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OPINION

Requester: Chairperson, Civil Service Commission
Board: Maui County Salary Commission
Date: April 13, 2007
Subject: Sufficiency of Agenda (S RFO-G 07-59)

REQUEST FOR OPINION

Requester seeks an advisory opinion on whether the Maui County Salary Commission (the "Commission") provided sufficient notice under part I of chapter 92, Hawaii Revised Statutes ("HRS") (the "Sunshine Law"), to allow its action to approve proposed salaries for certain Maui County officers set forth in the Commission's revised comprehensive salary model (the "Revised Salary Model") at its meeting held on January 12, 2007.[1]

Unless otherwise indicated, this opinion is based upon the facts presented in Requester's letter to the Office of Information Practices ("OIP") dated March 8, 2007 and attachment; the Commission's January 12 meeting agenda (the "Agenda"); and the January 12 meeting minutes.

QUESTION PRESENTED

Whether the Commission could properly take action on an agenda item listed where the Agenda did not expressly indicate that a decision would be made on that item or the nature of the decision.

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[1] Requester identifies the action taken as approval of the Revised Salary Model. According to the Commission's minutes for the January 12 meeting, however, the action taken was, among other things, approval of the proposed salaries listed in the Revised Salary Model.

BRIEF ANSWER

Yes. The Commission's agenda provided sufficient notice of the subject matter of the item to allow the Commission's action to approve an issue arising directly under the item listed. An agenda must provide notice of the matters that the Commission intends to consider at its meeting by listing the matters with enough detail to reasonably allow the public to understand the subject of the matter to be considered. The agenda does not need to specifically notice that a decision may be made on an item or the exact nature of that decision as long as it reasonably arises under the subject matter listed.

FACTS

The Revised Salary Model contains various schedules to assist the Commission in setting the salaries for Maui County's executive directors and deputy directors. The schedules provide data reflecting, among other things, comparisons of salaries among those officers and other neighbor isle officers, and weighted salary data based upon the cost of living index and budget and employee responsibility. The Revised Salary Model is used to determine, and contains, the Commission's proposed salaries for the Maui County officers.

The Commission's January 12 meeting agenda listed the Revised Salary Model as Item IV and included three more specific subtopics without stating that action would be taken with respect to either the main topic or the three subtopics:

IV. Revised Salary Model

A. Follow-up discussion of department operational funds that have equivalent personnel counts attached
B. Finalize Budget & Employees Method section
C. Review and discuss outstanding issues relating to revised salary model

After hearing public testimony on this item at the January 12 meeting, the Commission voted to approve the proposed salaries as they were currently listed in the Revised Salary Model, "writing a letter to the other commissions suggesting that they establish representatives to meet with the Salary Commission and its Model Subcommittee and restating that the review of the model is an ongoing process, and restating that in the future the Commission will take into consideration all requests and will continue to consult with the commissions and create a more formal process for consultation." Requester subsequently asked OIP whether the Commission's posted January 12 agenda provided sufficient notice to the public under the Sunshine Law that the Commission intended to vote on the executive pay increases proposed in the Revised Salary Model.

DISCUSSION

The Sunshine Law requires a board to file written public notice of any meeting at least six calendar days before the meeting. Haw. Rev. Stat. § 92-7(a), (b) (Supp. 2006). The notice must include an agenda that "lists all of the items to be considered" at that meeting. Haw. Rev. Stat. § 92-7(a). The clear purpose of the Sunshine Law's notice provisions is to give the public the opportunity to exercise its right to know and to scrutinize and participate in the formation and conduct of public policy. See Haw. Rev. Stat. §§ 92-1, -3 (1993).

Given this purpose, OIP interprets section 92-7(a) to require that an agenda list each item a board intends to consider with sufficient detail to allow a member of the public to reasonably understand the subject of the matter the board intends to consider at the meeting so that he or she can decide whether to attend and to participate through oral or written testimony. See OIP Op. Ltr. No. 03-22; OIP Op. Ltr. No. 07-02; see also Op. Att'y Gen. No. 85-2 at 4 (all matters should "be listed on the agendas . . . to give interested members of the public reasonably fair notice of what the [board] proposes to consider.").[2]

Although a board may choose to give notice of its intent to take action on an item,[3] 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" and reads in full as follows:

> (a) The board shall give written public notice of any regular, special, or rescheduled meeting, or any executive meeting when anticipated in advance. The notice shall 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) (emphasis added). The Sunshine Law does not define the term "considered" as it is used in section 92-7 and elsewhere in the statute.

