LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LIEUTENANT GOVERNOR

LESLIE H. KONDO
DIRECTOR

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@state.hi.us
WEBSITE: www.state.hi.us/oip

May 28, 2003

Mr. Johnny Brannon
The Honolulu Advertiser
605 Kapiolani Boulevard
Honolulu, Hawaii 96813

Re: Voting in Executive Meetings

Dear Mr. Brannon:

This is in response to your request to the Office of Information Practices ("OIP") for an opinion on the above referenced matter.

ISSUES PRESENTED

I Whether boards subject to the "Sunshine Law" at part I of chapter 92, Hawaii Revised Statutes, may vote in executive meetings.

II. Whether committees of boards subject to the Sunshine Law may vote in executive meetings.

III. Whether boards and committees may vote in a closed meeting on matters involving expenditures of public funds.

IV. Whether votes taken in executive meetings must be disclosed to the public.

V. Whether members of the City and County of Honolulu Police Commission ("Commission") violated the Sunshine Law by not disclosing how they voted on whether to approve a police officer's request that the City pay

for the legal defense of his criminal indictment until the officer and his attorney had been informed of the decision.

BRIEF ANSWERS

I. Yes. Although the Sunshine Law is silent on the specifics of when boards can vote in executive meetings, to require an open vote on matters discussed in executive meetings would, in many circumstances, defeat the purpose of going into an executive meeting. Thus, it would be illogical if boards could enter into executive meetings pursuant to section 92-5, Hawaii Revised Statutes, but could not vote on the matters discussed, except in an open meeting.

II. Yes. The Attorney General has opined that committees of boards subject to the Sunshine Law are also subject to the Sunshine Law, in part, because "[f]ailure to subject meetings of the committees to the same requirements as the parent body would allow a committee to do what the parent itself is prohibited from doing." Haw. Att'y. Gen. Op. No. 85-27. The OIP concurs with the Attorney General's Opinion and believes it is logical to extend the Sunshine Law's provisions on executive meetings to committees also. Thus, committees of boards may enter executive meetings in accordance with sections 92-4 and 92-5, Hawaii Revised Statutes, and may vote in executive meetings when necessary to avoid defeating the lawful purpose of the executive meeting.

III. Yes. Boards need not comply with the Sunshine Law for certain procurement matters. In other circumstances, boards may vote in closed meetings on expenditures of public funds only when such votes properly fall into one of the exceptions to open meetings at section 92-5, Hawaii Revised Statutes.

IV. No. The Sunshine Law allows minutes of executive meetings to be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer. Haw. Rev. Stat. § 92-9 (1993). However, in keeping with the intent of the Sunshine Law, so long as disclosure of votes taken in executive meetings does not defeat the lawful purpose of holding an executive meeting, the votes should be disclosed.

V. No. The Commission's July 31, 2002 hearing was a contested case hearing under the Hawaii Administrative Procedures Act, chapter 91, Hawaii Revised Statutes ("HAPA"). Thus, the decision of members of the

Commission to delay disclosing how they voted on whether to use public funds for the defense of an indicted police officer was not subject to the Sunshine Law.

FACTS

Your request for an opinion arose out of events of July 31, 2002 when, you allege, the Commission voted in a closed session on whether to approve the use of public funds for the legal defense of an indicted police officer. You stated that the Commissioners declined to disclose to you how they voted, as did the Commission's executive director, on the grounds that the police officer and his attorney had not yet been informed of the Commission's decision.

The City and County of Honolulu Department of the Corporation Counsel ("Corporation Counsel") provided comment on behalf of the Commission. The Corporation Counsel advised that the Commission's meeting of July 31, 2002 was part of a contested case hearing governed by HAPA and thus not subject to the Sunshine Law.

DISCUSSION

I. SUNSHINE LAW

The Sunshine Law governs meetings of Hawaii State and county boards[1]. The Sunshine Law mandates that board meetings be public in most instances[2] and allows boards to go into executive meetings only in eight circumstances.[3]

---

[1] "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).

