-HON was not required to provide an opportunity for oral testimony under the Sunshine Law.

Statement of Reasons for Opinion

I. Recon Request

The Meeting Agenda listed items under the following headings:

1. APPROVAL OF MINUTES
2. PUBLIC HEARINGS
3. PRELIMINARY HEARINGS
4. LICENSE APPLICATIONS
5. REQUESTS
6. ADOPTION OF DECISION AND ORDER
7. ADJUDICATION HEARINGS
8. OTHER BUSINESS.

Under the heading of "OTHER BUSINESS," the Agenda listed the Recon Request regarding a previously approved liquor license application from the Arts District Merchants Association (ADMA Application) as follows:

OTHER BUSINESS:

30. Ms. Chu Lan Schubert-Kwock

Request for Reconsideration of Commission's decision to approve the application

Application from The Arts District Merchants Association, Nuuanu Avenue, between Chaplain Lane And South King Street; Pauahi Street, between Bethel and Smith Streets, between Hotel and Pauahi Streets

For a [Non-Profit] Special General License approved, on October 2, 2014, for an event on Saturday, October 25, 2014, from 5 p.m. to 10 p.m.

(Special General license approved
on October 2, 2014)

When LIQC-HON considered the Recon Request at the Meeting, LIQC-HON allowed Ms. Shubert-Kwock to explain why she was requesting reconsideration of the ADMA Application that was previously approved at LIQC-HON's previous meeting on October 2, 2014 (Previous Meeting). After hearing from Ms. Shubert-Kwock, LIQC-HON voted in favor of a motion to go into executive session. The transcript states:

At 5:34 p.m., it was moved by Fong and seconded by Magaldi that the Commission recess from regular session and enter into executive session to deliberate the matter. Motion was unanimously carried. 5:0.

Chairman: This is to go into executive session. Just so you know, to hear testimony is [sic] if we allow the reconsideration.

Ms. Shubert-Kwock: Yes. I--I understand, yeah.

Chairman: And then if we allow the reconsideration, it [sic] will come back and then we'll hear more testimony from everybody else.

....

AFTER EXECUTIVE SESSION

It was moved by Fong and seconded by Magaldi that the request for reconsideration be denied. When put to a vote, Fong and Magaldi voted in favor of the motion; the Chairman and O'Donnell voted against the motion. Motion failed to carry 2:2:1; Guzon abstained.

Transcript at 91-92. After the executive session, LIQC-HON voted on the motion to deny the Recon Request. The motion died because it was a tie vote. Requester alleged that LIQC-HON did not allow her to present oral testimony regarding the Recon Request during the Meeting.

The previous meeting's agenda had listed the ADMA's Application for a special license under the heading of "LICENSE APPLICATIONS." In LIQC-HON's Response, LIQC-HON stated that it heard extensive public testimony and Requester was among those who testified. LIQC-HON further stated that, at the Meeting, no one was denied the opportunity to provide testimony before the LIQC-HON made its decision about the Recon Request. LIQC-HON also asserted that it was not required to take testimony about the Recon Request for the following reason:

Since this matter of the special license was an adversarial type of proceeding, involved a request for reconsideration, and determined the legal right, duties, or privileges of the requester and special licensee, consideration of Item 30 by the Commission was in the nature of a contested case hearing under HRS chapter 91.

LIQC-HON's Response cited E & J Lounge Operating Co. v. Liquor Comm'n of City & Cty. of Honolulu, 118 Haw. 320, 189 P. 3d 432 (2008) (E & J Lounge), which concluded that the issuance of liquor licenses falls within the definition of a contested case under chapter 91, HRS.

II. Adjudicatory Functions

Section 92-6, HRS, exempts from the Sunshine Law the state judicial branch and quasi-judicial boards, including the "adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9, or authorized by other sections of the [HRS]." HRS § 92-6(a) (2012).² As OIP explained in OIP Opinion Letter Number F18-01, the exemption is primarily intended to cover contested cases subject to sections 91-8 and 91-9, HRS, but its language allows for the possibility of a similar

² In full, section 92-6, HRS, reads as follows:

§ 92-6 Judicial branch, quasi-judicial boards and investigatory functions; applicability. (a) This part shall not apply:

- (1) To the judicial branch.
- (2) To adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9, or authorized by other sections of the Hawaii Revised Statutes. In the application of this subsection, boards exercising adjudicatory functions include, but are not limited to, the following:
 - (A) Hawaii labor relations board, chapters 89 and 377;
 - (B) Labor and industrial relations appeals board, chapter 371;
 - (C) Hawaii paroling authority, chapter 353;
 - (D) Civil service commission, chapter 26;
 - (E) Board of trustees, employees' retirement system of the State of Hawaii, chapter 88;
 - (F) Crime victim compensation commission, chapter 351; and
 - (G) State ethics commission, chapter 84.

(b) Notwithstanding provisions in this section to the contrary, this part shall apply to require open deliberation of the adjudicatory functions of the land use commission.

HRS § 92-6 (emphasis added).

adjudicatory function for which the process is set out elsewhere in HRS. OIP Op. Ltr. No. F18-01.

