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

July 14, 2003

Mr. Al Konishi
County Clerk
Office of the County Clerk, County of Hawaii
Hawaii County Building
25 Aupuni Street
Hilo, Hawaii 96720

Mr. Lincoln S.T. Ashida
Corporation Counsel
Office of the Corporation Counsel, County of Hawaii
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720

Re: Executive Meetings – Attendance by Parties Other Than Council or Board Members

Dear Mr. Konishi and Mr. Ashida:

This is in response to the request from the Office of the County Clerk, County of Hawaii to the Office of Information Practices ("OIP") for an opinion concerning whether non-Council members are authorized to attend Hawaii County Council ("Council") executive meetings closed to the public. The Office of the Corporation Counsel, County of Hawaii ("Corporation Counsel") also requested advice as to whether more than one attorney from its office may attend executive meetings of the Council.

ISSUES PRESENTED

I. Whether the Sunshine Law authorizes individuals, other than board members and legal counsel, to attend executive meetings closed to the public.

II. Whether, under the Sunshine Law, more than one attorney representing a board may attend an executive meeting.

BRIEF ANSWERS

I. Yes. When, in order to accomplish the purpose of convening an executive meeting, a board requires the assistance of non-board members, a board is authorized under the Sunshine Law to summon the non-board members to participate in the closed board meeting.

II. Yes. More than one of a board's attorneys may attend an executive meeting to advise the board concerning the board's powers, duties, privileges, immunities, and liabilities.

FACTS

On January 30, 2002, Mr. Al Konishi, County Clerk, County of Hawaii, requested an opinion from the OIP relating to attendance at Council executive meetings, specifically whether the Sunshine Law is violated when non-board members, other than legal counsel, are present during an executive meeting. Mr. Konishi advised that it is his belief that the Council has discretion to allow individuals other than members of the Council to be present, "so long as their presence and participation advances or facilitates the purpose of the executive session."

On March 6, 2002, Mr. Lincoln S.T. Ashida, Corporation Counsel, County of Hawaii, wrote to the OIP, supplemented Mr. Konishi's request and requested clarification of whether more than one attorney from his office can participate in executive meetings.

Both Mr. Konishi's and Mr. Ashida's requests appear to arise from a letter from Mr. Del Pranke questioning the Council's practices of (1) allowing non-council members to attend executive meetings and (2) permitting more than one attorney from the Office of the Corporation Counsel to attend executive meetings. A copy of Mr. Pranke's letter was provided to the OIP.

DISCUSSION

I. SUNSHINE LAW

The "Sunshine Law," Hawaii's open meetings law, at part I of chapter 92, Hawaii Revised Statutes, sets out the public policy to be implemented by the law and guides our interpretation:

> **§ 92-1 Declaration of policy and intent.** In a democracy, the people are vested with the ultimate decision-making power. Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore, the legislature declares that it is the policy of this State that the formation and conduct of public policy -the discussions, deliberations, decisions, and action of governmental agencies-shall be conducted as openly as possible. To implement this policy the legislature declares that:
>
> (1) It is the intent of this part to protect the people's right to know;
>
> (2) The provisions requiring open meetings shall be liberally construed; and
>
> (3) The provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings.

Haw. Rev. Stat. § 92-1 (1993).

The Sunshine Law requires that all meetings[1] of the Council[2] be open to the public, unless the Council votes, at an open meeting, to hold an

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[1] "Meeting" means "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(3) (1993).

[2] References herein to "Council" and "board" are interchangeable for the purposes of the interpretation of the Sunshine Law, which defines "board" as "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

executive meeting for eight limited purposes. See Haw. Rev. Stat. § 92-3, 92-4 (1993). Those limited purposes are set out at section 92-5, Hawaii Revised Statutes.[3] Neither of your letters raises an issue as to the appropriateness of the Council convening an executive meeting and, therefore, that issue is not addressed in this letter.

II. WHO MAY ATTEND EXECUTIVE MEETINGS

The Sunshine Law does not directly address the issue of who may attend executive meetings, but it does authorize "executive meeting[s] closed to the public." Haw. Rev. Stat. § 92-4 (1993). Reference to the eight limited purposes for which meetings may be closed to the public, however, makes it clear that, although not explicitly stated, the statute implicitly identifies certain non-board members who are required to attend to accomplish a meeting's purpose.

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specific matters and which is required to conduct meetings and to take official actions." Haw. Rev. Stat. § 92-2(1) (1993).

[3] (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;

(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 (Supp. 2002).

