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February 20, 2004

Mr. John Ishihara
Chief Counsel
Hawaii Civil Rights Commission
830 Punchbowl Street, Room 411
Honolulu, Hawaii 96813

Re: Board Decisionmaking Outside of Open Meetings

Dear Mr. Ishihara:

In your January 30, 2004 letter, you requested that the Office of Information Practices ("OIP") provide you with an opinion concerning the procedures for the Hawaii Civil Rights Commission ("HCRC") to follow in polling Commissioners relating to the HCRC's legislative testimony.

ISSUE PRESENTED

Whether, under part I of chapter 92, Hawaii Revised Statutes ("HRS"), the Sunshine Law, staff assigned to a board may to ascertain, outside of a meeting convened as permitted by the Sunshine Law, the position of individual board members on matters subject to the board's supervision, control, jurisdiction or advisory power.

BRIEF ANSWER

No. The Sunshine Law requires that all decisionmaking take place in meetings open to the public, unless an executive meeting is authorized pursuant to the constitution or sections 92-4 and 92-5, HRS.

FACTS

Your January 30, 2004 letter advises that, during the legislative session, the HCRC provides testimony on bills affecting civil rights. The HCRC's Commissioners meet monthly, generally on the third Wednesday of each month. At those meetings, the Commissioners vote on the position the HCRC will take in its testimony on bills directly impacting the laws under the HCRC's jurisdiction, as well as bills having a general impact on civil rights. The general practice is to have the Commission's executive director testify. At times, the Chair or a Commissioner may testify.

Your question addresses the issue of bills that are scheduled for hearing at the Legislature before the next regularly scheduled HCRC meeting. You ask whether, under the Sunshine Law, the HCRC staff may contact Commissioners by telephone or by e-mail to receive their position, and then submit testimony based on the position stated by the majority of Commissioners. You indicate that Commissioners would not be told of the votes of other Commissioners, and that, at a subsequent meeting, the Commissioners would vote to ratify the action taken.

DISCUSSION

I. THE SUNSHINE LAW AND DECISION-MAKING OUTSIDE OF AN OPEN MEETING

Under the Sunshine Law, all meetings[1] of State and county boards[2] and commissions are open to the public, unless otherwise provided in the constitution or closed pursuant to section 92-4 and 92-5, HRS. Haw. Rev. Stat. § 92-3 (1993). Based upon the statute's definition of the term "meeting," the OIP interprets the Sunshine Law to require all discussions, deliberations and decisions relating to a matter over which the board has "supervision, control, jurisdiction, or advisory power" ("Official Business") to occur at an open meeting unless specifically exempted.[3] Section 92-5(b), HRS, directs

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[1] "Meeting" means "the convening of a board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power." Haw. Rev. Stat. § 92-2(3) (1993).

[2] There is no dispute that the HCRC is subject to the Sunshine Law.

[3] You have not indicated that it is the HCRC's position that executive meetings are authorized for the purpose of determining the Commissioners' position on proposed testimony. Therefore, for the purposes of this letter, the OIP will presume that none of the provisions at section 92-5, HRS, authorize the HCRC to meet in executive session to consider proposed testimony to the Legislature.

that "[n]o chance meeting, permitted interaction, or electronic communication shall be used to circumvent the spirit or requirements of this part to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power." Haw. Rev. Stat. § 92-5(b) (Supp. 2003). The OIP believes that this section means that the Commission's members are not authorized to communicate by telephone, facsimile transmission, or e-mail to decide Official Business. The OIP's interpretation is consistent with and supported by the Sunshine Law's declaration of the State's policy: "that the formation and conduct of public policy – the deliberations, decisions, and action of governmental agencies – shall be conducted as openly as possible." Haw. Rev. Stat. § 92-1 (1993). Moreover, the Sunshine Law expressly directs that its "provisions requiring open meetings shall be liberally construed[.]" Haw. Rev. Stat. § 92-1(2) (1993).

Here, the purpose of the calls or e-mails to the Commissioners is to receive their position, i.e., their vote, on proposed legislation that directly impacts laws under the HCRC's jurisdiction, or legislation having a general impact on civil rights.[4] Whether the proposed legislation would broaden or curtail the HCRC's powers and functions, or involves civil rights matters in general, the voting is in effect a decision concerning matters the HCRC oversees, as enumerated in section 368-3, HRS. Therefore, the OIP concludes that the purpose of the calls or e-mails to consider a course of action to be taken on proposed testimony to be submitted to the Legislature is Official Business of the HCRC.

You have indicated that, if a majority (three) of the Commissioners agree on a position for proposed testimony, the HCRC staff would submit that testimony to the Legislature. The OIP finds that, although the Commissioners are not physically present in one location at the time that a decision is made regarding the testimony, and although the Commissioners would not be informed of each others' views, by the time the third vote in favor of one position or another is received, the Commissioners have, in effect, arrived at a decision. And, that decision is arrived at outside of an open meeting, without the opportunity being afforded to the public to participate in the meeting or to submit testimony.[5]

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[4] Section 368-3(7), HRS, grants the HCRC authority to submit recommendations concerning statutory changes required to further the purpose of chapter 368, HRS.

