LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LIEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
OFFICE OF INFORMATION PRACTICES
NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAI'I 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oip@hawaii.gov
www.hawaii.gov/oip

LESLIE H. KONDO
DIRECTOR

OPINION

Requester: Gerald Cysewski
Agency: Natural Energy Laboratory of Hawaii Authority ("NELHA")
Date: April 28, 2006
Subject: Finance Investigative Task Force (S INVES 090905)

REQUEST FOR OPINION

The Natural Energy Laboratory of Hawaii Authority's ("NELHA") Board of Directors (the "Board") formed a Finance Investigative Committee to investigate, as a permitted interaction, the charges to be used in negotiating the land rental rates with NELHA's tenants. Requester seeks an opinion on whether the Board's subsequent use of the Committee to consider other financial matters violated the Sunshine Law, part I of chapter 92, Hawaii Revised Statutes ("HRS"). Requester alleges that: (1) the Committee's ongoing activities exceed the scope of the investigation that it was created to perform; and (2) more than a quorum of the Board has attended the Committee's meetings.[1]

This opinion is based solely upon the facts presented in Requester's letter dated September 8, 2005, NELHA's letter dated September 16, 2005, and the minutes from the Board's meetings of October 21, 2003, May 17, 2005, June 21, 2005, July 19, 2005, and August 26, 2005, unless otherwise indicated.

QUESTION PRESENTED

Whether the Committee's meetings were permitted interactions under section 92-2.5(b)(1), HRS.

---

[1] "Meeting" is a defined term under the Sunshine Law, and does not include a permitted interaction between board members. Haw. Rev. Stat. §§ 92-2 and -2.5(f) (Supp. 2005). For convenience, however, this opinion generally refers to the planned gatherings of Committee members as meetings regardless of whether a particular gathering was a Sunshine Law "meeting" for which the members were required to file notice, allow public testimony, keep minutes or comply with any other of the requirements of a meeting under the Sunshine Law.

BRIEF ANSWER

No. The Committee was originally formed as an investigative task force under section 92-2.5(b)(1) to investigate "actual charges to be used to negotiate [land rental] rates with tenants." Once the Committee gave its report to the Board on the matter it was originally authorized to investigate, the Committee had no authority to consider other matters outside of a Board meeting, and in the absence of another permitted interaction or other exception, any discussion about Board business between Board members who had been assigned to the Committee should have occurred in a properly noticed meeting of the Board.

Given the length of time that the Committee has been meeting without following the requirements of the Sunshine Law, it appears impossible for the Board to entirely "cure" the past violations. However, the Board should, at a minimum, make the minutes or other recordings of those closed meetings publicly available.

STATEMENT OF REASONS FOR OPINION

A. FACTS

The minutes from the Board's meeting of October 21, 2003 reflect that the Board formed the Committee as "an investigative committee" pursuant to section 92-2.5(b)(1) "to decide on actual charges to be used to negotiate [land rental] rates with tenants."[2] Although OIP was not provided with the minutes of the Board's meeting at which the Committee reported on the matter it was originally charged to

[2] OIP requested that the Board provide information about the Committee, including, among other things, when the Committee was formed, the names of the board members assigned to the Committee and the specific matter that the Committee was formed to investigate. OIP also asked the Board for copies of the minutes of the meetings at which the Committee was formed, at which the Committee reported its findings and recommendations, and at which the Board deliberated and took action on the Committee's findings and recommendations. In its response, NELHA, presumably on behalf of the Board, provided the dates and times of the Committee's meetings of May 17, June 21, July 19 and August 26, 2005, the names of the people present at those meetings, and the minutes of the meetings. NELHA asserted that the minutes of the May 17 meeting reflected that the Committee was charged with investigating "a comprehensive plan that reviews seawater allocations, seawater rates, standardized leasing and standardized options[.]" The minutes of the May 17 meeting, however, appeared to reflect that the Committee was already in existence and had reported back to the Board on certain issues as part of the meeting. OIP therefore made another request for the minutes of the meeting at which the Committee was formed, which according to Requester was in October 2003, and in February 2006 NELHA provided those minutes to OIP. The Board has not provided all the requested information; however, given that the Board has the burden to provide sufficient information to refute the allegations and has not requested additional time in which to provide the requested information, OIP does not believe that further delay in rendering this opinion is warranted.

