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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: Roy Nakamura
Board: Honolulu Authority for Rapid Transit
Date: April 1, 2019
Subject: Executive Meeting (S APPEAL 18-7)

Request for Investigation

Requester, on behalf of the Financial Accountability for Rail Mass Transit Association, asked for an investigation into whether the Honolulu Authority for Rapid Transit (HART) violated the Sunshine Law by entering an executive meeting to discuss with its attorneys a presentation made by the State Legislative Auditor (Auditor) during the public portion of the meeting.

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's letter to OIP dated May 3, 2018; OIP's notice of appeal with enclosures to HART dated May 4, 2018; and a letter with exhibits to OIP from the Department of the Corporation Counsel (CORP CNSL-HON) on behalf of HART dated June 1, 2018.

Opinion

HART did not violate the Sunshine Law when it entered an executive meeting to consult with its attorneys on agenda item VII, a presentation by the Auditor. Section II of this opinion provides general advice on when individuals who are not board members may be present in an executive meeting.

Statement of Reasons for Opinion

I. The Executive Meeting Was In Compliance With The Sunshine Law

The Sunshine Law requires generally that all board meetings shall be open to the public, and persons shall be permitted to attend and given the opportunity to provide written and oral testimony, unless the meeting is closed pursuant to sections 92-4 and 92-5, HRS. HRS § 92-3 (2012). It is undisputed that HART is subject to the Sunshine Law.

Section 92-4, HRS, sets forth the general requirements for entering an executive meeting:

§ 92-4 Executive meetings. A board may hold an executive meeting closed to the public upon an affirmative vote, taken at an open meeting, of two-thirds of the members present; provided the affirmative vote constitutes a majority of the members to which the board is entitled. A meeting closed to the public shall be limited to matters exempted by section 92-5. The reason for holding such a meeting shall be publicly announced and the vote of each member on the question of holding a meeting closed to the public shall be recorded, and entered into the minutes of the meeting.

HRS § 92-4 (2012).¹

Section 92-5(a), HRS, sets forth the purposes for which a board subject to the Sunshine Law may enter into an executive meeting closed to the public. One purpose is applicable here. Section 92-5(a)(4), HRS, allows a board to enter into executive meeting to “consult with the board’s attorney on questions and issues pertaining to the board’s powers, duties, privileges, immunities, and liabilities[.]” HRS 92-5(a) (2012).

HART held a public meeting on April 19, 2018 (Meeting). Item VII on HART’s agenda was a presentation by the Auditor. CORP CNSL-HON explained that HART anticipated legal issues might arise relating to the Auditor’s presentation.

¹ HART consists of 14 members, 5 of which are ex officio non-voting members. With 9 voting members, HART has been advised by CORP CNSL-HON that it needs a quorum of 8 to make decisions. See Gordon K. Y. Pang, Oahu voters asked to solve HART board members dilemma, Honolulu Star Advertiser (October 10, 2018), <https://www.staradvertiser.com/2018/10/02/hawaii-news/oahu-voters-asked-to-solve-hart-board-members-dilemma/>. This appeal did not allege that HART did not have enough votes to enter an executive meeting, or that it failed to satisfy any other requirements in section 92-4, HRS. The Meeting minutes show that there were 12 members present and that the vote to enter the executive meeting was unanimous.

Accordingly, agenda item VII which listed the Auditor's report included the following language indicating that HART may enter an executive meeting:

VII. Presentation by State Auditor on Audit Pursuant to Act 1

Executive Session

The Board may enter in Executive Session pursuant to Hawaii Revised Statutes Section 92-4 and Subsection 92-5(a)(4) (To consult with its attorneys on questions and issues on a matter pertaining to the Board's powers, duties, privileges, immunities and liabilities").

During the Meeting, the Auditor testified as to a mandated financial audit that resulted from Senate Bill 4 for the 2017 Special Legislative Session (Act 1 referred to in agenda item VII). Relevant portions of the public meeting minutes state:

State Auditor Leslie Kondo introduced himself to the Board to explain what the auditor's office expected to complete in the next few months, and to answer any questions that the Board wished to ask. Mr. Kondo said that the Auditor's office was conducting two different tasks provided for in Act 1 (2017). The first task would be a non-traditional audit in the sense that it would not be a financial or a performance audit, and the second task would be an annual verification of invoices submitted for reimbursement to the Department of Accounting and General Services (DAGS) from the transit special fund. He expressed uncertainty that his office would agree with HART and DAGS regarding the eligibility of reimbursed costs. . . .

[H]e expected to have HART's full cooperation in providing full and complete access to its records. He also stated that the auditor has subpoena power. . . .

Mr. Kondo said that he would focus on how money has been spent and why costs had risen, as well as documentation in support. . . .

[HART board member Ember] Shinn asked Mr. Kondo to consider selecting a consultant with transit construction experience on large projects, noting the magnitude and complexity of the rail project. . . . Mr. Kondo said that his office is in the process of contracting with a consultant with transit construction experience; his office has already retained retired circuit court judge Randall Lee and head of the attorney general's office investigative unit Daniel Hanagami to be part of the consultant team.

At the conclusion of the Auditor's presentation, the minutes noted that Ms. Shinn made a motion for HART "to enter into executive session to seek advice from its

attorney regarding issues raised by Mr. Kondo and his office's process." The minutes then stated that

Mr. Kondo, representing that he was the prior Director of the Office of Information Practices, which oversees the application of the Sunshine Law, suggested that the Board could not properly enter into executive session.

Mr. [Randall] Ishikawa, [HART's attorney], said that if the Board had questions relating to the Board's powers, duties, privileges, immunities, and liabilities, those matters were properly discussed in executive session. Ms. Shinn confirmed that was the nature of the matters she wished to discuss in executive session. Mr. Ishikawa said that answers to those questions could be provided in executive session.

