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OPINION

Requester: Big Island Press Club
Board: Hawaii County Council
Date: July 19, 2006
Subject: Amendment of Agenda; Executive Meeting Agenda (S INVES-P 06-15)

REQUEST FOR OPINION

Requester seeks an opinion on whether the Hawaii County Council (the "Council") violated part I of chapter 92, Hawaii Revised Statutes ("HRS") (the "Sunshine Law"), by amending the agenda for its meeting held on March 1, 2006, to consult with the Office of the Corporation Counsel ("Corporation Counsel"), County of Hawaii (the "County"), in executive session regarding the pending case of Kelly v. 1250 Oceanside Partners, No. 00-01-0192K (3rd Cir. filed Oct. 30, 2000) (commonly referred to as the "Hokulia lawsuit"), brought against the County and other parties.

Requester also seeks an opinion on whether the Sunshine Law allows a board to place a generic entry of "executive session" on all of its agendas without identifying the subject matter even when the board knows the subject matter prior to the meeting.[1]

Unless otherwise indicated, this advisory opinion is based upon the facts presented in Requester's letter to this office received on March 8, 2006; correspondence and other communications from Mr. Lincoln Ashida, Corporation

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[1] Requester has made certain factual assertions related to this question. However, because we have not been asked to rule on a specific action actually taken, but instead have been asked for an opinion on this general question, investigation into the factual underpinnings here was unnecessary to render this opinion. Accordingly, we have made no attempt to verify the assertions made, and we do not by this opinion make any finding with regard to those assertions.

Counsel; a letter from Mr. Ivan Torigoe, Deputy Corporation Counsel, to the Council dated February 28, 2006, which was provided to this office for its *in camera* review; the March 1 meeting agenda; and the actions taken at the March 1 meeting, as reported on the Council's webpage.[2]

QUESTIONS PRESENTED

1. Whether the Sunshine Law allowed the Council to amend the March 1 meeting agenda to consult with Corporation Counsel in executive session regarding issues related to settlement of the Hokulia lawsuit.

2. Whether the Sunshine Law allows the use of generic "executive session" entries on agendas without identification of the subject matter of the executive meeting.

BRIEF ANSWERS

1. No. The Sunshine Law did not allow the Council to amend its filed agenda to add the Hokulia lawsuit as an item for consideration in executive session. An agenda may not be amended to add an item if it is of reasonably major importance and action on the item will affect a significant number of persons. Given the potentially widespread legal effect of and substantial County liability that could arise from the Hokulia lawsuit, OIP must find that consideration of matters relating to the lawsuit that could realistically affect settlement of the litigation was of reasonably major importance and that action on those matters would affect a significant number of persons.

2. No. The Sunshine Law does not allow the use of generic "executive session" entries on an agenda to allow a board to consider an undisclosed matter in an executive meeting. Such entries would not provide the public with the statute's expressly required public notice of the agenda item to be considered and the purpose for which the executive meeting is being held.

DISCUSSION

Amendment of Agenda to Consider Hokulia Lawsuit Not Allowed

The Hokulia lawsuit concerned the development of a $1 billion residential project in Kona.[3] During the proceedings, the trial court issued certain land use rulings viewed by many as having statewide significance regarding, among other

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[2] http://www.co.hawaii.hi.us/council/clerks/2004-2006.htm.

[3] http://www.starbulletin.com/2006/03/02/news/story01.html.

things, the types of housing that may legally be constructed on land designated for agricultural use.[4] Subsequently, approximately 150 Hokulia lot owners filed two lawsuits against the County and the State of Hawaii based upon, among other things, the County's actions taken in and as a result of the Hokulia lawsuit. The owners asserted claims for damages in excess of $265 million.[5]

By letter dated February 23, 2006, Corporation Counsel requested that the Council amend its filed March 1 meeting agenda, pursuant to section 92-7(d) of the Sunshine Law, to consider in executive session certain issues related to the settlement of the Hokulia lawsuit. The Council agreed to amend the agenda. Corporation Counsel stated in its March 9 letter to OIP (and in a telephone conversation with OIP)[6] that it concluded that the amendment was proper because the specific matters presented to the Council for action were, in its opinion, relatively minor items and, therefore, it did not believe that action on those items would affect a significant number of persons.

Section 92-7(d) of the Sunshine Law provides that a filed agenda may be amended to add an item by a two-thirds recorded vote of all members to which the board is entitled; "provided that no item shall be added to the agenda if it is of reasonably major importance and action thereon by the board will affect a significant number of persons." Haw. Rev. Stat. § 92-7(d) (Supp. 2005). Determination of whether an item "is of reasonably major importance" and when board action thereon will "affect a significant number of persons" is fact-specific and must be made on a case-by-case basis.