investigate,[3] the Board's minutes from May 2005, a year and a half after the Committee was formed, indicate that the Committee was still meeting and dealing with matters that appear different from the issue it was originally authorized to investigate. At the Board's May 2005 meeting, the Committee reported that it had been discussing "a plan on standardized leasing, standardized seawater rates, seawater allocations and land options." At that meeting the Committee was charged with coming up "with a comprehensive plan that reviews seawater allocations, seawater rates, standardized leasing and standardized options[.]"[4]

The minutes from June, July, and August 2005 indicate that the Committee continued to meet and reported every month to the Board on the matters assigned to it by the Board at its May meeting. The Board also took action on some matters reported on by the Committee immediately after receiving the Committee's monthly report: in June 2005, the Board took action on a matter that was part of the Committee's report, although it voided that action at its July meeting, and in August, the Board again took action on a matter the Committee had just reported on.

The membership of the Committee also apparently changed from its inception in October 2003. According to NELHA, the Committee's discussions held on June 21, July 18, and August 26, 2005, included John Corbin, and the August 26 discussion included Ted Liu, neither of whom was assigned to the Committee when it was formed in October 2003.

B. DISCUSSION

The Sunshine Law generally prohibits board members from discussing "board business"[5] between themselves outside of a properly noticed meeting. Haw. Rev. Stat. § 92-3 (1993). However, in limited circumstances board members may privately discuss "board business" as a permitted interaction, and such discussions are not considered meetings for the purpose of the Sunshine Law. Haw. Rev. Stat. § 92-2.5(f) (Supp. 2005).

The "investigation" permitted interaction, which the Board referred to as the basis for the Committee, allows a group of board members constituting less than a

---

[3] See Haw. Rev. Stat. § 92-2.5(b)(1)(B) (Supp. 2005).

[4] The minutes state that "CEO Ron Baird and NELHA staff" were charged with the task and were to report back to the Committee, but NELHA, in its letter to OIP, stated that the minutes reflect the assignment of the task to the Committee.

[5] Board business means "discrete proposals or issues that are actually pending before [the board] or that are likely to arise before [the board]." OIP Op. Ltr. No. 01-01 at 31.

quorum of a board to investigate a matter relating to the board's official business outside of a meeting. Haw. Rev. Stat. § 92-2.5(b)(1) (Supp. 2005). The statute, however, imposes specific procedural requirements that a board must follow in forming the investigative task force and considering the task force's findings and recommendations. Id. More specifically, the board members chosen to participate in the investigative task force must be named at a board meeting and the scope of the investigation and each member's authority must be defined at that time. Id. The investigative task force must report back at a second meeting, and the board cannot discuss or act on that report until another meeting "held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the board." Id. The language of the statute, in other words, anticipates that an investigative task force will undertake an investigation of defined and limited scope and will make a single report back to its board, after which the board (at a later meeting) may discuss and act on the issue. Because the permitted interaction allows board members to privately discuss board business, an exception to the usual open meeting requirements, OIP must strictly construe the statutory requirements. Haw. Rev. Stat. § 92-1(3) (1993).

The minutes from the October 2003 meeting show that the Board originally created the Committee in accordance with section 92-2.5(b)(1). Specific members, representing less than a quorum of the Board, were appointed and were charged with deciding a specific issue: "[the] actual charges to be used to negotiate [land rental] rates with tenants." However, the Committee members continued to meet after the Committee reported its findings and recommendations. The minutes of Board meetings held in June, July and August 2004, a year and a half after the Committee was formed, show that the Committee members had recently met and discussed matters that appear to be beyond the scope of and different from the investigation the Committee was originally charged to perform, including "a plan on standardized leasing, standardized seawater rates, seawater allocations and land options." The Committee had evidently metamorphosed into a "standing committee" to which the Board delegated a range of issues relating to financial matters and which reported back to the Board every month. A committee of a board (as distinguished from an investigative task force formed as a permitted interaction), however, is subject to the Sunshine Law and must comply with all of the statute's requirements. See, e.g., OIP Op. Ltr. No. 03-07.