Ms. Shinn's motion was thereafter seconded. HART unanimously voted to enter executive session, and did enter executive session to discuss agenda item VII and other items not at issue here. Requester alleged that HART entered an improper executive session. Specially, Requester alleged that the purpose for which HART moved for an executive meeting to discuss the mandated financial audit report was illegal because it was "not in accordance to HRS 92-5 exemptions."

Section 92-5(a)(4), HRS, clearly allows a board to enter an executive meeting to consult with its attorney. In addition, as noted in OIP Opinion Letter Number 19-03, the Hawaii Intermediate Court of Appeals (ICA) has interpreted section 92-5(a)(4), HRS, broadly to protect the attorney-client privilege. See County of Kauai v. Office of Info. Practices, 120 Haw. 34; 200 P.3d 403 (Haw. App. 2009) (Kauai v. OIP). Citing Hui Malama Aina O Ko'olau v. Pacarro, 4 Haw. App. 304, 314, 666 P.2d 177, 183-84 (1983), the ICA in Kauai v. OIP noted that "although the principles behind the sunshine laws serve an important purpose, there are compelling reasons for respecting and preserving the attorney-client privilege, that is also afforded to public agencies." Kauai v. OIP, 120 Haw at 44, 200 P.2d at 413.

Based on OIP's *in camera* review of the executive meeting minutes, OIP finds that HART members did discuss their legal concerns that were raised during the Auditor's presentation. The executive meeting minutes also show there were two deputies present from CORP CNSL-HON, and one of them did speak directly to HART regarding legal issues discussed by members. Thus, OIP finds that HART was "consult[ing] with [its] attorney on "questions and issues pertaining to [its] powers, duties, privileges, immunities, and liabilities." HRS § 92-5(a)(4). OIP therefore concludes that HART's discussion of agenda item VII in executive meeting was proper under section 92-5(a)(4), HRS, and not in violation of the Sunshine Law's open meeting requirement. Based on this conclusion that HART had a lawful purpose for its discussion of this agenda item in executive session, OIP declines to direct HART to give the public the minutes of the executive meeting as Requester

had asked. See HRS § 92-9(b) (2012) (minutes of executive session “may be withheld so long as their publication would defeat the lawful purpose of the executive meeting[.]”).

II. Guests Present During Executive Meetings

OIP’s *in camera* review of the executive meeting minutes show that in addition to HART members and two deputies from CORP CNSL-HON, HART’s Executive Director and 4 other members of HART staff were apparently also present. OIP understands some of the staff members were high level HART employees and one was the HART executive officer. Because their presence was necessary to the executive session as discussed in section I, supra, OIP finds the attorneys’ presence throughout the executive meeting on agenda item VII was proper. The presence of non-members of HART was not raised in the appeal, so OIP did not ask HART to address whether their presence might indicate a waiver by HART of the executive character of its executive meeting discussion of agenda item VII. OIP does not draw a conclusion here as to whether any non-attorney attendee’s presence in the executive session was unnecessary or may have altered the executive character of the meeting, but instead raises the issue and provides guidance herein to alert HART to the possibility of a challenge to a future executive session on that basis.

OIP has recognized the need to allow nonmembers to attend executive meetings, but there is a potential danger in having too many nonmembers attend because it may appear to exclude all but select members of the public from properly attending and participating in what should have been an open meeting on a matter that was not truly confidential. OIP Op. Ltr. No. 19-03 at 7 (citing OIP Op. Ltrs. No. 03-12 and 03-17). In Opinion 03-12, OIP found that the Sunshine Law did not prohibit a board from including a nonmember in an executive session, as “boards can more effectively conduct their affairs if they can obtain information in person in an executive meeting, rather than relying exclusively on written submissions from agency personnel,” and that the Sunshine Law “clearly contemplates, expressly and implicitly, that non-board members will be participants in certain meetings closed to the public.” OIP Op. Ltr. No. 03-12 at 6. However, OIP further found that “a board’s discretion to designate who may attend an executive meeting is not unlimited,” and cautioned boards “to not invite non-board members to attend executive meetings unless their presence is necessary to assist the board on one of the items listed in section 92-5(a), [HRS].” Id. As OIP explained in Opinion 03-17, “if an individual is present and not providing relevant information or recommendations, the meeting loses its ‘executive’ character and becomes a meeting to which only a portion of the public is invited.” OIP Op. Ltr. No. 03-17 at 3.

OIP has also recognized that a board might need to summon administrative staff to provide support for tasks such as taking minutes of executive meetings, and also include the board’s attorneys, agency personnel, and other persons with special

knowledge or expertise or performing a function relating to the subject of the executive meeting. OIP Op. Ltr. No. 03-12 at 6.

To prevent possible challenges to a board's executive session, OIP recommends "mak[ing] a record, when advisable, of the reason a non-board member is present in an executive meeting, preferably before the meeting." OIP Op. Ltr. No. 03-12 at 7. OIP further recommended that, in the event of an internal disagreement as to whether a nonmember's presence was necessary, the board should settle the matter by board vote. Id.

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.

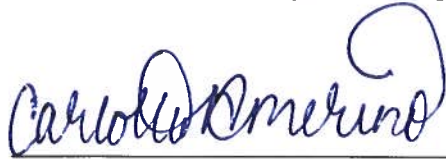
Where a final action of a board was taken in violation of the open meeting and notice requirements of the Sunshine Law, that action may be voided by the court. HRS § 92-11 (2012). A suit to void any final action must be commenced within ninety days of the action. Id.

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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