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The Office of Information Practices (OIP) is authorized to resolve complaints concerning compliance with part I of chapter 92, Hawaii Revised Statutes (HRS) (the Sunshine Law) pursuant to section 92F-42(18), HRS. This is a memorandum opinion and will not be relied upon as precedent by OIP in the issuance of its opinions.

MEMORANDUM OPINION

Requester: Larry Geller
Board: Reapportionment Commission
Date: October 4, 2011
Subject: Adequacy of Agendas; Permitted Interaction Group (S INVES-P 12-1)

Request for Investigation

Requester asked for an investigation into whether the Reapportionment Commission violated the Sunshine Law (1) by discussing items that were insufficiently noticed on its agendas for July 12 and 19, 2011, (2) by adding an item to its agenda by vote of 2/3 of its members at its June 28 meeting, and (3) by members' participation in its Technical Committee.

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's e-mail correspondence dated July 20, 2011 and attached materials; a letter from Commission Chairperson Victoria S. Marks, Esq., dated July 24, 2011; an e-mail from Chairperson Marks dated August 8, 2011; and the agendas, minutes, and testimony for the Commission's meetings through August 3, 2011[1], accessed on the Commission's website at http://hawaii.gov/elections/reapportionment/.

[1] OIP notes that the Technical Committee's work was ongoing as of the time Requester sought OIP's opinion and at the time OIP asked the Commission for its position on the issues raised (Requester's original request to OIP was made July 20; OIP's letter

Opinion

I. The July 12 agenda included several item descriptions that were too vague to notify the public of what, if anything, would be discussed under that heading. However, the minutes from that meeting show that the only topic actually discussed under those vague headings—inclusion of the military in the permanent resident population and the permanent resident population generally—was listed elsewhere on the agenda as an executive session agenda item. Thus, although the vague agenda items by themselves did not give sufficient notice to allow the Commission's discussion of any topic, the public had notice from the executive session agenda item that this topic was coming before the Commission for its consideration at the meeting, so in this specific instance, the discussion did not violate the Sunshine Law. See HRS § 92-7 (1993).

The July 19 agenda item, although less informative than it might have been, was legally adequate as notice to the public to allow the board's discussion of the item. See id.

II. The issue of which categories of persons should be included in the permanent resident population was both of reasonably major importance and affecting a significant number of persons, and as such would not have been a suitable item to be added to an agenda by a 2/3 vote of all members to which the Commission was entitled. See HRS § 92-7(d). However, the agenda as filed already listed that topic. The filed agenda described the topic as the subject of a report, and the Commission's vote to add it was apparently made under the belief that the agenda should have specified that the Commission would take action on that topic; however, a board's consideration of an item implicitly includes the possibility of board action on the item. Thus, in this particular case, the Commission's vote to add the permanent resident population issue to the agenda was not necessary to allow the Commission to consider and take action on the issue. The Commission's vote on the issue did not violate the Sunshine Law because the action taken fell within the scope of an already noticed agenda item.

III. The Technical Committee was formed as a permitted interaction group under section 92-2.5(b)(1), HRS. The Commission voted to allow substitution of other members for the original Technical Committee membership, and the status of the Technical Committee's work was listed as a topic on multiple agendas over a two-month span. However, the Technical Committee's gatherings did not include substitution of members nor did the Committee make multiple reports back to the Commission; only the members originally appointed to the group participated in the group and the Technical Committee did not present a substantive report to the Commission until the last meeting reviewed by OIP. Despite the confusion created by the Commission's agenda listings and vote to allow substitutions, in the specific circumstances before OIP the manner in which the Technical Committee actually operated was consistent with the requirements of the permitted interaction and thus in compliance with the Sunshine Law.

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asking the Commission for a response was dated July 21; and OIP's e-mail asking the Commission for clarification of one specific point was dated August 4). This opinion is given only as to meetings occurring prior to August 4, as the Commission has not been asked or provided an opportunity to give its position regarding events after that date.

Statement of Reasons for Opinion

I. Vague Agenda Listings

Requester complained that the Commission's agendas failed to adequately describe the topics to be considered by the Commission in several specific instances.
The Sunshine Law requires a board's notice of meeting to "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). More specifically, "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." OIP Op. Ltr. No. 03-22 at 6.

A. July 12 Agenda

First, Requester complained that item VIII from the Commission's July 12 agenda was too vague to allow the public to determine what would be considered. Item VIII was as follows:

> VIII. Update on matters from Reapportionment staff. Commission discussion and action, if appropriate, regarding those matters.