[2] Haw. Rev. Stat. § 92-3 (1993).

[3] **§92-5 Exceptions.** (a) A board may hold a meeting closed to the public pursuant to section 92-4 for one or more of the following purposes:

(1) To consider and evaluate personal information relating to individuals applying for professional or vocational licenses cited in section 26-9 or both;

(2) To 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;

II. VOTING IN EXECUTIVE MEETINGS

You asked when boards subject to the Sunshine Law may vote in executive meetings. To answer this question, the OIP looks to the definition of "meeting," which is "the convening of a board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power." Haw. Rev. Stat. § 92-2 (1993) (emphasis added). It is clear from this definition that a "meeting" includes both deliberating and making decisions. The OIP believes that making decisions is akin to voting.

The Sunshine Law's definition of "meeting" does not differentiate between open, executive, and other types of meetings. Because of this, the OIP believes that board members may deliberate and make decisions in executive meetings. The OIP finds support for this opinion in section 92-5(b), Hawaii Revised Statutes, which states that,"[i]n no instance shall the board make a decision or deliberate toward a decision in an executive meeting on matters not directly related to the purposes specified in subsection [92-5](a). . . ." Haw. Rev. Stat. § 92-5(b) (Supp. 2002) (emphasis added). The language "make a decision" in this section must be read to mean that a board can vote in an executive meeting. Any other interpretation would be illogical.

---

cont . . .

(3) To deliberate concerning the authority of persons designated by the board to conduct labor negotiations or to negotiate the acquisition of public property, or during the conduct of such negotiations;

(4) To consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities;

(5) To investigate proceedings regarding criminal misconduct;

(6) To consider sensitive matters related to public safety or security;

(7) To consider matters relating to the solicitation and acceptance of private donations; and

(8) To deliberate or make a decision upon a matter that requires the consideration of information that must be kept confidential pursuant to a state or federal law, or a court order.

Haw. Rev. Stat. § 92-5(a) (Supp. 2002).

The OIP also looks to the Sunshine Law's legislative history for guidance. The Senate Committee on Judiciary noted the following after hearing a bill to amend the Sunshine Law:

> Your Committee also expressed a concern with an amendment that would limit the ability of a board to make a decision or deliberate toward a decision in executive meetings. A "meeting" is defined in Section 92-2, Hawaii Revised Statutes, as ". . . the convening of a board . . . in order to make a decision or to deliberate toward a decision. . ." If a board cannot deliberate toward or make a decision in an executive meeting, the board will not be able to have any meeting closed to the public. Your Committee amended the bill to clarify that the matters that can be acted on in an executive meeting must be reasonably related to the exceptions for holding an executive meeting."

S. Con. Comm. Rep. No. 889, 11th Leg., 1985 Reg. Sess., Haw. H..J. 1424 (1985). The OIP believes that because the Legislature used the phrase "matters that can be acted on in an executive meeting" it must have intended that boards could deliberate *and* make a decision, i.e.: vote, on matters in executive meetings.

In addition, the Sunshine Law includes a section allowing boards to hold limited meetings that are not open to the public when it is necessary to meet at a location that is dangerous to health or safety. Haw. Rev. Stat. § 92-3.1(a) (Supp. 2002). The Sunshine Law expressly provides that no decisions shall be made at limited meetings. Haw. Rev. Stat. § 92-3.1(b)(3) (Supp. 2002). There is no similar provision prohibiting decisions from being made in executive meetings.

The OIP notes that one of the policies of the Sunshine Law is that "the provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings." Haw. Rev. Stat. § 92-1(3) (1993). Keeping this policy in mind, the OIP nonetheless believes it would be illogical to opine that boards can enter into executive meetings pursuant to section 92-5, Hawaii Revised Statutes, but that they cannot vote in executive meetings on matters discussed therein. To require an open vote on matters discussed in executive meetings would, in many circumstances, defeat the whole purpose of going into an executive meeting. For example, if a board invoked section 92-5(2), Hawaii Revised Statutes, to discuss the discipline of an employee in an executive meeting in order to protect the employee's

constitutional right to privacy and then had to vote in open session on whether to discipline the individual, that employee's privacy rights may be violated.

