LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LIEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
OFFICE OF INFORMATION PRACTICES
NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oip@hawaii.gov
www.hawaii.gov/oip

PAUL T. TSUKIYAMA
DIRECTOR

The Office of Information Practices ("OIP") is authorized to issue this advisory opinion concerning compliance with part I of chapter 92, Hawaii Revised Statutes ("HRS") (the "Sunshine Law") pursuant to section 92F-42(18), HRS.

OPINION

Requester: Council Member Charles K. Djou
Board: Boards, Generally
Date: July 28, 2008
Subject: Boards Created by Resolution (S RFO-G 09-01)

REQUEST FOR OPINION

Requester seeks an advisory opinion on whether a task panel created by resolution of the Honolulu City Council (the "Council") is a "board" subject to the Sunshine Law.

In March 2008, Requester asked OIP to investigate whether members of the City Mass Transit Technical Expert Panel (the "Transit Panel") had violated the Sunshine Law. A threshold question there was whether the Transit Panel, created by Council resolution, was a board subject to the Sunshine Law. Because the Council decided after consultation with OIP to have the Transit Panel comply with the Sunshine Law, OIP did not need to answer that threshold question. Instead, OIP solely addressed, by memorandum opinion dated April 14, 2008, the question of whether the Sunshine Law had been violated by certain actions of the Transit Panel's members.

Although the question of whether the Transit Panel did in fact fall under the Sunshine Law's definition of "board" was no longer at issue, Requester subsequently asked OIP to opine generally on whether a panel created by Council resolution does fall under that definition. OIP responds to that question generally, but also specifically addresses whether a task panel, such as the Transit Panel, may be

subject to the Sunshine Law.[1] Because the circumstances surrounding a specific panel may be relevant to the question, OIP advises that each panel or other body[2] should be reviewed on a case-by-case basis in accordance with the following guidance.

QUESTIONS PRESENTED

1. Whether a task panel created by Council resolution falls within the definition of "board" under the Sunshine Law.

2. Whether a task panel created by a Sunshine Law board may be subject to the Sunshine Law where the panel is delegated the authority to act on a matter that is the official business of the Sunshine Law board.

BRIEF ANSWERS

1. No. Under a plain reading of the Sunshine Law's definition of "board," a task panel or other body created by or pursuant to a "resolution" of county (or state) government generally does not fall within that definition.

2. Yes. OIP believes that a task panel or other body created by a Sunshine Law board is subject to the Sunshine Law where circumstances show that, by delegation of authority from that board, it is, in fact, acting in place of that board on a matter that is the official business of that board.

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[1] The Transit Panel consisted of five persons, none of whom were Council members. However, we note that this opinion applies equally to groups formed by a Sunshine Law board that consist of persons other than, as well as in addition to, the Sunshine Law board's members. Where subgroups are formed that consist entirely of members of a Sunshine Law board, OIP has previously opined that these groups must either be formed as an investigative task force under section 92-2.5, HRS, or must independently comply with the Sunshine Law's provisions. See OIP Op. Ltr. No. 03-07 (concurring with reasoning in Attorney General Opinion Number 85-27 that "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."); OIP Op. Ltr. No. 08-01 at 3-4 & n.4.

[2] This opinion applies to any type of "committee" created, whether called a committee, task panel, working group, or otherwise. See Haw. Rev. Stat. § 92-2(1) (1993) ("'Board' means any agency, board, commission, authority, or committee . . . ."); Black's Law Dictionary 288 (8th ed. 2004) ("committee" is defined as "[a] subordinate group to which a deliberative assembly or other organization refers business for consideration, investigation, oversight, or action . . . .").

FACTS

The Council acts by ordinance, which is a legislative act, or by resolution, which is a non-legislative act that does not have the force or effect of law:

> Every legislative act of the council shall be by ordinance. Non-legislative acts of the council may be by resolution, and except as otherwise provided,[3] no resolution shall have force or effect as law. . . .