This agenda item, by itself, does not state any subject matter that the Commission will consider, and thus this item by itself would not allow the Commission to discuss anything. OIP notes that in addition to the item Requester complained of, the July 12 agenda had similarly vague descriptions for two other reports to be given by the Advisory Councils and the Technical Committee (which is the subject of further discussion, below). Indeed, the only topic listed for the public portion of meeting that actually included a subject matter to be discussed was "Constitutional and statutory criteria and technical specifications for public submission of proposed redistricting plans."

The agenda for the executive session portion of the meeting, however, included three items for which an actual topic was stated: "legal issues regarding population base, permanent residents and prior case law regarding reapportionment and redistricting," "possible advisory council litigation concerning the reapportionment commission's decision to include military personnel and their dependents in the population base," and "filling staff positions[.]"

The meeting minutes for July 12 indicate that the Commission did not discuss anything (and no reports were made) under the agenda headings of reports from the advisory councils and the Technical Committee. Under the heading of "Update on matters from Reapportionment staff," the Commission discussed its staff's efforts to obtain more

information about where non-residents who might be counted in the permanent resident population live, especially those connected with the military, and discussed the permanent resident issue generally. The minutes indicate that there was extensive public testimony, both oral and written, on the topic of the status of non-residents in reapportionment.

A topic's inclusion on a board's agenda gives notice that the board may consider that issue at that meeting, but neither the notice provision nor any other provision in the Sunshine Law restricts consideration of agenda items to a certain order or prohibits the consideration of an agenda item at multiple points during the course of the meeting. See HRS § 92-7. OIP thus generally recognizes the ability of a board's chair to dictate the course of discussion of agenda items, including taking agenda items out of order, recessing discussion of an agenda item then returning to that discussion at a different point during the meeting, and reconsidering items in accordance with its rules and the meeting rules of general application. For this reason, although agenda item VIII by itself did not provide adequate notice of any topic to be considered by the board, the board could still have considered matters under this agenda heading so long as the matters were adequately noticed elsewhere on the agenda.

In particular, two of the items listed in the executive session portion of the agenda—"legal issues regarding population base, permanent residents and prior case law regarding reapportionment and redistricting," and "possible advisory council litigation concerning the reapportionment commission's decision to include military personnel and their dependents in the population base"—appear to reasonably cover the topics the Commission discussed under the heading of "Update on matters from Reapportionment staff" during the public portion of the meeting. The executive session agenda items described the permanent resident issue in the context of litigation and legal issues, which raises the question of whether members of the public might have been led to believe that the Commission would consider only legal issues relating to the nonresident issue. However, the public testimony received by the Commission for that meeting was largely focused on the permanent resident issue in general and was not limited to its legal ramifications, which indicates that the broader permanent resident topic was generally understood to be on the table for consideration at the meeting.

OIP therefore concludes that although the July 12 agenda was undoubtedly confusing in that it included multiple items for which no description of the topic was given, and although the issue of inclusion of non-residents in the permanent resident population was not clearly described as it might have been, the agenda, on the whole, gave enough notice to inform the public that the permanent resident issue would be considered during the meeting, and thus allowed the Commission's discussion of the issue. The Commission's discussion of the permanent resident issue during the agenda item, "Update on matters from Reapportionment staff," therefore, did not violate the Sunshine Law based on the specific circumstances presented.

B. July 19 Agenda

Requester complained that item X from the Commission's July 19 agenda, noticed for executive session, did not include a subject matter. Item X was listed as follows:

> X. Pursuant to HRS § 92-5(a)(2) relating to filling staff positions as consideration of matters involving privacy will be involved.

A topic that a board expects to consider in executive session must be listed on the agenda in the same manner required for a topic to be considered in open session. See HRS § 92-7(a). In addition, where the board anticipates going into executive session for an item, its agenda must note that the item is anticipated to be held in executive session and must list the purpose for the anticipated executive session. Id.

In this case, the agenda listed the item as an executive session item and listed the executive session purpose both by statutory citation and by description. The item did identify a subject matter, "filling staff positions." The listed subject matter could have been described better if this agenda item had specified the staff positions to be filled; however, assuming that the Commission's discussion during the executive session was, in fact, of applicants or potential candidates for staff positions, the topic "filling staff positions" did at least minimally meet the Sunshine Law's requirement that the agenda notify the public of what would be discussed. Based on the specific facts of this case, therefore, OIP finds no violation arising from item X of the Commission's July 19 agenda.

II. Adding an Item to the June 28 Agenda

Requester complains that the Commission added the subject of the permanent resident population to its June 28 agenda at its June 28 meeting by a vote of 2/3 of the Commission's members, denying the public the opportunity to prepare and submit testimony on the issue. Requester argues that this topic should not have been added to the agenda at the meeting in this manner because of its high importance and controversial nature.

