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DECISION

Requesters: David Rizor, Ph.D. (Appeal 07-9)
Larry Geller (Appeal 07-13)
Board: Board of Education
Date: October 30, 2006
Subject: Executive Meeting Minutes Re: Employee Evaluation

REQUEST FOR DECISION

Requesters seek a determination from the Office of Information Practices ("OIP") on whether the Board of Education ("BOE") properly denied their separate requests for records made under part II of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") ("UIPA").[1] Requesters both generally sought access to portions of BOE's September 7, 2006, executive meeting minutes ("the Minutes") related to the evaluation of Dr. James Shon, then Executive Director of the Charter School Administrative Office. Dr. David Rizor requested the portion of the Minutes concerning the retention or dismissal of Dr. Shon. Mr. Larry Geller requested a copy of the Minutes and the audiotape related to the agenda item for the September 7 executive meeting concerning the evaluation of Dr. Shon.

DECISION

BOE must provide Requesters access to those portions of the Minutes that reflect the motions voted on regarding Dr. Shon's retention as well as the votes cast by the individual BOE members on those motions. Disclosure of those portions of the

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[1] Requesters filed separate appeals from BOE's denials of access to the records each requested. Because the appeals present the same underlying issue for review, OIP issues this decision for both appeals.

Minutes would not defeat the September 7 executive meeting's lawful purpose of protecting the privacy interests of Dr. Shon in light of the fact that BOE's decision to not continue Dr. Shon's appointment was made public and given the strong public interest in knowing how the elected BOE members are performing their duties. BOE must also disclose those portions of the Minutes reflecting its discussion relating to certain procedural issues and other matters unrelated to Dr. Shon as BOE has provided no reasonable basis to justify withholding that information.

With respect to Mr. Geller's request for the audiotape, BOE should provide Mr. Geller with a copy of the audiotape, if any, and may redact that recording to withhold the same type of information redacted from the Minutes in accordance with this Decision.

FACTS

BOE convened the September 7 executive meeting to consider the evaluation of Dr. Shon and, as part of the closed meeting, voted not to continue Dr. Shon's appointment as the Executive Director.[2] BOE publicly announced its decision concerning Dr. Shon's appointment after the meeting, which decision was reported by the Honolulu Advertiser on September 8, 2006,[3] and as part of a news conference on September 8, 2006.

On September 14, 2006, Mr. Geller requested that BOE provide him with a copy of the Minutes and an audiotape of the September 7 executive meeting related to Dr. Shon's evaluation. After not receiving a response to his record request, Mr. Geller requested assistance from OIP.[4]

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[2] As part of an investigation under part I of chapter 92, HRS ("the Sunshine Law"), OIP will issue a separate opinion on whether BOE's convening of the September 7 executive meeting to consider the evaluation of Dr. Shon was proper, as well as other procedural matters related to that meeting. See Haw. Rev. Stat. § 92F-42(18) (Supp. 2005) (charging OIP with overseeing compliance with the Sunshine Law); Haw. Rev. Stat. § 92-4 (1993) and -5 (Supp. 2005).

[3] See http://the.honoluluadvertiser.com/article/2006/Sep/08/ln/FP609090336.html.

[4] BOE represented to OIP that it had responded to or, if it had not, would be responding to Mr. Geller's request. On October 13, 2006, Mr. Geller informed OIP that, as of that date, he had not received a response from BOE. In light of BOE's response to Dr. Rizor's record request for a portion of the Minutes and OIP's understanding that BOE denied or would have denied Mr. Geller's request, OIP has considered Mr. Geller's request for assistance to be an appeal of BOE's denial of access. OIP reminds BOE that it must, at a minimum, respond in writing to a written request for access to government records within

By letters to BOE dated September 21 and September 28, 2006, Dr. Rizor sought a copy of the portion of the Minutes relating to the retention of Dr. Shon. In its response to Dr. Rizor dated October 5, 2006, BOE denied access to the Minutes, stating that "providing the [M]inutes would be a violation of Dr. Shon's privacy rights." Dr. Rizor appealed BOE's decision to OIP.