Rev. Charter of Honolulu § 3-201, 2000 Ed., 2003 Supp. Procedures for the passage of the Council's ordinances and resolutions differ. For example, ordinances may be passed only after three readings on separate days, must be advertised in a daily newspaper of general circulation, and must be presented to the mayor for approval. See id. at §§ 3-202.1, -202.8, and -303.1. Resolutions, on the other hand, may be adopted on one reading, generally need not be advertised, and except for resolutions authorizing eminent domain proceedings, are not presented for mayoral approval. See id. at §§ 3-202.6, -202.8, and -202.9.

DISCUSSION

The Sunshine Law defines a "board" subject to its terms as follows:

> (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(1) (1993) (emphasis added). In analyzing whether an entity falls under this definition, we have previously sought guidance from the Hawaii Supreme Court memorandum opinion in Green Sand Cmty. Ass'n v. Hayward, Civ. No. 93-3259 (Haw. 1996) (mem.). See OIP Op. Ltr. No. 01-01 (recognizing that such memorandum opinion may not be cited as precedent before the Hawaii courts but adopting the test articulated therein as its own).

As the Court there stated, "[t]he definition of "board" in section 92-2(1), HRS, contains five distinct elements. A 'board' is: (1) an agency, board, commission, authority, or committee of the State or its political subdivisions; (2) **which is created by constitution, statute, rule, or executive order**; (3) to have

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[3] For example, it appears that resolutions authorizing proceedings in eminent domain are such an exception provided for under section 3-202.9 of the Revised Charter of Honolulu.

supervision, control, jurisdiction or advisory power over specific matters; (4) which is required to conduct meetings; (5) and which is required to take official actions." Id. at 11 (quoting Green Sand at 9) (emphasis added). Consistent with that opinion, OIP looks to whether an entity meets all five elements to determine whether it is a "board" as defined by the Sunshine Law.

The question presented here requires interpretation of the second element. Specifically, OIP must determine whether the phrase "created by constitution, statute, rule, or executive order" also includes creation by "resolution." Based upon rules of statutory construction, OIP believes that it does not.

In construing the language of a statute, Hawaii courts follow these established rules of statutory construction:

> First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.

Olelo: The Corp. for Cmty. Television v. Office of Information Practices, 116 Haw. 337, 344, 173 P.3d 484, 491 (2007) (citing Peterson v. Hawaii Elec. Light Co., Inc., 85 Haw. 322, 327-28, 944 P.2d 1265, 1270-71 (1997)). Courts will look to the "general or popular use or meaning" of words in a statute and may rely upon legal and lay dictionaries as extrinsic aids. Id. at 349, 173 P.3d at 496; Haw. Rev. Stat. § 1-14 (1993).

As a threshold matter, we note that a plain reading of the terms "constitution, statute, rule, or executive order," which clearly refer to state authority, creates an ambiguity under the statute because it is equally clear that the legislature intended the Sunshine Law to govern county boards, which are generally created under county authority. This intent is made clear by the language in the first element of the definition that includes boards "of the State or its political subdivisions" and by the explicit direction in section 92-71 that "[t]he provisions contained in this chapter shall apply to all political subdivisions of the State." Haw. Rev. Stat. § 92-71 (1993); see S. Stand. Comm. Rep. No. 759-76, Haw.

S.J. 1216, 1217 (1976); H. Stand. Comm. Rep. No. 580-76, Haw. H.J. at 1543, 1544 (1976).[4]

Given this clear intent, OIP believes that the terms "constitution, statute, rule, or executive order" must be read to refer to equivalent county authority, i.e. "charter, ordinance, rule or executive order (of the chief executive officer of the political subdivision)" to prevent rendering the above-quoted language in sections 92-2 and 92-71 insignificant. "It is a cardinal rule of statutory construction that a statute ought upon the whole be so constructed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant." In re Honolulu Corp. Counsel, 54 Haw. 356, 373-374 (1973) (citing Application of Island Airlines, Inc., 47 Haw. 87, 112, 384 P.2d 536, 565 (1963); State v. Taylor, 49 Haw. 624, 425 P.2d 1014 (1967)). Consistent with this reading, the Hawaii Supreme Court has implicitly construed the second element of "board" to refer to equivalent county authority by applying the Sunshine Law to the Maui County Planning Commission, which is created by Maui County Charter provision. Chang v. Planning Comm'n, 64 Haw. 431, 438, 442 & n.12 (1982) (noting that blanket mandate of open meetings "is made applicable to all political subdivisions of the state by HRS § 92-71"); see Charter of the County of Maui § 8-8.4, 2003 ed.; see also Haw. Att. Gen. Op. 86-5 (1986) (in concluding that the Maui County Council was a "board" subject to the Sunshine Law, the attorney general construed the term "constitution" in section 92-2(1), HRS, broadly "to mean the written organic and fundamental law of a body which establishes the government thereof, rather than . . . to refer only to the state constitution" given legislative intent to subject county agencies, boards,

