December 30, 2003

Mr. Alika Silva

Ms. Ninia Parks Elsey

Re: Oahu Island Burial Council

Dear Mr. Silva and Ms. Elsey:

This is in response to your letter to Governor Lingle dated September 20, 2003, and an earlier undated letter, both pertaining to the Department of Land and Natural Resources State Historic Preservation Division ("SHPD") Oahu Island Burial Council ("Burial Council"). Governor Lingle requested that the Office of Information Practices ("OIP") review the Sunshine Law violations alleged in your initial letter to her. Questions outside of the OIP's jurisdiction were referred by Governor Lingle to the appropriate agencies for follow up.

ISSUES PRESENTED

I. Whether the Burial Council's executive meeting convened pursuant to section 92-5(a)(4), Hawaii Revised Statutes ("HRS"), was improper because no attorney was present.

II. Whether you should have been allowed to testify at the March 12, 2003 meeting.

BRIEF ANSWERS

I. Yes. Boards subject to the Sunshine Law at part I of chapter 92, HRS, may only enter into an executive meeting under section 92-5(a)(4), HRS, to consult with the board's attorney. Because the Burial Council's attorney was not present, it should not have entered into an executive meeting under section 92-5(a)(4), HRS.

II. Boards are required by section 92-3, HRS, to allow written and oral testimony on all agenda items for public meetings.

FACTS

In an undated letter to Governor Lingle, you made several allegations against the Burial Council. Your allegations the OIP will address are: (1) that the Burial Council violated the Sunshine Law when it went into executive session at its March 12, 2003 meeting by invoking section 92-5(a)(4), HRS, when its attorney was not present at the meeting, and (2) that you should have been allowed to testify at the Burial Council's March 12, 2003 meeting.

DISCUSSION

I. EXECUTIVE MEETING

The agenda for the Burial Council's March 12, 2003 executive meeting notes that the Burial Council invoked both sections 92-5(a)(4)[1] and 6E-43.5[2], HRS, as justification for entering the executive meeting. On behalf of the Burial Council, SHPD explained to the OIP that the Burial Council had

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[1] Section 92-5(a)(4), HRS, states that a board may hold a meeting closed to the public "[t]o consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities[.]"

[2] Section 6E-43.5, HRS, states that island burial councils "shall hold meetings and acquire information as they deem necessary and shall communicate their findings and recommendations to the department [of land and natural resources]. Notwithstanding section 92-3, whenever the location and description of burial sites are under consideration, the councils may hold closed meetings."

intended to discuss items II. A. and B.[3] on its March 12, 2003 executive agenda with its attorney. However, the attorney was unable to attend the meeting, and a Burial Site Program staff member relayed the attorney's advice on these items. SHPD explained that the Burial Council then raised questions it wanted to ask its attorney and discussed setting up a special meeting with the attorney. The minutes of the March 12, 2003 meeting provided to the OIP by SHPD generally confirm SHPD's explanation and show that discussion on these executive agenda items went on for 9½ pages.

The "Sunshine Law" at part I of chapter 92, HRS, allows boards[4] to close a meeting to the public for eight specific purposes, one of which is "[t]o consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities." Haw. Rev. Stat. § 92-5(a)(4), HRS. The OIP is of the opinion that when it became apparent to the Burial Council that its attorney would not be present at the March 12, 2003 meeting, it should have cancelled the executive meeting as to those portions of the agenda which invoked section 92-5(a)(4), HRS, and should have announced this to members of the public present at the meeting. For any executive matters *not anticipated in advance*, the Burial Council could have amended its executive agenda by invoking another subsection of 92-5(a), HRS, or other law, if a provision of such laws allowed it to enter executive session, but should not have continued the lengthy discussion without properly invoking an exception to the Sunshine Law's open meeting requirements.