[5] At all open meetings, boards are required to "afford all interested persons an opportunity to present oral testimony on any agenda item." Haw. Rev. Stat. § 92-3 (1993). Written testimony must be accepted on any agenda item, as well. Id.

Accordingly, because the Commission cannot vote on a matter under the Commission's authority via telephone, e-mail or fax, the OIP opines that the HCRC's staff cannot poll individual Commissioners outside of a properly noticed meeting for the purpose of determining and/or approving the HCRC's legislative testimony. Decisions by the Commissioners regarding the HCRC's legislative testimony must be made in a properly noticed meeting of the HCRC.

II. RECOMMENDATIONS

The OIP offers several recommendations to assist the HCRC to obtain the Commissioners' position on the HCRC's testimony relating to bills scheduled for hearing before a regular HCRC meeting:

- At an open meeting, the Commissioners may provide the HCRC's director with general direction as to the Commission's inclination with regard to bills it anticipates may be introduced during the legislative session, and authorize the director to submit testimony consistent with the HCRC's inclination.

- The Commission may schedule a meeting to take place shortly after the last day for submission of proposed legislation (in 2004 that date was January 26, 2004) at which time the proposed testimony can be approved.

- Where hearings are scheduled on bills introduced but on which the director has not yet received guidance, an "emergency" meeting can be scheduled. Under the Sunshine Law, boards and commissions may meet with less than the six days public notice required by section 92-7(b), HRS, under certain circumstances, including when an "unanticipated event" authorizes a meeting. Haw. Rev. Stat. § 92-8 (Supp. 2003). One of the definitions of "unanticipated event" which would authorize an "emergency" meeting is applicable to the ascertainment of the Commissioners' vote as to the testimony regarding bills pending before the Legislature: "[a] deadline established by a legislative body, a court, or a federal, state, or county agency beyond the control of a board." Haw. Rev. Stat. § 92-8(c)(2) (Supp. 2003). Under rules adopted by the Senate and House, hearings are generally scheduled at least 48 hours in advance.

Senate Rule 21, House Rule 11.5(1). Briefly summarized,[6] the Commission, by a two-thirds majority, would make a finding that an unanticipated event has occurred, state that an emergency meeting is necessary and the reasons therefore, and obtain the concurrence of the attorney general. The finding is to be filed with the Office of the Lieutenant Governor with notice sent to those requesting notification pursuant to section 92-7(e), HRS.

- As stated above, section 92-5(b), HRS, requires that discussion and deliberation concerning Official Business only take place during a duly noticed meeting. This means that when two or more Commissioners decide Official Business it must be during a duly noticed meeting.[7] Nevertheless, staff can gather information from Commissioners individually in order to prepare testimony. This does not mean that staff can "poll" Commissioners. Rather, the expertise of particular Commissioners can be tapped to assist staff in drafting testimony. Should the Commission decide, at a meeting open to the public, a position it

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[6] The full text of the "unanticipated event" section follows:

If an unanticipated event requires a board to take action on a matter over which it has supervision, control, jurisdiction, or advisory power, within less time than is provided for in section 92-7 to notice and convene a meeting of the board, the board may hold an emergency meeting to deliberate and decide whether and how to act in response to the unanticipated event; provided that:

(1) The board states in writing the reasons for its finding that an unanticipated event has occurred and that an emergency meeting is necessary and the attorney general concurs that the conditions necessary for an emergency meeting under this subsection exist;

(2) Two-thirds of all members to which the board is entitled agree that the conditions necessary for an emergency meeting under this subsection exist;

(3) The finding that an unanticipated event has occurred and that an emergency meeting is necessary and the agenda for the emergency meeting under this subsection are filed with the office of the lieutenant governor or the appropriate county clerk's office, and in the board's office;

(4) Persons requesting notification on a regular basis are contacted by mail or telephone as soon as practicable; and

(5) The board limits its action to only that action which must be taken on or before the date that a meeting would have been held, had the board noticed the meeting pursuant to section 92-7.

Haw. Rev. Stat. § 92-8(b) (Supp. 2003).

[7] Section 92-2.5(a), HRS, authorizes two members of a board to communicate privately between themselves to gather information concerning official business, so long as no commitment to vote is made or sought.

wishes to endorse concerning a particular type of legislation, there is nothing in the Sunshine Law that would prohibit staff from consulting a Commissioner to craft language for testimony to be presented to the Legislature. Staff must ensure that there is no facilitation of deliberation through staff's discussion with multiple Commissioners. If staff contacts more than one Commissioner, they should not convey opinions of other Commissioners on matters not previously determined by the Commission.

CONCLUSION

Under the Sunshine Law, board decisionmaking must take place at a meeting open to the public, unless an executive meeting is authorized by the constitution or by sections 92-4 and 92-5, HRS. A series of telephone calls, e-mails, or facsimile transmissions at which board business is decided is not permitted by the Sunshine Law.

Very truly yours,

Susan R. Kern
Staff Attorney

APPROVED:

Leslie H. Kondo
Director

SRK:ankd

cc: The Honorable William D. Hoshijo, Executive Director
Ms. Allicyn Hikida Tasaka, Commissioner
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