The minutes also reflect that the membership of the Committee changed over time, further evidence that the Committee was not acting as an investigative group such as would be permitted by section 92-2.5(b)(1). More specifically, the Committee was initially comprised of Directors Jay Fidell, Tom Whittemore, Harry Yada, Richard Henderson and Carl Simons, but NELHA's letter to OIP reflects that, at the July and August, 2004 meetings, the Committee included Directors

John Corbin and Ted Liu.[6] As noted above, a board must appoint specific members to the investigative task force when the task force is created. Haw. Rev. Stat. § 92-2.5(b)(1). In OIP's opinion, it would be inconsistent with that explicit requirement for a board to interchange or replace members of the investigative task force once the task force has commenced the "investigation" that it has been charged to perform.

The fact that the Board did not hesitate to discuss and take action on matters that the Committee reported on at the same meeting in which the report was given further demonstrates that neither the Board nor the Committee was attempting to follow the procedural requirements and restrictions of 92-2.5(b)(1). The statute clearly requires that the Board take action on a matter being investigated only a meeting subsequent to that at which the Committee presented its findings and recommendations. Haw. Rev. Stat. § 92-2.5(b)(1)(C). If, as the Board asserts, the Committee was an investigative task force, the Board routinely violated the Sunshine Law by discussing and acting on a report or recommendation at the same meeting at which the report or recommendation was given.

In summary, the length of time the Committee has been in existence, the apparent changes to the Committee's membership, and the broadening of the Committee's jurisdiction to matters beyond the scope of its original investigation all indicate that, after the Committee gave its report on the matter it was originally charged to investigate, it was no longer an investigative task force within the terms of section 92-2.5(b)(1). See Haw. Rev. Stat. § 92-5(b) (Supp. 2005) ("No. . . permitted interaction . . . shall be used to circumvent the spirit or requirements of [the Sunshine Law] to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power."). Instead, from the information provided by the Board, the Committee became, in essence, a "standing committee" of the Board, subject to all of the same Sunshine Law requirements and restrictions as the Board. Specifically, after it reported back on the matter it was originally authorized to investigate, the Committee members could not privately discuss board business with each other absent another exception or permitted interaction. Those discussions were required to be at a meeting for which notice had been filed and at which the public had the opportunity to participate.

CONCLUSION

[6] NELHA's letter states that certain "members" were present for the Committee's meetings. OIP assumes the term "members" refers to members of the Committee and not to "members" of the Board. Board members who are not members of the investigative task force formed pursuant to section 92-2.5(b)(1) cannot participate in or attend the task force's meetings.

After the Committee reported back to the Board on the matter it was originally authorized to investigate, "actual charges to be used to negotiate [land rental] rates with tenants," it ceased to be an investigative task force under section 92-2.5(b)(1). The continued meetings by its members after that point were not permitted by section 92-2.5(b)(1) and, in the absence of any applicable permitted interaction or exception, should have been open to the public in the manner set forth by the Sunshine Law.

Given the length of time that the Committee has been meeting without following the requirements of the Sunshine Law, it appears impossible for the Board to entirely "cure" the past violations. However, the Board should, at a minimum, make the minutes of and any other records relating to those closed meetings of the Committee, if any, publicly available.

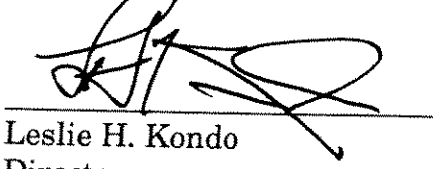
RIGHT TO BRING SUIT

A final action taken in violation of the Sunshine Law's open meetings and notice requirements may be voided by a court upon proof of violation. Haw. Rev. Stat. § 92F-11 (Supp. 2005). A lawsuit to void a final action must be commenced within ninety days of the action. Id. In addition, any person may file a lawsuit seeking an injunction to require compliance with or preventing violations of the Sunshine Law or to determine the Sunshine Law's applicability to discussions or decisions of the public body. Haw. Rev. Stat. § 92-12(c). The court may order payment of reasonable attorney fees and costs to the prevailing party in such a lawsuit. Id.

OFFICE OF INFORMATION PRACTICES

Jennifer Z. Brooks
Staff Attorney

APPROVED:



Leslie H. Kondo
Director