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[2] The Office of the Attorney General was charged with administration of the Sunshine Law from 1975 through 1998.

[3] Although it may be helpful to provide such notice, OIP cautions that, where a board chooses to do so, it may risk misleading the public if it does not provide that same notice for other items. OIP notes that the Agenda did not include language indicating the Commission's intent to take action on any item or sub-item.

However, when viewed in the context of section 92-7(a) and other sections of the Sunshine Law, OIP finds it clear that the legislature used the term "consider" to include all actions a board is likely to take at a meeting with respect to an agenda item. In section 92-7, the term "consider" is used in the context of the statute's general notice provision to direct a board to give public notice of the issues that will be before the board at the meeting. Absent other language in the section directing the board to provide public notice of decisions that may be made at the meeting, OIP concludes that the term "consider" must ordinarily be interpreted to include possible decision-making on the item. See State v. Kwak, 80 Haw. 297, 909 P.2d 1112 (1995) (ambiguous words in statute given meaning implied by context); Haw. Rev. Stat. § 1-15 (1993) (meaning of ambiguous words may be sought by examining context).

Further, this meaning is consistent with the use of the term "consider" in the two other sections of the Sunshine Law in which it appears. See State v. Walker, 106 Haw. 1, 7; 100 P.3d 595, 601 (2004) (rule of statutory construction requires that statutory language be read "in the context of the entire statute" and construed "in a manner consistent with its purpose."); Haw. Rev. Stat. § 92-5 (Supp. 2006) (use of term "consider" alone in context of listing the purposes for which an executive meeting may be held implies that "consider" must include all discussion, deliberation and decision-making); Haw. Rev. Stat. § 92-7(d) (items of reasonably major importance "shall be considered only at a [continued] meeting" implies that "consider" must include all discussion, deliberation and decision-making). In all of the relevant sections, the term "consider" only makes sense if it is construed to include all actions a board is likely to take at a meeting with respect to an agenda item. Otherwise, the statute's notice provision, executive meeting provision, and continued meeting provision would be read to only govern a board's discussion and deliberation of agenda items and would not contain any provision governing the board's actual decision-making on those items. Because this construction would be inconsistent with the statute's purpose and would produce an absurd result, it must be rejected. See Haw. Rev. Stat. § 1-15(3). OIP thus concludes that "consider" as used in section 92-7(a) must include all of the board's discussion, deliberation **and** decision-making that is reasonably related to the item for which notice was given.

The Agenda here listed "Revised Salary Model" as Item IV with three subtopics identifying specifically and generally outstanding issues arising under the model. OIP finds that Item IV's listing of the "Revised Salary Model" provided sufficient detail of its subject matter to allow interested persons to reasonably determine what the Commission intended to consider and whether to participate in the meeting. Specifically, Item IV reasonably notified the public that the Commission would be considering issues concerning the Revised Salary Model.

Clearly, the proposed salary schedule set forth in the Revised Salary Model is an issue arising directly under the model given that the sole purpose of the model

was to set the proposed salaries and to provide data from which the Commission could derive and justify those salaries. As set forth above, that consideration must include possible decision-making on that issue.[4] OIP thus concludes that the Agenda provided sufficient notice under the Sunshine Law to allow the Commission's vote to approve the proposed salaries under the Revised Salary Model.

RIGHT TO BRING SUIT

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 (Supp. 2006). A suit to void any final action must be commenced within ninety days of the action. Id.

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[4] Although the use of the terms "review and discuss" under subtopic IV.C may be somewhat misleading, in the sense that it could be understood to limit the Commission's consideration to review and discussion, OIP believes that it would not be reasonable to assume based upon that language that the Commission would not take any action with respect to the outstanding issues or the Revised Salary Model as a whole and other issues reasonably arising under the model.