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[4] The legislative history to section 92-71 reads as follows:

> This bill further amends Chapter 92, Hawaii Revised Statutes, by adding a new section dealing with the applicability of various provisions of said Chapter to the political subdivisions of the State. This amendment provides that in the event that any political subdivision of the State has provisions relating to open meetings which are more stringent than Chapter 92, Hawaii Revised Statutes, then the more stringent provisions of the charter, ordinance, or otherwise, of the political subdivision shall apply. The purpose of this amendment is to clarify the fact that it was not the intent of the Legislature, in enacting the Sunshine Law, to unintentionally dilute the existing open meeting requirements of the various county charters and ordinances when they were, in fact, more stringent than those of the Sunshine Law.

S. Stand. Comm. Rep. No. 759-76, Haw. S.J. at 1217; H. Stand. Comm. Rep. No. 580-76, Haw. H.J. at 1544.

commissions and committees to the Sunshine Law and the statute's policy and intent).[5]

We now address the general issue raised here of whether the Sunshine Law governs a board created by a "resolution" adopted by an official or body of either state or county government. The Hawaii courts have not yet addressed this question.

As discussed above, the terms "constitution, statute, rule, or executive order" create some ambiguity as to whether they should be read to include their county equivalents. With respect to whether they should be read to include "resolution," however, OIP finds that those terms, read alone or in the context of the entire statute, generally do not create a "doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression" because each of these terms have specific and distinct meanings.

The plain and obvious meanings of the terms "constitution, statute, rule, or executive order" do not include a "resolution." See Black's Law Dictionary 330, 1448, 1357, 610. More specifically, a resolution generally[6] does not fall within the

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[5] The Department of the Attorney General (the "AG"), who shared and shares enforcement power under the Sunshine Law with the Department of the Prosecuting Attorney, issued formal advisory opinions concerning the Sunshine Law prior to OIP being charged with administration of the statute in 1998. Haw. Rev. Stat. § 92-12 (1993). However, unlike OIP, the AG was not specifically authorized to provide administrative interpretation and resolution of complaints. Haw. Rev. Stat. §§ 92F-42(18), 92-1.5 (Supp. 2007). Thus, AG opinions are cited for more general guidance only.

[6] OIP believes there are specific types of resolutions that may fall within the definition of "statute." Specifically, there are instances in which resolutions are legislative pronouncements, i.e., they have the force and effect of law and are subject to executive veto. See e.g., Rev. Charter of Honolulu § 6-1511, 2000 Ed., 2003 Supp. ("council shall adopt the general plan or revisions thereof by resolution" which is then presented for mayoral approval under the same procedures as bills); Lum Yip Kee, Ltd. v. City and County of Honolulu, 70 Haw. 179, 767 P.2d 815 (1989) ("enactment of and amendments to development plans constitute legislative acts of the City Council") (citing Kailua Cmty. Council v. City & County, 60 Haw. 428, 432, 591 P.2d 602, 605 (1979)); Life of Land v. City Council of Honolulu, 61 Haw. 390, 424, 606 P.2d 866, 887 (1980) (veto power of the Mayor, which serves the principle of checks and balances, extends to ordinances, resolutions authorizing proceedings in eminent domain, and resolutions adopting or amending the General Plan); Black's Law Dictionary 1337 (a "**joint** resolution" "has the force of law and is subject to executive veto."). However, because these types of resolutions are used for specific purposes generally provided for by statute or ordinance and because OIP is unaware of any instance in which they are used to create boards, OIP does not address them here. See e.g., Haw. Rev. Stat. § 6E-52 (1993) (specifying that certain lands shall be

definition of "statute," which means "[a] **law** passed by a legislative body; specifically, legislation enacted by any lawmaking body, including legislatures, administrative boards, and municipal courts." Id. 1448 (emphasis added). A "resolution," whether by legislative or other body, whether simple or concurrent, has a distinct meaning: it is a formal expression of a body's opinion or desired action that does not have the force of law. See Black's Law Dictionary 1337; Rev. Charter of Honolulu § 3-201 ("Non-legislative acts of the council may be by resolution, and except as otherwise provided, no resolution shall have force or effect as law."). Specifically, it is defined as "[a] main motion that formally expresses the sense, will, or action of a deliberative assembly (esp. a legislative body)." Black's Law Dictionary 1337.