For example, section 92-5(a)(4), Hawaii Revised Statutes, authorizes the Council to consult in an executive meeting with its attorney, a non-council member. Similarly, a reasonable interpretation of section 92-5(a)(3), Hawaii Revised Statutes, would allow a non-board member negotiator to attend an executive meeting to, for instance, advise the board as to the progress of on-going labor negotiations. Section 92-5(a)(1), Hawaii Revised Statutes, authorizes boards to consider personal information relating to professional and vocational licensees and implicitly authorizes necessary Department of Commerce and Consumer Affairs' personnel and licensees to attend. Section 92-5(a)(2), Hawaii Revised Statutes, permits the Council to consider certain personnel matters in an executive meeting. For the Council to effectively consider such matters, non-council members must be allowed to attend to provide relevant information and recommendations. Any different interpretation would render section 92-5(a), Hawaii Revised Statutes, meaningless.

Other jurisdictions have similarly interpreted executive meeting statutes to permit non-board members to attend meetings closed to the public. For instance, the question of whether a school superintendent's presence at a meeting caused the meeting to lose its "executive" character was addressed in Dathe v. Wildrose Sch. Dist., 217 N.W.2d 781 (N.D. 1994). The North Dakota court noted that, so long as the public is excluded and only those selected persons whom the board invites attend, the meeting retains its "executive" character. The court stated:

> We believe that the presence of the superintendent was proper and that no error was committed in allowing the superintendent to state the reasons for his recommendation that the contracts not be renewed. Such a procedure would seem to be more conducive to fairness than, for example, merely reading a statement from the superintendent in his absence.

Id. at 787.[4]

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[4] In 1997, after the Dathe case was decided, North Dakota amended its statute to define closed meeting: "all or part of an exempt meeting that a public entity in its discretion has not opened to the public, although any person necessary to carry out or further the purposes of a closed meeting may be admitted." N.D. Cent. Code § 44-04-17.1.1. (2001).

For reasons similar to those expressed by the Dathe court, the OIP is of the opinion that the Council has, and boards and commissions have, discretion to select non-council or non-board members to attend executive meetings where necessary to assist in considering an agenda item. The OIP believes, as did the Dathe court, that boards can more effectively conduct their affairs if they can obtain information in person in an executive meeting, rather than relying exclusively on written submissions from agency personnel. The OIP further concludes that such interpretation is consistent with the intent and purpose of section 92-5, Hawaii Revised Statutes. As discussed above, the statute clearly contemplates, expressly and implicitly, that non-board members will be participants in certain meetings closed to the public. The OIP also extends this interpretation to authorize a board to summon a board's administrative staff, or other necessary individuals, such as a court reporter, to attend executive meetings to provide administrative support for tasks such as taking of minutes of executive meetings.[5]

Nevertheless, a board's discretion to designate who may attend an executive meeting is not unlimited. The OIP's conclusion as set forth above is based upon the fact that the statute designates, expressly or implicitly, the identity of certain members who are permitted to attend, at the board's discretion, executive meetings. The OIP therefore cautions boards to not invite non-board members to attend executive meetings unless their presence is necessary to assist the board on one of the items listed in section 92-5(a), Hawaii Revised Statutes.

Thus, boards' attorneys, agency personnel, and persons who have some special knowledge,[6] expertise or perform a function that relates to the subject of the executive meeting in question are authorized to attend executive meetings. As the public's business must be conducted in public, boards must ensure that an executive meeting does not become a meeting to which only a portion of the public is admitted. If a non-board member, including the board's attorney, remains in an executive meeting after his or her presence is no longer required for the meeting's purposes, the executive meeting may lose its "executive" character. The result may be a Sunshine Law violation.

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[5] Section 92-9(a), Hawaii Revised Statutes, requires a board, in executive meetings, to take minutes of the meeting. The OIP cannot conclude that the Legislature intended that board members themselves perform the administrative function of taking the minutes or performing other administrative functions imposed by the board or by other laws.

[6] Included as individuals with special knowledge would be informants or witnesses with information relevant to the stated purpose of the meeting.

Therefore, the OIP opines that non-members should remain in the meeting only so long as their presence is essential to the agenda item being considered in the executive meeting. Once the agenda item for which the non-board member's participation is needed has been concluded, the non-board member should be excused, and the meeting should continue only with those non-board members whose presence is necessary and permitted by section 92-5(a), Hawaii Revised Statutes.

