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

September 11, 2003

Mr. Al Konishi
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: Attorneys' Presence – Required to Accomplish the Essential Purpose of an Executive Meeting

Dear Messrs. Konishi and Ashida:

This letter is written in response to Mr. Ashida's request for clarification of the Office of Information Practices' ("OIP") Opinion Letter Number 03-12 concerning attendance at a board's executive meetings by the board's attorney.

ISSUE PRESENTED

Whether a board's attorney is authorized under part I of chapter 92 ("Sunshine Law") to attend executive meetings when the purpose of a particular meeting is other than to consult with the board concerning a

board's "powers, duties, privileges, immunities, and liabilities." Haw. Rev. Stat. § 92-5(4) (Supp. 2002).[1]

BRIEF ANSWER

Yes. As long as the attorney's presence is essential to advise the board, a board may request that its attorney attend executive meetings convened pursuant to the Sunshine Law. The Sunshine Law authorizes a board's attorney to attend an executive meeting, should the meeting be convened for an authorized purpose and should the board need its attorney's advice concerning subject matter related to that authorized purpose. A board is also authorized by the Sunshine Law to seek its attorney's assistance to ensure that it deliberates or decides only matters directly related to the purpose for which an executive meeting is convened.

FACTS

Mr. Ashida has asked whether the OIP Opinion Letter Number 03-12 should be interpreted to preclude a board's attorney from being present for the entire executive meeting, when the purpose of a particular meeting is other than that set out in section 92-5(4), Hawaii Revised Statutes ("HRS"). Mr. Ashida advised the OIP that there are legal questions and issues that frequently arise during an executive meeting convened for a purpose other than to consult with the board's attorney concerning its "powers, duties, privileges, immunities, and liabilities[.]" According to Mr. Ashida, in the County of Hawaii, it has been some boards' practice for the board's attorney to remain present during and throughout the executive meeting to advise the board concerning those matters, as well as issues relating to whether the Sunshine Law authorizes certain board action to be conducted in a closed meeting.[2]

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[1] As quoted in the OIP Opinion Letter Number 03-12, section 92F-5(a), HRS lists eight circumstances when a board is entitled to hold a meeting closed to the public, one of which is to consult with its attorney "on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities[.]" There are seven other distinct purposes recognized by the Sunshine Law as providing the authority for an executive meeting closed to the public.

[2] The OIP received an e-mail from Mr. Horace H. Hara, Chair, Hawaii County Police Commission, asking whether Mr. Ashida could attend the Police Commission's executive meetings. Mr. Hara indicated that, for example, the Police Commission questions complainants, witnesses and police officers in executive meetings, and that Mr. Ashida's presence is helpful when legal questions arise and to ensure that the Police Commission acts in accordance with the Sunshine Law.

DISCUSSION

In OIP Opinion Letter Number 03-12, the OIP advised that attendance by a board's attorney at an executive meeting would compromise the "executive" nature of the meeting if the attorney's presence is not necessary to further the purpose for which the executive meeting is convened. In particular, the OIP cautioned against having two deputy corporation counsel present in an executive meeting when one deputy's presence is not necessary. The reason for that caution is that the Sunshine Law would be violated if an executive meeting became a meeting to which only a portion of the public is invited.[3] The OIP opined that an executive meeting retains its "executive" character so long as non-board members, including a board's attorneys, attend to provide relevant information and recommendations. OIP Op. Ltr. No. 03-12 at 6 (July 14, 2003). But, if an individual is present and not providing relevant information or recommendations, the meeting loses its "executive" character and becomes a meeting to which only a portion of the public is invited.

The OIP's statement that the board's attorney should not remain in an executive meeting after his or her presence is no longer required addressed the situation when the attorney's presence is not necessary to accomplish the purpose of the executive meeting. To illustrate further, supposing there were five different deputies from the Corporation Counsel's Office, each deputy being assigned to represent the County with respect to only one of the five different lawsuits. During an executive meeting, when the first of the five lawsuits is discussed and if only one deputy is designated to represent the Council on that matter, the presence of only that deputy is necessary to assist the Council. The other four deputies who have no involvement in the lawsuit should remain outside of the executive meeting until such time as the particular lawsuit to which the deputy is assigned is discussed. The other deputies not assigned to that particular lawsuit should remain outside of the executive meeting because the Council does not require their assistance to make a decision concerning that lawsuit.