For these reasons, the OIP opines that boards may vote in executive meetings. Such votes should be limited to matters listed in section 92-5(a), Hawaii Revised Statutes. Further, in keeping with the Sunshine Law's policy on openness, votes should only be held in executive meetings when to do otherwise would defeat the lawful purpose for holding an executive meeting in the first place. Such a determination must be made on a case by case basis.

III. COMMITTEES

You asked when committees of boards subject to the Sunshine Law may vote in executive meetings. The Attorney General has opined that committees of boards subject to the Sunshine Law are also subject to the Sunshine Law. Haw. Att'y. Gen. Op. No. 85-27. In deciding whether meetings of the University of Hawaii Board of Regents standing or select committees are "meeting[s] of a board" under the Sunshine Law's requirement of openness in section 92-3, Hawaii Revised Statutes, the Attorney General found at page 6, that:

> the definition of 'board' in section 92-2(1) cannot be interpreted to permit members of a board to evade the open meeting requirements of the Sunshine Law by merely convening themselves as 'committees,' . . . Failure to subject meetings of the committees to the same requirements as the parent body would allow a committee to do what the parent itself is prohibited from doing."

The OIP concurs. Although the Attorney General Opinion Number 85-27 specifically discusses the requirement that committees of boards subject to the Sunshine Law also follow the Sunshine Law's requirements regarding open meetings, the OIP believes it is logical to extend the Sunshine Law's provisions on executive meetings to committees also. Thus, the OIP is of the opinion that committees of boards may enter executive meetings in accordance with sections 92-4 and 92-5, Hawaii Revised Statutes, for the reasons set forth in the previous section. Accordingly, as with boards as a whole, committees of boards may vote in executive meetings convened pursuant to section 92-5, Hawaii Revised Statutes, when necessary to

prevent frustrating the purpose of the executive meeting. Again, such a determination must be made on a case by case basis.

IV. EXECUTIVE MEETING VOTES ON EXPENDITURE OF PUBLIC FUNDS

You asked when boards and committees may vote in a closed meeting on matters involving expenditures of public funds. As was noted above, boards and committees can only go into executive meetings to discuss matters listed in section 92-5(a), Hawaii Revised Statutes. Generally speaking, should an executive meeting on an item listed in section 92-5(a), Hawaii Revised Statutes, require inclusion of a discussion on public funds, the OIP believes it would be within the board's purview to hold such a discussion.[4] Boards should keep in mind the Sunshine Law's policy of openness and should not enter executive meetings unless necessary. Again, it must be determined on a case by case inquiry whether a board may discuss expenditures of public funds in executive meetings. If there is a question as to the need for an executive meeting, a board should seek advice from its own attorney or the OIP prior to the meeting if possible.

---

[4] Boards should note that government records regarding expenditures of public funds are generally available to the public:

> **§92F-12 Disclosure required.** (a) Any other law to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours:
>
> . . .
>
> (3) Government purchasing information, including all bid results, except to the extent prohibited by section 92F-13;
>
> . . .
>
> (10) Regarding contract hires and consultants employed by agencies: the contract itself, the amount of compensation, the duration of the contract, and the objectives of the contract; . . .

Haw. Rev. Stat. § 92F-12(a) (Supp. 2002).