Under these plain meanings, thus, an ordinary resolution cannot be considered to be a "statute." Further, nothing in the remaining provisions of the Sunshine Law or its legislative history indicates that the legislature intended a Sunshine Law "board" to have an official existence other than as authorized by "constitution, statute, rule, or executive order" or, as explained above, their county counterparts. See S. Stand. Comm. Rep. No. 759-76, Haw. S.J. at 1216; H. Stand. Comm. Rep. No. 580-76, Haw. H.J. at 1543.

OIP acknowledges that, as a practical matter, a task force created by the legislature through concurrent resolution may have the same purpose and effect as one created by the legislature through statute. However, given the above analysis, OIP believes that it must not read into the definition a distinct term that the legislature chose not to include. It is the legislature's function to determine public policy and to accordingly define the parameters of the Sunshine Law's application. See In re Water Use Permit Applications, 94 Haw. 97, 196, 9 P.3d 409, 508 (2000) (Ramil, J., dissenting), *vacated in part*, 105 Haw. 1, 93 P.3d 643 (2004) (legislature determines public policy and separation of powers doctrine requires that executive agency not transcend its statutory authority when interpreting law); see also Olelo, 116 Haw. at 346, 173 P.3d at 493 (threshold issues relating to the applicability of chapter 92F, HRS, defined by the legislature). Accordingly, under a plain reading of the definition's terms, we must find that a task panel created by Council resolution falls outside the definition of "board" and, therefore, outside the ambit of the Sunshine Law.

We next address the specific question of whether a body created by Council resolution and delegated an official function, such as the Transit Panel, may be subject to the Sunshine Law even though it does not fall within the definition of "board." As explained above, OIP did not have reason to opine on the Transit Panel and, therefore, OIP did not complete its investigation into the circumstances

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used to create living war memorial as provided by Act 288, Session Laws of Hawaii 1949, as amended by Joint Resolution 37, Session Laws of Hawaii 1951).

surrounding the Transit Panel. For that reason, OIP does not hereby render an opinion on the Transit Panel, but merely uses it as an example for guidance purposes only.

The Council resolution creating the Transit Panel instructs the panel "to perform the evaluation and the final technology selection for the fixed guideway" for the City and County of Honolulu's proposed mass transit system. See Council Resolution No. 07-376, CD1, FD1 (B). In a letter to OIP dated March 14, 2008, Requester stated that the Office of the Corporation Counsel had opined that the decision made by the Transit Panel would, absent council action, be "an official action and the final government decision on the fixed guideway technology selection." Selection of the guideway technology system was apparently a matter upon which the Council was to take official action. See id.

A board, as defined by the Sunshine Law, must conduct its official business in meetings open to the public unless otherwise provided by the constitution or in the statute. Haw. Rev. Stat. § 92-3 (1993). OIP agrees with the general rule adopted by other jurisdictions that, where a board governed by the Sunshine Law delegates its duties or powers to another entity, the policies underlying an open meetings law require that that entity also comply with the Sunshine Law because it is functioning in place of the Sunshine Law board with respect to the delegated authority. See News-Press Publishing Co., Inc. v. Carlson, 410 So. 2d 546, 547-8 (Fla. App. 1982) (public hospital board's delegation of its responsibility to prepare hospital's budget and "[t]he preponderant interest of allowing the public to participate in the conception of a complex multimillion dollar budget" justified placing the ad hoc committee it created in the shoes of the board for application of its Government in the Sunshine Law; court noted that one purpose of that law "is to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance" and that the $35 million dollar budget "was conceived during a several month period but approved by ceremonial acceptance of the board with very little discussion" (citation omitted)); Red & Black Publishing Co. v. Board of Regents, 262 Ga. 848, 427 S.E.2d 257 (1983) (although student Organization Court, created by delegated authority of the Board of Regents, did not fit the literal language as a "governing body," court found it "stands in the place of, and is equivalent to the Board of Regents and the University under the Open Meetings Act" because, having been delegated official responsibility and authority, the Organization Court "is the *vehicle* by which the University carries out its responsibility" to regulate social organizations); Town of Palm Beach v. Gradison, 296 So. 2d 473, 475 (1974) (nature and function of citizen's advisory committee, created by town council to make tentative decisions guiding the zoning planners and advising the Council as to their ultimate zoning ordinances, reached the status of a board or commission that must comply with the sunshine law; "Council delegated to the committee much of their administrative and legislative decisional zoning formulation authority which is ordinarily exercised by a city-governing body

