

# TAX FOUNDATION

O F F I C E

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November 17, 2016

Colleen M. Takamura, Chair  
Tax Review Commission  
c/o Rules Office  
Room 219  
830 Punchbowl Street  
Honolulu, HI 96813

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Re: **Executive Session**

Ladies and Gentlemen:

I am writing to draw the Committee's attention to the justification, or lack thereof, for the extended executive session at a recent Tax Review Commission meeting.

Specifically, I attended your meeting of November 14, 2016. I stayed through the first ten minutes of the meeting in which the first three agenda items were covered.

The fourth agenda item stated:

**EXECUTIVE SESSION – TO CONSULT WITH THE COMMISSION'S ATTORNEY ON QUESTIONS OR ISSUES REGARDING THE COMMISSION'S POWERS, DUTIES, PRIVILEGES, IMMUNITIES, AND LIABILITIES PURSUANT TO SECTION 92-5(A)(4), HAWAII REVISED STATUTES, REGARDING THE SOLICITATION FOR QUALIFIED PROFESSIONALS WHO HAVE A WORKING KNOWLEDGE OF HAWAII'S TAX STRUCTURE AND OF HAWAII'S ECONOMY TO PREPARE STUDIES OF HAWAII'S TAX SYSTEM**

Members of the public, including me, were then asked to and did leave the meeting room. However, several individuals who work for the Department of Taxation remained in the meeting room, including:

- Ted Shiraishi, Administrative Rules Officer.
- Jonathan White, Acting Tax Research and Planning Officer.
- Mallory Fujitani, Public Information Officer.
- Titin Sakata

Deputy Attorney General Randall Nishiyama was also present.

Of these individuals, Ms. Sakata is not an attorney, according to the records of the Hawaii State Bar Association.

I left sixty (60) minutes later. The meeting still appeared to be in executive session, as the members of the public who came to the meeting were still waiting outside.

The Hawaii 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.” HRS §92-3. More specifically, the statute provides, “[a] meeting closed to the public shall be limited to matters exempted by section 92-5.” HRS §92-4. Section 92-5, HRS, lists the eight specific purposes for which a board may convene an executive meeting. Those purposes are the only times when a board may close its meetings from the public. OIP Op. Ltr. No. 05-04 (2005).

The agenda cites HRS §92-5(a)(4) as justification for the executive session. That paragraph allows a closed meeting to “consult with the board’s attorney on questions and issues pertaining to the board’s powers, duties, privileges, immunities, and liabilities.” Maybe the “board’s attorney” is Mr. Nishiyama, because he is a deputy attorney general and he can advise public officers. It can’t be Mr. Shiraishi, because HRS §231-4.5, the statute authorizing his appointment, specifically prohibits him from rendering legal services reserved to the attorney general under chapter 28, HRS, which includes advising public officers (HRS §28-4). Mr. White, who is also an administrative rules specialist, has the same problem. Ms. Fujitani is supposed to be a public information officer, and Ms. Sakata is not an attorney.

We understand and appreciate that non-Commission members may be allowed in the executive session portion of the meeting. OIP Op. Ltr. No. 03-12 (2003). But we urge the Commission to use extreme caution when the *only* non-members allowed in the room represent a specific constituency. As OIP explained:

Thus, boards’ attorneys, agency personnel, and persons who have some special knowledge, 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. 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 nonboard 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. 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.

The length of time during which members of the public other than Department of Taxation employees were excluded from the meeting room (and I am informed that this is not the first time that there has been an executive session of this length) raises at least an appearance that the Commission is not in fact independent of the Department of Taxation. The Commission was given a separate existence under the Constitution of Hawaii to conduct a systematic review of the State's tax structure. Department of Taxation employees do not and should not have a monopoly on knowledge of the State's tax structure. The Commission needs to do its work independently of, and not under the thumb of, the Executive Branch, both in fact and in appearance.

For these reasons, we urge the Commission generally to treat Department of Taxation employees as members of the public for purposes of the Commission's work, and to be careful about the length of and matters discussed in executive session. Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Thomas Yamachika". The signature is fluid and cursive, with the first name "Thomas" being more prominent than the last name "Yamachika".

Thomas Yamachika  
President

c: Peter Fritz, Esq.