OIP has reviewed *in camera* the matters related to the Hokulia lawsuit that were discussed and decided by the Council in the March 1 executive session. OIP agrees that it may reasonably be argued that the **specific issues presented** were "minor" in the sense that they required the County to agree to certain conditions that the Council could reasonably believe to be of relatively little consequence to the

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[4] http://starbulletin.com/2006/03/14/news/story07.html; http://starbulletin.com/2006/03/15/news/story06.html; http://starbulletin.com/2006/03/02/news/story01.html.

[5] http://www.hokuliaupdate.com/pdf/statecourt_amcomplaint.pdf; http://www.hokuliaupdate.com/pdf/fedcourt_amcomplaint.pdf.

[6] On or about March 3, 2006, Corporation Counsel contacted OIP to discuss concerns raised by a news reporter regarding the Council's amendment of its meeting agenda to include the Hokulia lawsuit. Based upon information provided and Corporation Counsel's stated reasoning, OIP agreed that Corporation Counsel's determination that the amendment was allowed under the Sunshine Law appeared to be based upon a reasoned and good faith interpretation of the statute. Although OIP has subsequently determined that the statute did not allow the amendment, this determination should not be construed as implying that the Corporation Counsel's interpretation was unreasonable. Cf. Haw. Rev. Stat. § 92-13 (1993) (penalties imposed upon **willful** violation).

County and because the action taken **on those specific issues**, in line with Corporation Counsel's recommendation, would arguably result in minor consequence to the County financially, legally or otherwise. However, because the Sunshine Law's provisions must be liberally interpreted to implement this state's policy to conduct government as openly as possible, OIP does not believe that the importance of agenda items and the effect of actions thereon can be narrowly measured in the manner done by the Council. See Haw. Rev. Stat. § 92-1 (1993).

The importance of an agenda item and the effect of a decision on that item cannot be measured solely by looking to the distinct issue presented for deliberation and decision at that particular meeting or the consequences of the action taken on the item viewed in isolation. Rather, the item's importance and the potential consequence of any action taken on it must be viewed relative to the larger context in which it occurs. Where a litigation involving the County has potentially widespread legal ramifications or substantial financial consequences to the County, consideration of any matter that could realistically affect the settlement[7] of that litigation is clearly of reasonably major importance to those who could be affected by the outcome of the case. Further, any action on a matter that could realistically affect the outcome of the case would have an effect, good or bad, on the many who would be affected by the court's decision in the case or who would indirectly shoulder the financial repercussions.

For example, the Council's approval of certain conditions necessary to the proposed settlement of the case was likely a direct contributor to the settlement of the Hokulia lawsuit, which ultimately entailed relatively minor legal or financial ramifications for the County. If, however, the Council had **not** voted to agree to those conditions, the consequences to the County, including all of its taxpayers and landowners, might have been substantially different: A "no" vote could have precluded settlement of the case, leaving the County susceptible to potentially major financial and legal ramifications. The import of the Council's action, thus, cannot be measured by the isolated financial or other significance of the specific conditions agreed to. It must be measured by the significance the Council's agreement to those conditions had for the Hokulia litigation and what could have resulted if the Council had not agreed to the conditions.

Accordingly, OIP finds that the Sunshine Law did not allow the Council to amend its filed March 1 agenda to include the Hokulia lawsuit as an agenda item. OIP notes, however, that the agenda item was properly considered under an executive meeting purpose and, even if the stated agenda item had been included in the filed agenda, it would not have revealed the specific substance of the matter

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[7] Thus, if a matter for consideration has no realistic potential to significantly affect the outcome of the case, amendment of the agenda to consider that matter may be allowed.

considered. Under this particular circumstance, therefore, inclusion of this item in the filed agenda would not have enabled interested members of the public to observe the board's discussion, so the item's addition to the agenda in violation of the Sunshine Law would likely not justify voiding the action taken. See Haw. Rev. Stat. §§ 92-5(a)(4) (Supp. 2005) (allowing a closed meeting to consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities) and -11 (Supp. 2005); see also discussion below (notice of executive meeting purpose should allow public to determine whether meeting is proper without defeating lawful purpose of meeting).

OIP further notes that Corporation Counsel's request that the Council add the item to its agenda was made on February 23, 2006, which was six calendar days prior to the March 1 meeting. Given this timeframe, the Council should have simply filed a new agenda on February 23 that included the Hokulia lawsuit as an agenda item that the Council anticipated would be considered in executive session.[8] See Haw. Rev. Stat. § 92-7 (Supp. 2005) (requiring notice to be filed six calendar days before meeting).[9] The filing of a new agenda would have avoided the requirements for amending the agenda.