itself - and particularly the position of the process where the affected citizens expect to be officially heard."); Ind. Code § 5-14-1.5-2(b) (defining "governing body" for purposes of Indiana's Open Door Law to include "any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated.").

Such a construction "is consistent with the legislature's '[d]eclaration of policy and intent,' set forth in HRS § 92-1 (1985), 'that the formation and conduct of public policy – the discussions, deliberations, decisions, and action of governmental 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, 846 P.2d 882, ___ (1993). Moreover, similar to the court in Carlson, we believe that to conclude otherwise would create a ludicrous result in that actions taken in closed meetings by subordinate groups created by and given the authority of a Sunshine Law board would be allowed, whereas those same actions taken by the board itself in a closed meeting would be voidable:

> We agree with the holding of the Fourth District Court of Appeal in the case of IDS Properties, Inc. v. Town of Palm Beach that it would be ludicrous to invalidate the actions of a public body where said actions are the results of secret meetings of that body, while at the same time giving approval to similar actions resulting from the secret meetings of committees designated by, or acting under the authority of, the public body.

Carlson, 410 So. 2d at 548. See generally Haw. Att. Gen. Op. 85-27, supra note 1, at 2; see Haw. Rev. Stat. § 92-11 (Supp. 2007).

Lastly, we believe that allowing Sunshine Law boards to create subordinate groups that may meet in private on matters that the Sunshine Law board delegated and which the board would have to deliberate in an open meeting, would provide a means for boards to circumvent the open meetings requirement of the Sunshine Law. We do not have any reason to believe that Sunshine Law boards do so to deliberately attempt to circumvent the statute. However, even a good faith delegation will result in taking the official business of a Sunshine Law board outside of the law's open meeting requirements.

Accordingly, OIP believes that a task panel or other body created by resolution may be subject to the Sunshine Law where the surrounding circumstances show that it is, in fact, acting in the place of a board that is subject to the Sunshine Law through a delegation of that board's powers and duties. These circumstances must necessarily be reviewed on a case-by-case basis.

OIP notes, for guidance purposes only, that it thus believes that the Council created Transit Panel was subject to the Sunshine Law by virtue of the Council's delegation of authority to the panel to make the final selection[7] of the fixed guideway technology. Although we understand that the Council had legitimate reasons for doing so,[8] OIP believes that allowing a subordinate group of the Council to meet in private to act on a matter of Council business would contravene the policies and intent underlying the Sunshine Law to allow the public to participate in the formation of public policy. Clearly, the public had a preponderant interest in, and an expectation to be officially heard early in the process on, a decision as important and far reaching as the choice of the City and County's mass transit system.

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).

OFFICE OF INFORMATION PRACTICES

Cathy L. Takase
Staff Attorney

APPROVED:

Paul T. Tsukiyama
Director

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[7] We note our belief that the Transit Panel would have been subject to the Sunshine Law under the analysis set forth even if the Council decided to vote to ratify the Transit Panel's determination. We believe that concluding otherwise could prevent public participation at the conception point, which is what the Sunshine law intends. We agree with courts of other jurisdictions that find it is contrary to the policy of open meetings laws to allow "at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance." Carlson, 410 So. 2d at 547-8 (citation omitted).

[8] To be clear, we do not, by this opinion, find or imply any intent by the Council members to circumvent the Sunshine Law.