At OIP's request, BOE provided a copy of the Minutes for OIP's *in camera* review and its reasons for denying Requesters' access to the Minutes, arguing that "the information contained in the September 7, 2006, Board executive session minutes contains and concerns significant privacy interests with respect to Dr. Shon." BOE also asserted the attorney-client privilege protects portions of the Minutes from disclosure.[5]

DISCUSSION

The UIPA generally mandates the disclosure of minutes of meetings of government boards. See Haw. Rev. Stat. § 92F-12(7) (Supp. 2005) (agency shall make available "[m]inutes of all agency meetings required to be public"). This mandate does not apply to the minutes of executive meetings that are properly closed to the public. See OIP Op. Ltr. No. 92-27 at 5 n.1. For executive meetings properly held under the Sunshine Law, a board may withhold minutes of these meetings from disclosure under the UIPA's frustration exception because disclosure would defeat the purpose of holding the meeting closed to the public in the first place. See Haw. Rev. Stat. § 92F-13(3) (1993) (UIPA does not require disclosure of "[g]overnment records that, but their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function").

The Sunshine Law expressly recognizes that a board may withhold executive meeting minutes to avoid frustration of its ability to protect certain matters properly discussed in a closed meeting under the Sunshine Law. See Haw. Rev. Stat. § 92-9 (1993). However, the Sunshine Law also clearly recognizes that, at a future point in time, the need to maintain the confidentiality of information contained in an executive meeting's minutes may end. See id. Specifically, the Sunshine Law

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a reasonable time **not to exceed ten business days**. See Haw. Admin. R. § 2-71-13 (1999).

[5] OIP interprets BOE's position to be that sections 92F-13(2), (3) and (4) support its withholding of the record. OIP reminds BOE that it must cite to at least one of the UIPA exceptions to deny access to a record that it maintains.

OIP agrees that the Minutes include discussions between BOE and its attorney that fall within the attorney-client privilege and which are, therefore, protected from disclosure. Haw. Rev. Stat. §§ 92F-13(2), (3) and (4) (1993). In advising BOE below regarding the specific information that it may withhold, OIP has included those attorney-client communications that it finds may be redacted.

provides that a board may withhold public access to the minutes of that executive meeting "so long as their publication would defeat the lawful purpose of the executive meeting, **but no longer**." Id. (Emphasis added). Thus, for an executive meeting convened to protect an employee's privacy interest, when and to the extent matters considered would no longer affect that person's privacy, the minutes or portions of the minutes reflecting those matters must be made available to the public.

At issue in this opinion is an executive meeting BOE held for, among other things, the purpose of considering the evaluation of an employee "where consideration of matters affecting privacy [would] be involved[.]" Haw. Rev. Stat. § 92-4 (1993); see Haw. Rev. Stat. § 92-5(a)(2) (Supp. 2005).[6] Under this executive meeting purpose, when a request is made for the executive meeting minutes, a board must, **at that time**, determine whether disclosure of the specific matters recorded in the minutes would still affect the individual's privacy interests in that information. This requires the board to analyze at the time of the request: (1) whether a matter reported in the minutes is of the kind that affects the privacy of an individual; and (2) whether disclosure of all or certain portions of the minutes recording that matter would defeat the purpose of the closed meeting by revealing information that should or must remain confidential. See Op. Att'y Gen. No. 94-01 (1994) (opining on the extent to which individual board members may disclose matters discussed and decided in a BOE executive meeting held under section 92-5(a)(2) to protect the privacy of candidates for appointment as the State's Superintendent of Education).[7]

First, a matter reported in the minutes affects the privacy of an individual if it is one that would generally be protected under the UIPA. Id.[8] Second, a matter no longer affects the privacy of the individual where it has been made public or has been published. See Op. Att'y Gen. No. 94-01 at 7 (citing in Painting Industry of Hawaii Market Recovery Fund v. Alm, 69 Haw. 449, 746 P.2d 79 (1987)); Op. Att'y Gen. No.

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[6] Under the Sunshine Law, a board may hold a meeting closed to the public for certain purposes expressly set forth in the statute, including "[t]o consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved; provided that if the individual concerned requests an open meeting, an open meeting shall be held . . . ."). Haw. Rev. Stat. § 92-5(a)(2).

[7] The Office of the Attorney General (the "Attorney General") was charged with administration of the Sunshine Law from 1975 through 1998.

[8] Because the Sunshine Law does not elaborate on what kinds of matters affect an individual's privacy, the Attorney General there opined that, under the rules of statutory construction, it is appropriate to look to the UIPA for guidance in construing the phrase "matters affecting privacy[.]" Accordingly, matters protected would be those falling within section 92F-13(1), which protects information where disclosure would constitute a clearly unwarranted invasion of personal privacy.

86-19 (1986). In addition, an individual may at any point in time demand the disclosure of those portions of the minutes that affect his or her privacy. See Haw. Rev. Stat. § 92-5(a)(2) (individual may require that meeting under this section be open).