Generic Executive Session Entries on Agenda Not Allowed

The Sunshine Law contains the following notice and agenda requirements:

> (a) The board shall give written public notice of **any** regular, special, or rescheduled meeting, or any executive meeting when anticipated in advance. The notice shall include an agenda which lists **all of the items to be considered** at the forthcoming meeting, the date, time, and place of the meeting, and in the case of an executive meeting the purposes shall be stated.

Haw. Rev. Stat. § 92-7(a) (emphasis added). A plain reading of this section requires notices for **all** meetings to include an agenda listing **all** items to be considered. An agenda must, therefore, also include all items to be (or anticipated to be) considered in an executive meeting. In addition, the statute plainly and expressly requires that, for an executive meeting, the agenda state the purposes for which the executive meeting is being held.

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[8] See Haw. Rev. Stat. § 92-4 (1993) (executive meeting requires affirmative vote in open meeting of two-thirds of the Council members present).

[9] We recognize that time was of the essence because of court deadlines set and the tenuous nature of settlements. If the Council was unable to file a new agenda for the March 1 meeting six days in advance and March 1 was the last day it could take action to meet a court deadline, the Council would likely have been able to hold an emergency meeting as provided for under section 92-8(b) of the Sunshine Law.

The purpose of the notice and agenda provisions is to give the public the opportunity to exercise its right to know and to scrutinize and participate in the formation and conduct of public policy. See Haw. Rev. Stat. §§ 92-1 and 92-3 (1993); Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 384, 846 P.2d 882 (1993) (Sunshine Law ensures public access to open meetings and an opportunity to be heard). Given this purpose, OIP interprets section 92-7(a) to require that the agenda describe the matter that the board intends to consider with sufficient detail to allow a member of the public to understand what the board intends to consider at the meeting and to decide whether or not to participate in the meeting. See Haw. Rev. Stat. § 92-1; Op. Att'y Gen. No. 85-2 (Haw. 1985)[10] (Sunshine Law provisions must be liberally construed to favor public scrutiny and participation; agenda must list specific items or matters; general phrases such as "unfinished business" and "new business" do not comply with the law).

For an agenda item that is anticipated to be discussed in an executive meeting (from which the public may properly be excluded),[11] OIP advises that the agenda should specify the items to be considered generally, but in as much detail as possible to allow a third party to determine the applicability of the claimed executive meeting purpose without defeating the lawful purpose for which the meeting is being held. See Haw. Rev. Stat. § 92-1 (provisions shall be strictly construed against closed meetings); Haw. Rev. Stat. §§ 92-7(a) and -9(b) (executive meeting minutes may be withheld so long as their publication would defeat the lawful purpose of the executive meeting) (1993).[12] Such a description will meet the statute's express notice requirements, noted above, and is consistent with the policies underlying the executive meeting provisions and the Sunshine Law in general. See id.

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[10] The Office of the Attorney General was charged with administration of the Sunshine Law until 1998.

[11] The Sunshine Law's executive meeting provisions provide exceptions to the open meetings requirements for certain issues that may require private deliberation; however, these narrowly defined exceptions must be strictly construed against closed meetings. See Haw. Rev. Stat. §§ 92-5 (Supp. 2005) and -1; see also H. Stand. Comm. Rep. No. 485, 8th Leg., 1975 Reg. Sess., Haw. H.J. 1183 (1975) ("To preserve the sanctity of certain matters—such as personnel matters, labor negotiations and consultation with attorneys—that must of necessity require private deliberation, this bill excludes 'executive meetings' from the open meeting requirement.").

[12] See Haw. Rev. Stat. § 1-13 (1993) ("Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other."); State v. Keawe, 108 P.3d 304 (Haw. 2005) (statutory language must be read in the context of the entire statute and consistent with "the reason and spirit of the law . . . ." (quoting Haw. Rev. Stat. § 1-15(2) (1993)); Op. Att'y Gen. No. 94-1 (Haw. 1994) (reading sections 92-5(a)(2) and 92-9 together to preclude commission members from disclosing matters inconsistent with section 92-5(a)(2) for as long as disclosure would defeat the purpose of convening the executive meeting).

Because use of generic "executive session" entries on a board's agendas would provide no notice of the item being considered or the purpose for which the executive meeting is being held, OIP finds that use of such entries would not comply with the Sunshine Law.

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. 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 to 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) (1993). The court may order payment of reasonable attorney fees and costs to the prevailing party in such a lawsuit. Id.

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