The OIP recommends making a record of the reason a non-board member is summoned to attend an executive meeting. The record will assist the public to evaluate whether or not the non-board member's presence is necessary.[7] This is especially the case when the justification for the presence of that individual is not apparent. The best practice would be to make the record at the time when the board decides to convene an executive meeting, i.e., before the non-board member is summoned to participate in the executive meeting. For the same reason, if there is a dispute as to whether or not a non-board member should participate in an executive meeting, the matter can be resolved by means of a motion to permit or disallow the attendance of the non-member. Therefore, the OIP recommends that boards both (1) make a record, when advisable, of the reason a non-board member is present in an executive meeting, preferably before the meeting; and (2) if there is a dispute as to whether a particular individual need attend a board meeting, the matter be settled by board vote. The OIP believes these suggested procedures will diminish the likelihood of disputes concerning whether or not an individual was authorized to participate in an executive meeting.

III. ATTORNEYS ATTENDANCE AT EXECUTIVE MEETINGS

Mr. Ashida relayed a concern raised by Mr. Pranke's letter that the Council allows more than one attorney to be present in executive meetings when they are presenting different cases. Mr. Pranke suggests that a strict reading of section 92-5(a)(4), Hawaii Revised Statutes, would only allow the Council to meet with its "own" attorney; thus if the Corporation Counsel has appointed one attorney to the Council, then only that attorney would be allowed to meet in an executive meeting with the Council. The Corporation

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[7] The OIP recognizes that public disclosure of this information may defeat the lawful purpose of the executive meeting. If that is the case, disclosure would not be warranted until the need for confidentiality has passed.

Counsel's practice is to allow multiple attorneys from his office to attend executive meetings, primarily for supervisory and learning purposes.

A. More than One Corporation Counsel Attorney Can Attend an Executive Meeting

As the OIP explained above, a board's attorney may attend an executive meeting when the meeting is held to "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) (Supp. 2002). In this case, the Charter of the County of Hawaii ("Charter") establishes that the Corporation Counsel serves as the Council's chief legal advisor and legal representative. Charter, § 6.2.1 (2000). While not explicitly stated in the Charter, the OIP believes that the Corporation Counsel is entitled to delegate to other attorneys in his office ("deputies") the responsibility of serving as the Council's attorney on certain matters. In other words, as with a private law firm, any of the deputies may serve as the Council's attorney.[8] This is recognized by the Hawaii Rules of Professional Conduct: "[w]ith respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct." Comment 2 to Haw. Rules of Prof'l Conduct R. 1.10 (2001). Thus, the OIP concludes that the Office of the Corporation Counsel, and not one particular designated deputy, is the board's attorney. Although the word "attorney" in section 92-5(4), Hawaii Revised Statutes, is in the singular, the OIP does not interpret the Sunshine Law to require that a board only consult with one particular deputy or that no more than one attorney can be present during an executive meeting. Such a reading of the statute would ignore the reality of how law firms in general, and the Office of the Corporation Counsel in particular, operate. The OIP notes that it is a common practice for more than one attorney to be assigned to a particular matter. And, if a matter involves complex legal issues, several attorneys may be assigned to the matter. Moreover, the Charter authorizes the employment of special counsel for "any

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[8] The OIP did not locate any Hawaii case law applying the concept of a "firm" to the counties' offices or departments of corporation counsel. However, Hawaii courts have addressed the concept in the context of the attorney general's and public defender's office and ensuring that confidential information is not interchanged. State v. Klattenhoff, 71 Haw. 598, 603-604, 801 P.2d 548, 551 (1990) (the Attorney General's unique status permits the representation of conflicting interests so long as independent representation is assured.); White v. Board of Education, 54 Haw. 10, 16, 501 P.2d 358, 363 (1972) ("AG who participated as an adversary at a dismissal hearing against the school board could not then advise the board in its decision-making proceedings involving the same case."); State v. Pitt, 77 Haw. 374, 380, 884 P.2d 1150, 1156 (1994) (the office of the public defender acts as a "firm.")

special matter presenting a real necessity." Charter § 6-2.5 (2000). The OIP recognizes that the Council may need to consult with both the special counsel and the Corporation Counsel or assigned deputy. Thus, the OIP concludes that, when necessary, all attorneys assigned to the matter for which the executive meeting is convened are authorized to attend to advise the board on its "powers, duties, privileges, immunities and liabilities." Haw. Rev. Stat. § 92F-5(4) (Supp. 2002). Any other interpretation of the term "attorney" in section 92-5(4), Hawaii Revised Statutes, would be cumbersome for the Council to implement and would not advance the purpose of the open meeting exception to allow confidential consultation with a board's attorney. The OIP simply cannot conclude that the interpretation of section 92F-5(4), Hawaii Revised Statutes, advanced by Mr. Pranke is reasonable or was the Legislature's intention. Likewise, the OIP can see no reason why the Sunshine Law would prohibit a supervisory attorney or an attorney newly assigned to a matter to be present for learning purposes.