In addition, Hawaii's Procurement Code allows boards otherwise subject to the Sunshine Law to not follow it in limited circumstances relating to procurement:

> **§ 103D-105 Public access to procurement information.** Government records relating to procurement shall be available to the public as provided in chapter 92F. **Part I of chapter 92 shall not apply to discussions, deliberations, or decisions required to be conducted or made confidentially under this chapter.**

Haw. Rev. Stat. § 193D-105 (Supp. 2002) (emphasis added). See also Haw. Rev. Stat. § 103D-303 (Supp. 2002).[5]

V. DISCLOSURE OF EXECUTIVE MEETING VOTES

You asked when must votes taken in executive meetings be disclosed to the public. The Sunshine Law requires that meeting minutes contain "a record, by individual member, of any votes taken;" and that :

> minutes shall be public records and shall be available within thirty days after the meeting except where such disclosure would be inconsistent with section 92-5; provided that minutes

---

[5] The Procurement Code also requires the following with regard to competitive sealed proposal procurement processes:

> (d) Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals shall be prepared in accordance with rules adopted by the policy board and shall be open for public inspection after contract award.
>
> . . .
>
> (f) Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. **In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.**
>
> . . .

Haw. Rev. Stat. § 103D-303 (Supp. 2002) (emphasis added).

> of executive meetings may be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer.

Haw. Rev. Stat. § 92-9 (1993). This section requires that minutes be kept for all board meetings, that they include a record by member of votes taken, and that minutes of executive meetings may be only be withheld from public disclosure for so long as disclosure would defeat the lawful purpose of an executive meeting.

The Attorney General has noted that the Sunshine Law is not clear with respect to how board members should conduct themselves after deliberating and making decisions in executive session. Haw. Att'y. Gen. Op. No. 94-01.

In Attorney General Opinion 94-01, the Attorney General discussed whether members of the Board of Education could disclose whether they voted for Dr. Herman Aizawa's appointment as Superintendent of Education. The Attorney General opined that members of the Board of Education:

> are free to discuss what occurred during the executive session as long as their discussion is not inconsistent with and does not defeat the purpose of the executive session. That is, as a general matter, the Board members may not disclose matters affecting Dr. Aizawa's or any other applicants' privacy, which is the reason for convening the executive session under Haw. Rev. Stat. § 92-5(a)(2) in the first place.

Haw. Att'y. Gen. Op. No. 94-01. The Attorney General reached this conclusion by following rules of statutory construction requiring that when provisions of a comprehensive statute are unclear, they should be construed by reading them in context with the entire statute and in light of the general legislative scheme. Id. Thus, the Attorney General found that board members can disclose some matters deliberated on or decided in executive session. Id. The OIP agrees with the Attorney General and opines that, if a board member can disclose how he or she voted in an executive meeting without frustrating the purpose of the meeting, the vote should be disclosed. This should be decided on a case-by-case inquiry.

VI. POLICE COMMISSION MEETING OF JULY 31, 2002

You asked whether the decision of members of the Commission and its executive director to decline to say how they voted on whether to approve the use of public funds for the legal defense of an indicted police officer on the grounds that the police officer and his attorney had not yet been informed of the decision violated the Sunshine Law.

When a police officer is criminally prosecuted "for acts done in the performance of the officer's duty as a police officer," the county is to employ and pay for the officer's defense. Haw. Rev. Stat. § 52D-8 (1993). The Commission is required to make a conclusive[6] decision, in consultation with the Corporation Counsel, as to whether an act for which an officer is being prosecuted was done in the performance of the officer's duty, thus entitling the officer to be represented by counsel provided by the county. Haw. Rev. Stat. § 52D-9 (1993).

The Commission's Rule 11[7] requires that hearings such as the one on July 31, 2002 be conducted in accordance with Alejado v. City and County of Honolulu, 89 Haw. 221 (1998) ("Alejado"). The Alejado Court ruled that the Appellant, a police officer with criminal charges pending, had a property interest or legal entitlement under section 52D-8, Hawaii Revised Statutes, in legal representation by the City which entitled him to HAPA's adjudicatory procedures[8] at the Commission before he could be deprived of that interest. Alejado at 230-31. The Alejado Court stated that the Commission must follow HAPA in order to satisfy the Appellant's due process

---

[6] This does not preclude judicial review. See Alejado v. City and County of Honolulu, 89 Haw. 221, 231 (1998).

