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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: Frederick Harris
Board: University of Hawaii
Date: December 27, 2018
Subject: Faculty Hiring Committees (S RFO-P 16-02)

Request for Investigation

Requester asked for an investigation into whether ad hoc hiring committees formed by the administration of the University of Hawaii (UH) to advise administrators regarding faculty or staff hiring decisions are boards subject to the Sunshine Law.

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's letter to OIP dated September 22, 2015, and attached materials, Requester's emails to OIP dated September 24, October 19, and October 22, 2015, and UH's emails to OIP dated October 5 and 14, 2015, and attached materials.

Opinion

An ad hoc hiring committee called together by an administrator to review applications and recommend potential candidates to that administrator is not a group created by constitution, statute, rule, or executive order, and thus such hiring committees are not "boards" subject to the Sunshine Law. HRS § 92-2(1) (2012). The circumstances in this case further show that the hiring committees are not acting in the place of the UH Board of Regents through a delegation of that board's powers and duties, so the hiring committees are not subject to the Sunshine Law as

proxies for a Sunshine Law board. See OIP Op. Ltr. No. 08-02 at 9 (a group may be subject to the Sunshine Law where it is acting in the place of a board that is subject to the Sunshine Law through a delegation of that board's powers and duties).

Statement of Reasons for Opinion

Requester asked OIP whether an ad hoc hiring committee formed by a UH administrator to advise that administrator regarding a faculty or staff hiring decision is a board subject to the Sunshine Law. In his request, Requester defined the hiring committees in question as "any ad-hoc university hiring apparatus acting as an administrative proxy for the University of Hawaii Board of Governors." He subsequently clarified that he was interested in "temporary University of Hawaii and ad-hoc (for that purpose only) hiring committee[s] related to University of Hawaii faculty jobs or so-called 'APT' jobs."

UH provided some factual background on how such hiring committees are formed: they are ad hoc committees formed by individual administrators to screen candidates for faculty and administrative, professional, and technical (APT) job categories, and provide recommendations to the selecting administrator, who makes the actual selection. Exact details of each committee's duties may vary based on what the administrator in question asked the committee to do, but typically the committee would review applications, conduct interviews, and recommend a list of names for further consideration. The final hiring decisions for the positions the committees advise on are not made by the UH Board of Regents, whose approval of such decisions is not required, but instead by UH administrators.

The Sunshine Law does not apply to every staff meeting, working group, or other gathering of government employees; rather, its applicability is specifically limited to those groups created by some formal legal act as set out in the Sunshine Law definition of a "board," as follows:

- (1) "Board" means any agency, board, commission, authority, or committee of the State or its political subdivisions which is created by constitution, statute, rule, or executive order, to have supervision, control, jurisdiction or advisory power over specific matters and which is required to conduct meetings and to take official actions.

HRS § 92-2(1). Thus, to determine whether a group is a "board" subject to the Sunshine Law, OIP looks to whether it meets five elements. See OIP Op. Ltr. No. 01-01. Specifically, a group is a "board" if it is: (1) an agency, board, commission, authority, or committee of the State or its political subdivisions; (2) created by constitution, statute, rule, or executive order; (3) given supervision, control, jurisdiction or advisory power over specific matters; (4) required to conduct meetings; and (5) required to take official actions. Id. at 11.

Requester's argument is essentially based on policy rather than the specific factors making a body a "board" as defined in the Sunshine Law. He argues that because the hiring committees require people to disclose personal information, they should be subject to the Sunshine Law to allow public scrutiny of whether their decisions are made on merit principles rather than personal preference. UH, looking to the Sunshine Law definition of a "board," argues that the hiring committees are not created by constitution, statute, rule, or executive order,¹ but instead by individual UH administrators, and thus they are clearly not "boards."

OIP agrees with UH that an ad hoc hiring committee called together by an administrator to review applications and recommend potential candidates to that administrator is not a group created by constitution, state, rule, or executive order, and thus the hiring committees are not "boards" subject to the Sunshine Law. HRS § 92-2(1).

Requester also argues that a hiring committee is a proxy for the UH Board of Regents, which itself is a board subject to the Sunshine Law. OIP has previously found that

a task panel or other body created by resolution may be subject to the Sunshine Law where the surrounding circumstances show that it is, in fact, acting in the place of a board that is subject to the Sunshine Law through a delegation of that board's powers and duties. These circumstances must necessarily be reviewed on a case-by-case basis.

OIP Op. Ltr. No. 08-02 at 9. Here, though, there is no evidence that the UH Board of Regents would normally be making the hiring decisions for the APT and faculty jobs the hiring committees advise on; rather, those hiring decisions are made by UH administrators without coming before the Board of Regents for approval. Furthermore, the actual hiring decisions have not been delegated to the hiring committees, as those committees are merely advisory. Thus, OIP concludes that the circumstances in this case show that the hiring committees are not acting in the

¹ UH also argues that the hiring committees do not meet other elements of the definition of a "board" subject to the Sunshine Law, but in light of OIP's conclusion herein we do not need to reach the question of whether other elements of the definition also are not met.

place of the UH Board of Regents through a delegation of that board's powers and duties,² so the hiring committees are not subject to the Sunshine Law as proxies for a Sunshine Law board.

Finally, Requester argues that the Sunshine Law has no exemption applicable to hiring committees and that no executive session purpose applies to their consideration of potential hires. These arguments beg the question of whether the hiring committees are "boards" subject to the Sunshine Law in the first place: the question of whether an exception to the Sunshine Law's usual open meeting requirements applies only arises when a discussion would otherwise be governed by the Sunshine Law. Because the hiring committees are not "boards" subject to the Sunshine Law, their discussions are not governed by the Sunshine Law, so they have no need to justify holding closed meetings under the Sunshine Law's executive session purposes or other exceptions.

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.

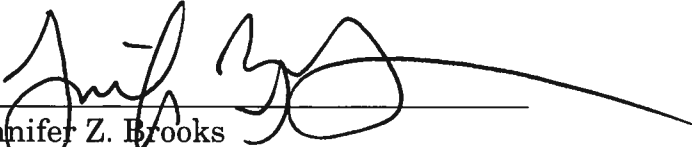
Where a final action of a board was taken in violation of the open meeting and notice requirements of the Sunshine Law, that action may be voided by the court. HRS § 92-11 (2012). A suit to void any final action must be commenced within ninety days of the action. Id.

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

² The Sunshine Law does not govern, and therefore OIP does not address, issues relating to a board's ability to delegate its powers and duties.

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



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