Besides representing the Council, the Corporation Counsel represents all county agencies, and all officers and employees in matters related to their official powers and duties. Charter, § 6-2.3 (2000). Thus, there may be times when there could be a potential conflict of interest between the Council and a county agency, employee or officer. See In re Water Use Permit Applications, 94 Haw. 97, 9 P.3d 409 (2000); Chun v. Board of Trustees of the Employees' Retirement Sys., 87 Haw. 152, 952 P.2d 1215 (1998). In such cases, the Rules of Professional Responsibility direct the Corporation Counsel to appropriately screen[9] its potential deputies to avoid any potential conflict.[10] Mr. Ashida advised the OIP that, although the Corporation Counsel encountered "conflict" situations, his office complies with rule 1.10(d) of the Hawaii Rules of Professional Responsibility which requires that a government lawyer who has a conflict of interest be screened from participation in the matter.

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[9] An attorney is "screened" when an ethical wall is put in place that "protects client confidences by preventing one or more lawyers within an organization from participating in any matter involving that client." Black's Law Dictionary 573 (7th Ed. 1999).

[10] A case-by-case inquiry has been held to be appropriate in the context of a conflict within the public defender's office: "where the practice of the attorneys in the office is so separated that the interchange of confidential information can be avoided or where it is possible to create such separation, the office is not equated with a firm and no inherent ethical bar would be present to the office's representation of antagonistic interests." State v. Pitt, 77 Haw. 374, 380, 884 P.2d 1150, 1156 (1994), citing Graves v. State, 94 Md.App. 649, 669-70, 619 A.2d 123, 133 (1993).

B. Attorneys' Presence Must Be Required to Accomplish the Essential Purpose of the Executive Meeting

The Sunshine Law's declaration of policy and intent makes it clear that the Legislature intended that policy-making by boards be conducted in public meetings, to the extent possible. See Haw. Rev. Stat. § 92-1 (1993). Thus, attendance by the Council's attorneys at executive meetings must conform to that policy.

The OIP believes that the "executive" nature of the meeting would be compromised if an attorney is present when his or her attendance is not necessary. For instance, if there were two matters on an agenda and one deputy was exclusively assigned to each matter, both deputies should not attend the entire executive meeting. If both attended the entire executive meeting, then, at any one time, one deputy's presence would not be necessary to further the purpose for which the executive meeting was convened. And, the meeting would not retain its "executive" character, as a non-council member would be unnecessarily present. Strictly construing the Sunshine Laws exceptions to open meeting requirements, as we are required to do, only the attorney or attorneys assigned to the matter under discussion should attend, and should remain only for so long as essential to accomplish the purpose of the meeting.

The OIP recommends that, once the Council receives the benefit of the attorney's advice, it should discuss the courses of action in public, and vote in public, unless to do otherwise would defeat the lawful purpose of holding the executive meeting. See OIP Opinion Letter Number 03-07 at 6 (May 28, 2003). To do otherwise is contrary to the Sunshine Law's policy requiring that the "conduct of public policy – the discussions, deliberations, decisions, and action of governmental agencies – shall be conducted as openly as possible." Haw. Rev. Stat. § 92-1 (1993).

CONCLUSION

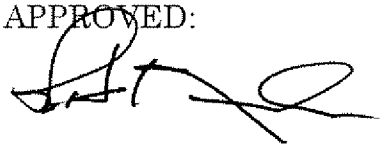
Under the Sunshine Law, the Council, as do all boards and commissions, has discretion to summon non-council members to attend executive meetings so long as the presence of those summoned is necessary for the Council to carry out the purpose of convening the executive meeting or necessary for administrative purposes.

The Sunshine Law authorizes more than one attorney assigned to the Council to attend an executive meeting when discussion of matters concerns its powers, duties, privileges, immunities and liabilities. Only those attorneys necessary to a discussion of the particular matter before the Council should attend. The attorneys should remain in the executive meeting only so long as necessary to effectuate the purpose of the executive meeting.

Very truly yours,

Susan R. Kern
Staff Attorney

APPROVED:



Leslie H. Kondo
Director

SRK: ankd

cc: Mr. Del Pranke