The June 28 agenda as originally filed included the following item:

> V. Report from Hawaii Advisory Council
> - What should be included in permanent resident population
> - Active duty military
> - Military dependents
> - Students
> - Sentenced Felons

Requester provided his transcription of the relevant portion of the June 28 meeting, made from the 'Olelo video of the meeting starting at 54:57, quoting Chairperson Marks as follows:

> Two items. In terms of discussion and action if appropriate regarding the issue of permanent resident population was not specifically on the agenda – through my oversight – and I think it had been on the agenda for the past couple of meetings. It's even been reported by a couple of news organizations that we're going to be deciding that question today, and so at this point I would at least make a motion to amend the agenda so that discussion and action as appropriate regarding permanent resident population can be taken up. That's the first part of my motion. The second part is that we also specifically maybe have it on the agenda of our next meeting to then either further discuss or ratify whatever we might have done today.

The Commission members present voted unanimously in favor of the addition.

The Sunshine Law allows a board to add an item to its previously filed agenda with "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." HRS § 92-7(d). Based on those criteria, OIP finds that the issue of which categories of persons should be included in the permanent resident population was not a suitable item to add by a 2/3 vote, because OIP finds that this issue was both "of reasonably major importance" and "will affect a significant number of persons." However, the propriety of the Commission's agenda addition is ultimately irrelevant because the subject matter of the Commission's proposed addition was already adequately described in the originally filed agenda under agenda item V, the Hawaii Advisory Council's Report regarding categories of persons to be included in the permanent resident population. As OIP has previously stated,

> Although a board may choose to give notice of its intent to take action on an item, the Sunshine Law's notice provisions contain no requirement that an agenda specifically notice that action will be taken. Section 92-7(a), which contains the Sunshine Law's general notice provision, only requires a board to list all items "to be considered."

OIP Op. Ltr. No. 07-06 at 3. OIP has further concluded that "the term 'consider' must ordinarily be interpreted to include possible decision-making on the item." Id. at 4. Thus, it is the subject matter description of the item on the agenda that is critical, rather than the anticipated action, such as "report" or "for board action," because a board's consideration of an item includes the possibility of any reasonable board action on that item. And as discussed above, a board can discuss an agenda item at any point in the meeting and is not limited to the chronological order set forth in the agenda.

Although the description of item V as being part of a report may have caused some confusion, OIP believes that this description nonetheless gave legally adequate notice that the board would consider whether the listed groups should be counted as part of

the permanent resident population. The Commission's effort to add "action as appropriate regarding permanent resident population," therefore, was not necessary to allow the Commission to consider that topic, including taking action on the topic. Thus, the Commission's discussion and action on that topic did not violate the Sunshine Law in the specific circumstances presented.

III. Technical Committee

Requester questioned whether the Commission's "Technical Committee" was formed and operated in compliance with the Sunshine Law.

The Technical Committee was formed at the Commission's May 4 meeting. Although the minutes for that meeting do not specify whether the Technical Committee was intended to be a regular or standing committee, or an investigative group formed under a permitted interaction, the Commission clarified to OIP that the Technical Committee was formed as a permitted interaction group under section 92-2.5(b), HRS.

At the May 4 meeting, four named members were appointed to the Technical Committee, i.e. less than a quorum of the Commission's membership. At that same time, the Commission specifically voted to allow other Commission members to attend Technical Committee meetings in the place of the named members. However, according to the Commission, the Technical Committee's gatherings did not at any time include a member other than the appointed four members. Instead, when a Technical Committee member had a scheduling conflict, the other three appointed members met alone.

At the Commission's May 11 meeting, the topic of "Discussion and appropriate action, if necessary, re: the Technical Committee role" was on the agenda, and the minutes reflect that the full Commission discussed the timeframe and general manner in which the Technical Committee would operate.

At the May 24 meeting, the topic of "Discussion and appropriate action, if necessary, on the status of work for Technical Committee" was on the agenda, and the minutes reflect that the full Commission discussed when the Technical Committee would begin meeting.

At the June 9 meeting, the topic of "Discussion and action, if appropriate, on status of work for Technical committee" was on the agenda, and although the Commission did not discuss anything at that point in the agenda, the minutes reflect that later in the meeting, the Commission discussed ways to make the Technical Committee more accessible to the public and added "the redistricting for the US House of Representatives, and both the State Senate and House of Representatives" as an additional item to be investigated and reported on by the Technical Committee. The minutes indicate that the Technical Committee had not yet begun meeting and would not begin its work until an unspecified contract was signed.

At the June 28 meeting, the topic of "Discussion and action, if appropriate, on status of work for Technical Committee" was on the agenda. The minutes do not reflect any

substantive discussion by the Commission, merely stating, "Chairperson Marks stated that after this meeting, the Technical Committee will begin their work and come up with a meeting schedule."