In this case, OIP has reviewed the Minutes and generally finds the matters reported related to Dr. Shon's evaluation and dismissal would be matters protected under the UIPA's privacy exception and, accordingly, BOE may withhold those portions of the Minutes. See Haw. Rev. Stat. § 92F-13(1) and -14(b)(4), (8) (Supp. 2005). However, OIP also finds that certain portions of the Minutes reflect matters no longer protected because they have been made public and because the public interest in disclosure of those matters outweighs Dr. Shon's privacy interests.

Specifically, OIP finds that the motions made and the votes cast by individual members regarding Dr. Shon's dismissal are no longer protected. Disclosure, at this point, would generally not defeat the September 7 executive meeting's lawful purpose by disclosing matters affecting Dr. Shon's privacy in light of the fact that BOE's decision to terminate Dr. Shon has been made public. See Op. Att'y Gen. No. 86-19; OIP Op. Ltr. No. 03-07 (individual members' votes taken in an executive meeting may only be withheld so long as disclosure would defeat lawful purpose of meeting); Op. Att'y Gen. No. 94-01 (opining that, after appointment of superintendent of education and where all candidates' names had been published, individual member's disclosure of how he voted and certain reasons underlying his vote would not defeat the executive meeting's purpose of protecting the candidates' privacy). Although OIP recognizes that Dr. Shon may have a privacy interest in the actual vote recorded by individual member that is separate from his interest in the fact that his employment was terminated, OIP believes that the public's interest here in knowing how board members -- especially elected board members -- are performing their individual functions[9] outweighs that privacy interest. See Haw. Rev. Stat. § 92F-14(a) ("Disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interest of the individual.").

OIP also finds that BOE's discussion relating to certain procedural issues and other matters unrelated to Dr. Shon must be disclosed as BOE has provided no reasonable basis to justify withholding that information. See Haw. Rev. Stat. § 92F-15(c) (1993) (agency bears burden of justifying nondisclosure). OIP, however, agrees

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[9] For the purpose of the balancing test under section 92F-13(1), the relevant public interest is the public interest in the disclosure of official information that sheds light on an agency's performance of its statutory purpose and the conduct of government officials, or which otherwise promotes governmental accountability. See OIP Op. Ltr. No. 06-04; see generally State of Haw. Org. of Police Officers v. Soc'y of Prof'l Journalists-Univ. of Haw. Chapter, 83 Haw. 378, 399-400, 927 P.2d 386, 407-08 (1996).

with BOE that the remaining information in the Minutes comprising Dr. Shon's evaluation itself, including BOE's discussion and deliberations on Dr. Shon's retention, may be withheld. Absent publication of those matters or Dr. Shon's consent, OIP believes that Dr. Shon's significant privacy interests outweigh the public interest in disclosure as to those matters.

Because of the upcoming general election on November 7, 2006, OIP directs that the portions of the Minutes that cannot be withheld, as discussed above, must be disclosed no later than the close of business on Wednesday, November 1, 2006.[10] To assist BOE in understanding which specific portions of the Minutes OIP has determined are public and because of the short timeframe OIP has set for BOE to release the Minutes, OIP has redacted the portions of the Minutes that can be withheld and is providing BOE and its deputy attorney general with a copy of those redacted Minutes. It is OIP's determination that the Minutes in the redacted form provided to BOE and its attorney cannot be withheld.

RIGHT TO BRING SUIT

By copy of this Decision to the agency, OIP hereby notifies the agency of its determination that the record be disclosed. Haw. Rev. Stat. § 92F-15.5(b) (1993) (If OIP's decision is to disclose, OIP shall notify agency of its decision "and the agency shall make the record available.").

OIP also notifies Requester that Requester may appeal the agency's denial of access to the circuit court. See Haw. Rev. Stat. §§ 92F-15 and -15.5(a) (1993). This action must be brought within two years after the agency denial. If Requester prevails, the court will assess against the agency Requester's reasonable attorney's fees and costs incurred in the action. Haw. Rev. Stat. § 92F-15(d). If Requester

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10 The primary purpose of both the UIPA and Sunshine Law is to open up governmental processes to public scrutiny and participation. Haw. Rev. Stat. § 92F-2 (1993); Haw. Rev. Stat. § 92-1 (1993). Among other things, the disclosure provided allows the public, in the case of an elected body such as BOE, to make informed choices when electing its officials.

decides to file a lawsuit, Requester must notify OIP in writing at the time the action is filed. Haw. Rev. Stat. § 92F-15.3 (Supp. 2005).

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