In addition, it appears from the minutes that the executive meeting included individuals who are not members of the Burial Council. If the executive meeting was held for the Burial Council to consult with its

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[3] These agenda items read as follows:

II. CLOSED/EXECUTIVE SESSION
A. 'IOLANI PALACE / BISHOP MUSEUM DRUM
Information: Executive session pursuant to §92-5(4)

B. MOKAPU
Information: Executive session pursuant to §92-5(4).

[4] "Board" means "any agency, board, commission, authority, or committee of the State or its political subdivisions which is created by constitution, statute, rule, or executive order, to have supervision, control, jurisdiction or advisory power over specific matters and which is required to conduct meetings and to take official actions." Haw. Rev. Stat. § 92-2 (1993).

attorney, the fact that other individuals were in attendance but the attorney was not appears also to be a Sunshine Law violation.[5]

SHPD's letter further explained that, after it discussed agenda items II A. and B., the Burial Council continued its executive session discussion on agenda item II.C. Kupihea, which was closed pursuant to section 6E-43.5, HRS. SHPD asserts, and the OIP agrees, that the Burial Council's attorney need not be present for executive discussions conducted under section 6E-43.5, HRS. SHPD further explained that the Burial Council "expected" to discuss the location and description of burial sites, during discussion of the Kupihea agenda item.

Section 6E-43.5, HRS, states that "[n]otwithstanding section 92-3, whenever the location and description of burial sites are under consideration, the councils may hold closed meetings." The Kupihea discussion in the executive meeting minutes goes on for 15 pages. The minutes show that there was some discussion on pages 14-24 about where bones were being stored and generally where they were found, but not specific "location and description of burial sites." It thus appears, based on the information provided, that it may not have been necessary for the Burial Council to be in an executive meeting. The OIP thus cautions the Burial Council not to discuss in executive meeting items that may be discussed in open meetings, in light of the stated purpose of the Sunshine Law to strictly construe provisions allowing exceptions to open meetings against closed meetings. Haw. Rev. Stat. § 92-1(3) (1993).

Page 23 of the minutes indicates the Burial Council questioned whether executive session was appropriate. We advise that in the future, when executive meeting discussions include topics not listed in section 92-5(a), HRS, or other law allowing executive meetings, the Burial Council should end the executive meeting and continue in a open meeting. If there is a question as to whether a meeting should be open, an open meeting should always to favored. Haw. Rev. Stat. § 92-1(2) (1993).

II. TESTIMONY

Regarding your allegation that you were not allowed to testify, SHPD asserts that some Burial Council members believed that testimony was not

[5] The presence of non-board members in executive meetings is discussed in detail in the OIP Opinion Letters Number 03-12 and 03-17.

appropriate because they did not intend to gather additional information at that time, but only intended to consider information compiled by the subcommittee. SHPD asserts that you were allowed to testify on the Kupihea matter at five prior meetings, and submitted a written statement through Koa Mana.

The Sunshine Law requires that boards "afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item. The boards shall also afford all interested persons an opportunity to present oral testimony on any agenda item." Haw. Rev. Stat. § 92-3 (1993). The OIP therefore finds that you should have been allowed to testify on agenda items at the March 12, 2003 meeting that were or should have been discussed in an open meeting.

By a copy of this letter to the State Historic Preservation Division, we recommend that the Burial Council and/or its staff contact Cindy Yee at 586-1400 to schedule training by the OIP on the Sunshine Law's provisions as soon as possible to avoid similar violations in the future.

III. RECORD REQUEST

Because the OIP also administers the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), this letter also addresses your request to the Burial Council for copies of audio tapes of certain meetings of the Burial Council.

The OIP is in receipt of copies of a Notice to Requester to Ms. Elsey dated November 13, 2003, and another to Mr. Silva of the same date, which indicated you would be provided with access to the public and executive meeting audio tapes and transcripts of the Burial Council's March 12, 2003 meeting.

For your information, boards may withhold access to records from an executive meeting, including minutes, transcripts, and audio tapes for so long as the purpose for having the executive meeting remains. See Haw. Rev. Stat. §§ 92-9(b) and 92F-13(3) (Supp. 2003 and 1993). This does not mean that the Burial Council should not have made these records available to you, as agencies may waive exceptions to disclosure of government records and choose to make records public unless they are subject to a confidentiality statute.

IV. SUFFICIENCY OF AGENDA

A. Open Meeting Agendas

While this issue was not raised by you, the OIP notes, by copy of this letter to SHPD, that several of the Burial Council agendas provided for our review raised concerns as to their legal sufficiency. The Sunshine Law requires that each notice "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 purpose shall be stated." Haw. Rev. Stat. § 92-7(a) (1993). Based on this provision, the OIP routinely advises boards that the Sunshine Law requires an agenda for a public meeting to be sufficiently detailed so as to provide the public with reasonable notice of what the board intends to consider. The statute's notice requirement is intended to, among other things, give interested members of the public enough information so that they can decide whether to participate in the meeting.