[7] **RULE 11. COURSE AND SCOPE OF EMPLOYMENT DETERMINATION**
The purpose of this section is to establish procedural rules pursuant to Chapter 91 of the Hawaii Revised Statutes and Alejado v. City and county of Honolulu, et. at., [sic] 89 Haw 221, 971 P.2d 310 (1998'), contested case hearing, for the Honolulu Police Commission to follow in determining whether a police officer's actions were done in the course and scope of employment, so as to entitle the police officer to legal representation provided by the City and County of Honolulu as stated in section 52D-8 and 52D-9 of the Hawaii Revised Statutes. . . .

Rules of the Honolulu Police Commission Rule 11.

[8] Such an adjudicatory procedure under HAPA is a "contested case," which means "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." Haw. Rev. Stat. § 91-1(5) (1993).

rights. Id. at 230. The Court further ruled that while the Appellant was given reasonable notice of rehearing and allowed to present evidence and argument to the Commission, he should have been afforded an agency decision on the record and a written decision accompanied by findings of fact and conclusions of law[9]. Id. at 231.

Based on the decision in Alejado, the OIP agrees that the Commission's hearing on July 31, 2002 was a contested case hearing under HAPA and not held pursuant to the Sunshine Law. Contested cases are not subject to the Sunshine Law:

> **§ 92-6 Judicial branch, quasi-judicial boards and investigatory functions; applicability.** (a) This part shall not apply:
>
> . . .
>
> (2) To adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9, or authorized by other sections of the Hawaii Revised Statutes. . . .

Haw. Rev. Stat. § 92-6 (Supp. 2002). Because the hearing of July 31, 2002 was not subject to the Sunshine Law, there was no Sunshine Law violation.

The Corporation Counsel asserted that, at the time of your request, the Commission had not completed its "written decision accompanied by findings of fact and conclusions of law" as required by HAPA and Alejado. The Commission's decision was not final until adoption of its Findings of Fact and Conclusions of Law on September 9, 2002. Disclosure of government records is governed by the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"). Section 92F-13(3), Hawaii Revised Statutes, states that agencies need not disclose records which, if disclosed, would cause the frustration of a legitimate government function. The OIP has opined that drafts are protected under the "frustration" exception. See OIP Op. Ltr. No. 91-22 (Nov. 25, 1991). Until the Commission's written decision on its July 31, 2002 hearing was final, the Commission was entitled to withhold disclosure of any drafts under the UIPA's "frustration" exception.

---

[9] See Haw. Rev. Stat. §§ 91-9 to 91-13 (1993).

CONCLUSION

Boards and their committees may vote in executive meetings, so long as the vote is on a matter listed in section 92-5, Hawaii Revised Statutes, and when necessary to avoid defeating the lawful purpose of the executive meeting.

Boards need not comply with the Sunshine Law for certain procurement matters. Otherwise, boards may vote in executive meetings on expenditures of public funds only when such votes properly fall into one of the exceptions to open meetings at section 92-5, Hawaii Revised Statutes.

In keeping with the intent of the Sunshine Law, so long as disclosure by board members of their votes in executive meetings does not defeat the lawful purpose of holding an executive meeting, the votes should be disclosed.

The Commission's July 31, 2002 hearing was a contested case hearing under HAPA. Thus, the decision of members of the Commission to delay disclosing how they voted on whether to use public funds for the defense of an indicted police officer was not subject to the Sunshine Law.

Very truly yours,

Carlotta Dias
Staff Attorney

APPROVED:

Leslie H. Kondo
Director

CMD: ankd

cc: Mr. Ronald I. Taketa, Chair, Honolulu Police Commission
Mr. Tony Sommer
Mr. Duane W. H. Pang, Deputy Attorney General