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The Office of Information Practices ("OIP") is authorized to issue this advisory opinion under section 92F-42(18), Hawaii Revised Statutes ("HRS").

OPINION

Requester: Ken Fukuoka, Director
Office of Council Services, County of Maui
Board: Maui County Council
Date: March 14, 2008
Subject: Council Members Attending Committee Meetings When Not Assigned to the Committee (S RFO-G 07-58)

REQUEST FOR OPINION

Requester seeks a written opinion on whether, under part I of chapter 92, HRS (the "Sunshine Law"), Maui County Council members may attend and participate in a meeting of a committee of the Council when they are not assigned as committee members ("Non-members"). This opinion formalizes the oral opinion OIP previously provided to the Council through its Corporation Counsel. Unless otherwise indicated, this opinion is based upon the facts contained in Requester's letter to OIP, dated February 28, 2007.

QUESTION PRESENTED

Whether the Sunshine Law allows Non-members to attend and participate in a committee meeting.

BRIEF ANSWER

No. The Sunshine Law requires board members to discuss matters involving board business in a properly noticed meeting of their board absent an applicable exception. When a board forms a committee, the committee and its members must independently comply with the Sunshine Law's open meeting requirements apart from the parent board. Where Non-members attend a committee meeting, the combined attendance of committee members and Non-members must be viewed as a discussion by them as members of the parent board, i.e. the Council, of Council business, which may not occur outside of a properly noticed Council meeting.

FACTS

The "Rules of the Council" provide that the Council "by resolution shall establish the standing committees and the composition of each standing committee," and "the duty of the standing committees [is] to consider and make recommendations on all matters referred to such committees." Maui County, Haw., Resolution No. 07-3 Adopting the Rules of the Council (Jan. 2, 2007). The nine-member Council currently has six standing committees,[1] three consisting of all Council members and three consisting of five members. With regard to the committees limited to five members, Requester explains that "[t]raditionally, [C]ouncil members who are not members of a committee have been allowed to participate in the committee's discussions."

DISCUSSION

The Sunshine Law's expressed policy and intent is "'that the formation and conduct of public policy—the discussions, deliberations, decisions, and actions of

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[1] The Council may also create "any special committee as deemed appropriate" and also "[a] subcommittee within any standing committee may be created." Maui County, Haw., Resolution No. 07-3 Adopting the Rules of the Council (Jan. 2, 2007). The conclusions reached in this opinion also apply where Council members may want to attend meetings of special committees or subcommittees without being members of those committees.

government agencies—shall be conducted as openly as possible' in order to protect the people's right to know . . . ." Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 383 (1993) (quoting Haw. Rev. Stat. § 92-1); see, e.g., OIP Op. Ltr. No. 05-15. To effectuate this policy and intent, the Legislature directed that "[t]he provisions requiring open meeting shall be liberally construed" and "[t]he provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings." Haw. Rev. Stat. § 92-1 (1993).

Based upon the statute's provisions construed in accordance with this policy and intent, OIP has consistently opined that board members may discuss "board business"[2] only as part of a properly noticed board meeting unless a permitted interaction or other exception applies. See Haw. Rev. Stat. §§ 92-2 and -3 (1993) (Board meetings must be open to the public unless otherwise permitted; a board "meeting" involves deliberation or decision on "a matter over which the board has supervision, control, jurisdiction, or advisory power" whereas a social or informal gathering with no discussion of official business is a "chance meeting."); see also, e.g., OIP Op. Ltr. Nos. 05-15 and 04-01.

Committees of a board must also comply with the Sunshine Law's open meeting requirements separate and apart from the parent board's compliance.[3] OIP Op. Ltr. No. 03-07; see also Op. Att'y Gen. No. 85-27 (committees of the Board of Regents). Committee members comply with the Sunshine Law's open meeting mandate by discussing committee business, i.e., Council business referred to the committee, with each other at a properly noticed committee meeting (or under a permitted interaction of the committee's members).[4] When Non-members attend a

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[2] Board business includes "discrete proposals or issues that are actually pending before [the board] or that are likely to arise before [the board]." OIP Op. Ltr. No. 01-01 at 31.

[3] For instance, a board must allow the public to testify on agenda items even where the public was allowed to testify on the same items at a meeting of a committee. Op. Att'y Gen. No. 86-5 (county councils cannot delegate to their committees the responsibility of allowing the public to testify on agenda items).

committee meeting,[5] however, the ensuing discussion is no longer exclusively a discussion between the committee members of committee business. Rather, it becomes a discussion of the parent board's business between these members as parent board members because neither Non-Members nor committee members may take off their parent board "hats" when the discussion of parent board business occurs. Thus, this discussion of Council business among Non-members and committee members, who cannot remove their Council member "hats," must not occur outside of a Council meeting where no exception applies.[6]

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[4] The Sunshine Law does not specifically permit committee meetings, either as permitted interactions among board members assigned to the committee or otherwise. However, given that the practice of creating committees or subcommittees of boards was long established at the time the Sunshine Law was passed, OIP does not believe that the Legislature intended to eliminate it through passage of the Sunshine Law. Hence, OIP has previously opined that board members assigned to a board committee meet the Sunshine Law's requirements by properly noticing the committee's meetings and otherwise complying with the Sunshine Law's open meetings provisions. See OIP Op. Ltr. No. 03-07.

[5] A question was raised as to whether a Council member would be prohibited from listening to the committee proceedings, which are currently broadcasted to the Council members' offices or from watching the committee proceedings as broadcasted on public access television. OIP believes that a board member's observation of proceedings in either of these fashions would not be deemed participation in the discussion or deliberation at a "meeting" under the Sunshine Law. Although the line drawn may appear artificial, OIP believes and generally advises that individual members' receipt of information concerning board business that does not result from their actual interaction with other members is not prohibited so long as the manner in which the information is received is not used to circumvent the Sunshine Law. For example, OIP does not believe that a board member violates the Sunshine Law where he or she learns of another member's position through a public source, such as a television or newspaper account. In contrast, however, OIP believes that a "discussion" in violation of the Sunshine Law may occur if a board member circulates copies of a newspaper article regarding board business to other board members.

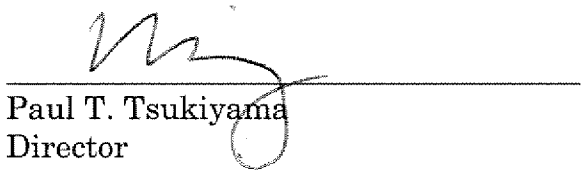
[6] OIP understands that the Council wishes to continue its practice of freely allowing all Council members to attend meetings of committees of which they are not members. Accordingly, as OIP previously suggested to the Council, the Council may want to consider revising its Council Rules to allow assignment of Council members as ad hoc members. (The Sunshine Law governs neither the composition nor the assignment of members to the board's committees.) This would allow all Council members to attend the committee meetings without being required for quorum purposes. Where all Council members attending a committee meeting are members of the committee, the committee is then the only "board" that is having a "meeting" for which the Sunshine Law's open meeting requirements must be observed. For example, OIP has learned that all of the committees of the Hawaii County Council consist of all Council members so that this

It is, therefore, OIP's opinion that the Sunshine Law does not permit Non-members to attend a committee meeting because the resulting discussion of Council business among the various Council members, consisting of both committee members and Non-members, constitutes a meeting of the Council that does not conform to the requirements of the Sunshine Law.

OFFICE OF INFORMATION PRACTICES

Lorna L. Aratani
Staff Attorney

APPROVED:



Paul T. Tsukiyama
Director

Council's committees are never faced with the issue of whether Non-members may attend committee meetings.