At the July 12 meeting, the topic of "Discussion and action, if appropriate, on status of work for Technical Committee" was on the agenda. The minutes do not reflect any substantive discussion by the Commission, merely stating that "Commissioner Nonaka noted the Technical Committee is scheduled to meet on July 13, 2011."

At the July 19 meeting, the topic of "Discussion and action, if appropriate, on status of work for Technical Committee regarding proposed Congressional and/or State Senate and/or State House redistricting plans" was on the agenda. The minutes reflect that the Technical Committee members reported that they had met the previous week and would meet several times over the next two weeks, and that they expected to complete their work on time. The minutes do not reflect any discussion of the substance of the Technical Committee's work.

At the August 3 meeting, the topic of "Proposed Redistricting Plan(s) – Presentation of findings and recommendations of the Technical Committee – Deliberation and appropriate action, if any" was on the agenda. The minutes reflect that the Technical Committee gave a substantive report on the draft plans it had created. The minutes do not indicate that the full Commission deliberated on or made any decision on the plans presented by the Technical Committee.

A permitted interaction group under section 92-2.5(b), HRS, is not a standing committee[2], but instead represents a special circumstance in which members of a board subject to the Sunshine Law are specifically permitted to discuss board business outside of a board meeting. OIP discussed the Sunshine Law's requirements for an investigative task force of this sort in OIP Opinion Letter Number 07-06:

> 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 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

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[2] Meetings of a regular or standing committee of a Sunshine Law board are subject to the same open meeting requirements as apply to meetings of the parent board. E.g. OIP Op. Ltr. No. 03-07 at 6.

> 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).

OIP Op. Ltr. No. 07-06 at 3-4 (emphasis added). In that opinion, OIP further stated:

> 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.

Id. at 5.

The Commission's agendas from May through July routinely included "Discussion and action, if appropriate, on status of work for Technical Committee" and similar topics, which likely contributed to the concerns expressed by Requester and various testifiers as to whether the Technical Committee was complying with the requirements of section 92-2.5(b), HRS. As noted in the OIP opinions above, the statutory language anticipates that a permitted interaction group will make a single report back to its board (which the full board may discuss and act on only at a subsequent meeting) and after its reporting, the permitted interaction group will no longer exist. OIP believes the Commission's practice of routinely including on its agendas the topic of a permitted interaction group's ongoing work was confusing to the public, in that it implied that the Commission might be hearing regular reports from a permitted interaction group in the same way that it would from a regular committee, which would be inconsistent with the requirements of section 92-2.5(b)).

OIP further notes that at the Commission's June 9 meeting, the Commission expanded the scope of the investigation by adding another item to be investigated by the Technical Committee. Section 92-2.5(b) provides that a permitted interaction group's investigation is to be defined "at a meeting of the board," or in other words, during one meeting rather than over a series of meetings. HRS § 92-2.5(b)(1) (emphasis added). The Commission's addition of an additional item to the investigation at a later meeting was not consistent with that statutory scheme.

Nonetheless, because the Technical Committee did not actually begin its work until July 13, well after the addition of the additional item on June 9, OIP cannot find that

the inconsistency rose to the level of a Sunshine Law violation in that the Technical Committee was not a permitted interaction group whose work was ongoing at that point. Because OIP's examination of the Commission's minutes indicates that there was not, in fact, any substantive discussion of the Technical Committee's issues under those headings, OIP cannot conclude that the Commission's discussions constituted multiple reports by the Technical Committee in a manner inconsistent with section 92-2.5(b) and in violation of the Sunshine Law.

In a similar vein, OIP believes that the Commission's vote on May 4 to allow the substitution of other Commission members for the named Technical Committee members was confusing to the public, in that it implied that the Commission would swap out the Technical Committee's membership in a way that would be inconsistent with the requirements of section 92-2.5(b). See OIP Op. Ltr. No. 06-02 at 4-5. Nonetheless, because in practice no substitute ever participated in the Technical Committee's gatherings, OIP cannot conclude that the Commission interchanged or replaced members of the Technical Committee. OIP therefore finds that the Technical Committee operated within the bounds of section 92-2.5 and did not violate the Sunshine Law under the specific facts of this case.

Right to Bring Suit to Enforce Sunshine Law and to Void Board Action

Any person may file a lawsuit to require compliance with or to prevent a violation of the Sunshine Law or to determine the applicability of the Sunshine Law to discussions or decisions of a government board. Haw. Rev. Stat. § 92-12 (1993). The court may order payment of reasonable attorney fees and costs to the prevailing party in such a lawsuit. Id.

Where a final action of a board was taken in violation of the open meeting and notice requirements of the Sunshine Law, that action may be voided by the court. Haw. Rev. Stat. § 92-11. A suit to void any final action must be commenced within ninety days of the action. Id.

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