Part IV, of chapter 281, HRS, sets forth the “Procedure for Obtaining [Liquor] License” (Statutory License Procedure) and requires LIQC-HON to conduct a public hearing before granting a license. HRS § 281-52 (2007). As the Hawaii Supreme Court opined in E & J Lounge, public hearings on liquor license applications held by LIQC-HON are contested case hearings subject to the requirements of HRS chapter 91. E & J Lounge, 118 Haw. at 340.

Similarly, the Hawaii Supreme Court previously considered whether a planning commission’s consideration of a motion for reconsideration was an adjudicatory function that was exempt from the Sunshine Law requirements. Chang v. Planning Commission, 64 Haw. 431 (1982). In Chang, the Court held, “the commission’s closed deliberations on Makena Surf’s permit application and on appellant’s subsequent motion and petition were permissible under HRS § 92-6(a)(2) despite the open meeting mandate of HRS § 92-3.” Id. at 443.

In light of the Court’s decisions regarding LIQC-HON’s public hearings on liquor license applications and a planning commission’s consideration of a motion for reconsideration of an application, OIP opines that LIQC-HON’s consideration of the Recon Request was within the scope of its “adjudicatory functions.” Consequently, the Sunshine Law’s open meeting requirements, including its public testimony requirement, did not apply to the Recon Request when it was considered by LIQC-HON at the Meeting. HRS § 92-6(a)(2).

III. Public Testimony

Under the Sunshine Law, boards are required to “afford all interested persons an opportunity to present oral testimony on any agenda item.” HRS § 92-3 (emphasis added). Furthermore, in OIP Opinion Letter Number 05-02, “as [OIP has] stated in previous opinions, we interpret the Sunshine Law to require a board to accept oral testimony relating to any item on every meeting agenda. See, e.g., OIP Op. Ltr. No. 01-06 (Dec. 31, 2001).”

Additionally, LIQC-HON has its own requirements for testimony. Under its Statutory License Procedure, “[t]he liquor commission shall accept all written or oral testimony for or against the application whether the application is denied, refused, or withdrawn.” HRS § 281-59 (Supp. 2016).

Nevertheless, having determined above that the Recon Request was within the scope of LIQC-HON’s adjudicatory functions and therefore LIQC-HON’s consideration of it was not subject to the Sunshine Law’s requirements, OIP concludes that the public testimony requirements of the Sunshine Law are not applicable in this case. OIP cannot make determinations about other statutes’

public testimony requirements. Consequently, OIP opines that the Sunshine Law was not violated by LIQC-HON's failure to allow Requester's testimony regarding the Recon Request.

IV. Meeting and Adjudicatory Matters Listed in Same Agenda

OIP, however, is authorized to determine the adequacy of the notice provided for a meeting with respect to matters falling within the Sunshine Law. The law requires a board to file written public notice of any meeting at least six calendar days before the meeting, and the notice must include an agenda that "lists all of the items to be considered" at that meeting. HRS § 92-7(a), (b) (Supp. 2017). 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).

In this case, the agenda items listed with reasonable specificity the matters that would be considered at the meeting. See OIP Op. Ltr. No. 03-22; OIP Op. Ltr. No. 07-02; see also Op. Att'y Gen. No. 85-2 at 4 (stating that 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.").³ Consequently, OIP concludes that there was no Sunshine Law violation as to the adequacy of the notice provided for the topics subject to the Sunshine Law and listed in LIQC-HON's Meeting Agenda.

However, given that LIQC-HON planned to consider items falling within its adjudicatory function as well as items whose consideration was subject to the Sunshine Law, the Meeting Agenda contained a confusing mix of matters, with no indication as to which were meeting matters governed by the Sunshine Law and which were adjudicatory matters governed by the Statutory License Procedure, chapter 91, HRS, or other laws governing LIQC-HON's adjudicatory functions.⁴ OIP finds that this format to be confusing to the public, as people are unable to

³ The Office of the Attorney General was charged with administration of the Sunshine Law from 1975 through 1998.

⁴ As specific examples of the confusing mix of Sunshine Law versus adjudicatory matters, OIP makes the following observations about the Meeting Agenda. "Approval of Minutes" is the first item listed on the Agenda, which appears to be Sunshine Law matter. There is a heading for "License Applications," and this may be either a Sunshine Law item or adjudicatory matter. The headings for "Public Hearings," "Preliminary Hearings," and "Requests" presumably involve adjudicatory matters. Items under the headings for "Adoption of Decision and Order" and "Adjudication Hearings" seem to indicate that they are adjudicatory matters. The Recon Request falls under the heading of "Other Business" and it is not readily identified as an adjudicatory matter. Additional items listed under "Other Business" are clearly not adjudicatory matters, such as Item 33 citing the Sunshine Law justification for an executive session to confer about personnel and employment matters.

readily ascertain which items listed are meeting matters subject to the Sunshine Law's testimony requirements or adjudicatory matters subject to different testimony requirements.

While it is not a violation of the Sunshine Law for LIQC-HON to include both regular meeting and adjudicatory hearing matters on the same agenda, OIP believes that the effectiveness of the notice is substantially compromised when a mix of regular and adjudicatory matters are listed without identifying which items are subject to the Sunshine Law and which items are adjudicatory matters subject to chapter 281, HRS. OIP thus recommends that the LICQ-HON prepare its agenda with separate headings that clearly indicate whether matters are subject to the Sunshine Law or are adjudicatory matters, or it can prepare two separate agendas for Sunshine Law matters and for adjudicatory matters.

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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