On the other hand, Mr. Ashida's question involves matters not addressed in the OIP Opinion Letter Number 03-12 – it involves whether the Sunshine Law authorizes a board's attorney to be present during an executive meeting only when the meeting concerns the board's "powers,

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[3] The Sunshine Law requires that: "[e]very meeting of all boards shall be open to the public and all persons shall be permitted to attend any meeting unless otherwise provided in the constitution or as closed pursuant to sections 92-4 and 92-5." Haw. Rev. Stat. § 92-3 (1993).

duties, privileges, immunities, and liabilities[.]" Haw. Rev. Stat. § 92-5(4) (Supp. 2002). Mr. Ashida articulated two separate circumstances. The first circumstance concerns whether it is appropriate for a board's attorney to participate in an executive meeting convened for ***any*** one of the eight authorized executive meeting purposes. The second situation also relates to whether a board's attorney can be present in an executive meeting convened for any one of the eight authorized executive meeting purposes, but involves the giving of advice solely to assist the board in limiting its discussion to publicly noticed items on the board's agenda for that particular meeting. See OIP Op. Ltr. No. 03-08 at 5 (June 18, 2003).

As noted above, the Sunshine Law authorizes executive meetings in eight circumstances. For instance, a board is authorized to meet in private to evaluate personal information relating to an individual applying for professional or vocational licensing. See Haw. Rev. Stat. § 92-5(1) (1993). The fact that the attorney is present in the executive meeting does not mean that the executive meeting loses its "executive" character, so long as the attorney's presence is necessary for the board to accomplish the task for which it convened the executive meeting. Likewise, a board is authorized to meet in private to deliberate concerning information that is required to be kept confidential pursuant to state or federal law, or a court order as authorized by section 92-5(a)(8), HRS. The board may need its attorney's assistance to explain the legal ramifications of various courses of conduct available to the board. Another example would be if a board were meeting with its negotiator concerning labor negotiations or the acquisition of public property, as authorized pursuant to section 92-5(a)(3), HRS. The assistance of the board's attorney may be required to advise the board and the negotiator whether the civil service laws or procurement laws authorize certain contemplated courses of action. The OIP can conceive of many additional situations when the knowledge and counsel of an attorney assigned to a board is necessary to assist the board to perform its duties. Thus, the OIP concludes that, when necessary, a board is authorized to consult with its attorney in an executive meeting convened for any of the purposes listed in section 92-5(a), HRS, so long as the consultation is necessary to achieve the authorized purpose of the executive meeting.

The second circumstance has to do with compliance with section 92-5(b), HRS, which provides, in relevant part:

> In no instance shall the board make a decision or deliberate toward a decision in an executive meeting on matters not directly related to purposes specified in subsection (a).

In some instances, a board may require its attorney's assistance to ensure that it confines its discussions to topics directly related to the purposes of the executive meeting, as required by section 92-5(b), HRS.

The determination of whether an attorney's presence in an executive meeting is essential to assist a board to comply with the above statute must be made on a case-by-case basis by the board itself, taking into account various factors. Those factors include, but are not limited to, the board's familiarity with the Sunshine Law, more particularly the portions of the statute articulating the types of matters that may be discussed in an executive meeting. The presence of the board's attorney will assist both the board and the public by preventing a board from inadvertently straying into discussion or deliberation of a topic not directly related to the executive meeting's purpose.[4] In such circumstances, the board would be consulting with its attorney concerning its powers and duties under the Sunshine Law. So long as the attorney's presence is essential to accomplish the purpose of the meeting, the attorney's presence in an executive session does not violate the Sunshine Law.

Thus, a board is authorized to summon attorneys to executive meetings, so long as the board ensures that it is not meeting with its attorneys in order to circumvent the spirit or requirements of the Sunshine Law. See Haw. Rev. Stat. § 92-5(b) (Supp. 2002).

CONCLUSION

Under the Sunshine Law, when a board makes a determination that the presence of its attorneys is essential to advise the board on issues that may arise about the board's authority under the Sunshine Law, and its legal

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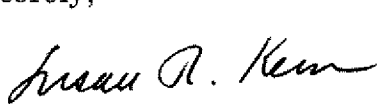
[4] The attorney's presence can also ensure that the board complies with section 92-7, HRS, by ensuring that the board limits its discussion to publicly noticed items on the board's agenda for that particular meeting. See OIP Op. Ltr. No. 03-08 at 5 (June 18, 2003).

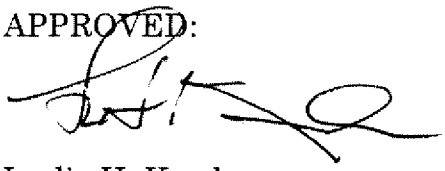
rights and responsibilities, including issues that may subject a board to liability, a board's attorney is authorized to attend the executive meeting.

Sincerely,



Susan R. Kern
Staff Attorney

APPROVED:



Leslie H. Kondo
Director

SRK: ankd

cc: Mr. Horace H. Hara
Mr. Del Pranke