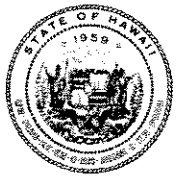
LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LIEUTENANT GOVERNOR



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June 29, 2004

Ms. Jo Anne Johnson
Council Member
County Council, County of Maui
200 South High Street
Wailuku, Hawaii 96793

Re: Right to Testify on Agenda Items

Dear Council Member Johnson:

You have asked for an opinion as to whether section 10-4 of the Charter of the County of Maui ("Charter") is invalid under the Sunshine Law, part I of chapter 92, Hawaii Revised Statutes ("HRS") ("Sunshine Law"), or the freedom of speech and equal protection clauses of the constitutions of the United States and Hawaii. The OIP does not have the authority to issue an opinion on the Charter's constitutionality, and therefore the OIP will not address the question of whether the Charter violates either the Hawaii Constitution or the United States Constitution. This opinion is limited to the effect of the Sunshine Law on section 10-4 of the Charter.

ISSUE PRESENTED

Does a county charter provision barring county employees from representing private interests before a county agency conflict with the Sunshine Law?

BRIEF ANSWER

No. The Sunshine Law requires boards to provide an opportunity for members of the public to testify. It does not prevent an employer, whether government or private, from forbidding its employees to present testimony to a board. However, if a county employee nevertheless seeks to testify before a county agency that is a board under the Sunshine Law, the board must allow that testimony as required by section 92-3, HRS.

FACTS

The Charter of the County of Maui, 1999 ed. ("Charter"), contains provisions restricting the ability of county officers and employees to appear before county agencies. Specifically, section 10-4(1) of the Charter states: "No officer or employee of the county shall . . . [r]epresent private interests in any action or proceedings against the interests of the county or appear in behalf of private interests before any agency." Section 10-4(4) goes on to provide that:

> [o]fficers and full time employees of the county shall not appear on behalf of or represent private interests before any county agency, provided that no officer or employee shall be denied the right to appear before any agency to petition for redress or grievances caused by any official county action affecting such person's personal rights, privileges or property, including real property, provided that members of boards and commissions may appear on behalf of private interests before county agencies other than the one on which such person serves and other than those agencies that have the power to review the actions of the agency on which such person serves, or to act on the same subject matter as the agency on which such person serves; provided, further, that without changing the prohibitions and rights stated above, the council by ordinance may prescribe further standards, conditions, and guidelines concerning the representation of private interests before county agencies.

Charter § 10-4(4) (1999).

DISCUSSION

I. A BOARD'S DUTY TO ACCEPT TESTIMONY ON AGENDA ITEMS

The Sunshine Law is sometimes spoken of as providing a public right to testify before a board. However, the public right to testify provided by the Sunshine Law is more accurately a requirement placed on boards to accept public testimony. Boards "shall afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item," and "shall also afford all interested persons an opportunity to present oral testimony on any agenda item." Haw. Rev. Stat. § 92-3 (1993). The law's focus is on a board's legal obligation to accept public testimony, rather than on an individual's entitlement to freely present testimony. Thus, although a Sunshine Law board generally cannot prevent an individual from testifying on agenda items, the law does not provide individuals with an affirmative right to freedom of speech akin to that found in the constitutions of Hawaii and the United States.

II. THE CHARTER'S RESTRICTION ON OFFICERS' AND EMPLOYEES' SPEECH

The Charter provisions, on the other hand, bar county employees and officers from appearing on behalf of or representing private interests before county agencies, but do not bar county agencies from accepting testimony from county employees or officers. Thus, the Charter provisions are focused on restricting county employees' and officers' freedom of speech in presenting testimony, rather than on altering a board's obligation to accept public testimony.

Even where a county agency is a "board" for the purposes of the Sunshine Law, the Charter provisions and the Sunshine Law do not conflict. A board is required to accept testimony under the Sunshine Law, and the Charter provisions do not purport to change that requirement. See Charter §§ 10-4 and -5 (1999) (no indication in provision barring representation of private interests or penalty provision that a board subject to Sunshine is barred from accepting testimony that may violate Charter provisions). A board receiving testimony that may be presented in violation of section 10-4 of the Charter is nonetheless obligated to receive that testimony as it would any other testimony. Haw. Rev. Stat. § 92-3 (1993). The Charter provisions do purport to limit an individual officer's or employee's ability to appear and

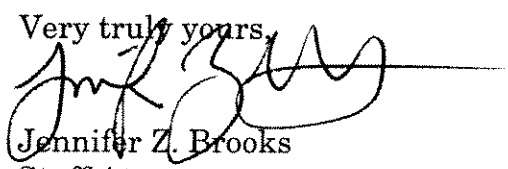
testify as a member of the public; however, because the Sunshine Law does not provide individuals with an affirmative right to freedom of speech akin to that found in the constitutions of Hawaii and the United States, that limitation does not violate the Sunshine Law.

CONCLUSION

Section 10-4 of the Charter does not violate the Sunshine Law. The Sunshine Law places a legal obligation on a board to accept testimony. Haw. Rev. Stat. § 92-3 (1993). The Charter places a legal obligation on county employees and officers not to present testimony on behalf of private interests to county agencies. Charter § 10-4 (1999). If a county employee or officer seeks to testify before a county board, to comply with the Sunshine Law, the board should simply accept the testimony as it would for any other member of the public: the issue of whether the county employee or officer has thereby violated section 10-4 of the Charter is a separate matter.

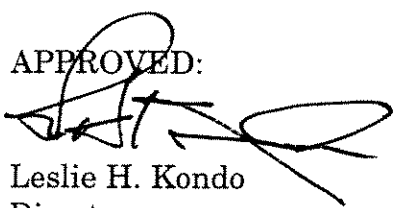
The Sunshine Law does not provide an affirmative right of free speech to individuals, and thus it does not bar an employer (governmental or private) from attempting to restrict employees' speech. The OIP has no authority to give an opinion as to whether the Charter violates the constitutions of the United States or Hawaii, and we recommend that you consult with your Corporation Counsel or your personal attorney on those questions. This opinion is limited to the effect of the Sunshine Law on the Charter.

Very truly yours,



Jennifer Z. Brooks
Staff Attorney

APPROVED:



Leslie H. Kondo
Director

JZB:ankd

cc: Brian T. Moto, Maui County Corporation Counsel