An example of an agenda item of concern to us is the agenda dated February 11, 1998 which includes the agenda item "**E. CASE UPDATES AND INADVERTENT DISCOVERIES:** Discussion and updates on new and ongoing cases, including, but not limited to, Sacred Falls and Citron Streets."[6] This agenda item should have specifically identified which new and ongoing cases were going to be discussed at the meeting. As is, the OIP does not believe the above agenda item would provide members of the public with enough information to allow meaningful participation in the Burial Council's meeting. We further believe that this agenda item should not contain the language "including, but not limited to," as it appears to be for the purpose of considering matters that were either unknown or had not been specifically identified at the time that the notice was filed. If the Burial Council knew what it intended to consider relating to this agenda item, it was required to describe the matters with reasonable specificity. Items that are not included on an agenda should not be considered at a board meeting.

An agenda item meant to be a "catch-all" or to preserve a board's ability to consider a matter unknown at the time that the notice is filed is improper. Given the purpose of the agenda, i.e., to provide the public with a reasonably specific description of what the board intends to consider, agenda

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[6] Similar agenda items are listed on the agendas for the Burial Council's meetings of March 11, 1998, March 21, 1998, May 12, 1998, December 17, 1998, October 11, 2000, November 8, 2000, December 13, 2000, and March 14, 2001. This may not be an exhaustive list.

items included for such purposes are contrary to the intent and the spirit of the statute. If, less than six days prior to the meeting, the Burial Council decides to consider a matter that it did not list on the agenda, the Burial Council cannot do so unless the agenda is amended at the meeting in accordance with section 92-7(d), HRS, or unless it holds an emergency meeting in accordance with section 92-8, HRS. Agenda items such as the one in the August 9, 2000 agenda which reads "**G. CASE UPDATES Information/Recommendation:** Discussion of recent inadvertent discoveries and other staff updated regarding ongoing cases"[7], are also inappropriate for the above reasons.

B. Executive Meeting Agendas

Although an executive meeting or executive session is closed to the public, the Sunshine Law requires a board to provide notice of any anticipated executive meeting and requires a board to include an agenda stating the purpose of the meeting. Haw. Rev. Stat. § 92-7(a) (Supp. 2002).

At a minimum, an executive agenda must refer to the specific subsection of section 92-5(a), HRS, which is the basis for the executive meeting. Based on our review, the Burial Council is already doing this. The OIP also routinely recommends that the agenda provide as much detail regarding the subject matter of the executive meeting as possible without jeopardizing the purpose of the executive meeting. For instance, if a board is meeting in executive session to discuss with the board's attorney a proposed settlement of a lawsuit, we have suggested that the agenda identify the caption and civil number of the lawsuit, assuming that such disclosure would not defeat the purpose of the executive meeting, and note that the executive meeting is to permit the board to consult with its attorney regarding its powers, duties, privileges, immunities and liabilities, citing section 92-5(a)(4), HRS.

The amount of detail appropriate for an executive meeting agenda is case specific and, accordingly, must be decided on a case-by-case basis. An example of agenda items that would be of concern to the OIP is the Burial Council's executive meeting agenda items in footnote 3 of this letter. The OIP believes these executive agenda items may be insufficient in that they do not include descriptions of what will be discussed, however, we note that we do

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[7] Similar agenda items are listed on the agendas for the Burial Council's meetings of July 19, 2000, August 9, 2000, September 13, 2000, January 10, 2001, and February 14, 2001. This may not be an exhaustive list

not have sufficient information to determine whether the Burial Council could have provided a reasonable description of the subjects of the executive meeting without compromising the purpose of the executive meeting. We suggest that the Burial Council consider our comments when preparing their agendas in the future.

I hope the information provided above is helpful. Feel free to contact me if you have any questions.

Very truly yours,

Carlotta Dias
Staff Attorney

APPROVED:

Leslie H. Kondo
Director

CMD:ankd

cc: The Honorable Linda Lingle, Governor
(through Mr. Bob Awana, Chief of Staff)

The Honorable Mark J. Bennett, Attorney General

P. Holly McEldowney, Ph.D., Acting Administrator, State Historic Preservation Division