IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

In re	)	S.P. No. 14-1-0543 JPC
	)	(Agency Appeal)
OFFICE OF INFORMATION PRACTICES OPINION LETTER NO. F15-02	)	ORDER DENYING OFFICE OF HAWAIIAN AFFAIRS, BOARD OF TRUSTEES' MOTION FOR SUMMARY JUDGMENT (Motion Filed 3/1/2017)
	)	Judge: Jeffrey P. Crabtree
	)	Hearing Date: April 19, 2017
	)	Time: 9:00 a.m.

ORDER DENYING OFFICE OF HAWAIIAN AFFAIRS, BOARD OF TRUSTEES' MOTION FOR SUMMARY JUDGMENT (Motion Filed 3/1/2017)

On April 19, 2017, a hearing on Office of Hawaiian Affairs, Board of Trustees' Motion for Summary Judgment (Motion Filed 3/1/2017) was held before the Honorable Jeffrey P. Crabtree. Present was Robert Gordon Klein on behalf of the Office of Hawaiian Affairs. The Office of Information Practices was not represented by counsel at the hearing, and instead filed a Notice of Nonparticipation on March 9, 2017, which noted that OIP relies on the reasoning and bases set out in its Opinion Letter No. F15-02. Nancy Munroe appeared telephonically, without objection, and with approval of the court.

I. INTRODUCTION.

This case deals with Office of Information Practices Opinion Letter No. F15-02, dated November 7, 2014 ("OIP Opinion Letter"). The essential underlying facts seem undisputed, and are clearly set forth in the OIP Opinion Letter, as well as in OHA's memorandum in support of their motion. In essence, the key facts are that OHA's CEO, Mr. Crabbe, on May 5, 2014, sent a letter to the U.S. Secretary of State. The letter asked for a legal opinion on several issues fundamental to OHA's goal of facilitating Native Hawaiian participation in building a Native Hawaiian governing entity. The OHA Board responded by a) rescinding Mr. Crabbe's letter on May 9, 2014, and b) calling a Board meeting to discuss Mr. Crabbe's contract and conduct.

II. THE APPLICABLE LEGAL STANDARD.

The OIP has the responsibility to administer Hawai'i's Sunshine Law. By law, OIP's opinions and interpretation of its own governing statute are entitled to deference if they are consistent with legislative intent and are not "palpably erroneous." Kanahele v Maui County Council, 130 Hawai'i 228, 245 (2013); Gillan v GEICO, 119 Hawai'i 109, 119 (2008).

III. THE ISSUES PRESENTED.

OHA's motion addresses two main holdings from the OIP Opinion Letter. First, regarding Mr. Crabbe's May 5, 2014 letter to the Secretary of State, was it "board business" for each member of the OHA Board of Trustees to sign the "Rescission Letter" dated May 9, 2014? The OIP Opinion Letter answered "yes," and therefore found an actual meeting of the OHA Board was required. Second, regarding OHA going into executive session on May 19, 2014, to

discuss with its attorney a) Mr. Crabbe's contract and b) appropriate action regarding Mr. Crabbe's conduct, does the Sunshine Law require OHA to first permit public testimony on those subjects? The OIP Opinion Letter answered "yes."

IV. THE RESCISSION LETTER.

A. Because the Trustees were in different parts of the country when Mr. Crabbe sent his May 5, 2014 letter, the Board did not meet in person. There was no emergency meeting or online video conference. Instead, the Board members communicated serially through phone calls and e-mails with staff, and the Rescission Letter was issued on May 9, 2014.

B. The OHA Board's Rescission Letter was signed by every Board member. The Rescission Letter did not say "Mr. Crabbe's letter is contrary to the official position of this Board and should be disregarded." Rather, it specifically says Mr. Crabbe's letter is "hereby rescinded." This language clearly infers an active OHA Board decision to rescind. Therefore the court cannot say OIP's Opinion Letter was palpably erroneous when it found that the Rescission Letter was "board business."

C. The court's reasons for upholding OIP's determination that the Rescission Letter was "board business" are essentially as stated at page 7 of the OIP Opinion Letter: namely, there were serial e-mail and telephone communications between OHA Board members and their staffs during an undeniably fast-moving situation. While it is completely understandable why the OHA Board wanted to respond quickly, these serial communications amounted to and led directly to a Board decision to "hereby rescind" Mr. Crabbe's letter.

Therefore, a properly noticed in person meeting (or emergency meeting or online video conference) was required under the Sunshine Law since the issue was not exempted by HRS 92-2.5 or other law. See HRS 92-2, 92.5, 92-3, and 92-5(b), discussed at OIP Opinion Letter, pp. 3-4.

D. The court understands OHA's position that Mr. Crabbe's letter was *ultra vires* and *void ab initio* as contrary to OHA's official position. The court agrees that OHA's clear policy, adopted on March 6, 2014, was to facilitate Native Hawaiian participation in building a Native Hawaiian governing entity. The court also agrees that Mr. Crabbe's May 4, 2014 letter ran contrary to OHA's policy. However, for the above reasons, acknowledging OHA's established policy does not mean the OIP's Opinion Letter was palpably erroneous or contrary to legislative intent when it found the Board's Rescission Letter was "board business."

V. THE MAY 19, 2014 PUBLIC MEETING AND EXECUTIVE SESSION.

A. Following the Rescission Letter, OHA held a public meeting on May 19, 2014. The public meeting moved directly into executive session so the Board could talk with its attorney regarding a) Mr. Crabbe's contract and b) appropriate OHA Board action regarding Mr. Crabbe's conduct.

B. It is important to distinguish two separate issues: 1) OHA's ability to go into closed executive session to privately discuss with its attorney these private personnel issues, and 2) whether OHA first had to allow public testimony on the issue before going into closed executive session.

C. The OIP Opinion Letter acknowledges that the OHA Board was entitled to meet privately in executive session with its attorney to discuss Mr. Crabbe's contract and conduct. However, OIP's opinion was that since the issue was on the meeting agenda, the Board first had to accept public testimony on the issue before going into (closed) executive session.

D. The OIP Opinion Letter acknowledges that OIP has not previously issued a formal opinion on the public's right to testify on agenda items that will be held in executive session. The OIP Opinion Letter finds that the requirement to accept public testimony on every agenda item applies to those items which will be discussed in executive session, even when only executive session items are on the agenda (IOP Opinion Letter at p. 8.) OHA is right (as OIP concedes) that the Sunshine Law does not expressly and unmistakably require public testimony on all issues which are destined for executive session. However, OIP's Opinion Letter relies on HRS 92-3, and correctly notes that the language of HRS 92-3 affording all persons an opportunity to present oral testimony on any agenda item does not have any qualification or exception for agenda items that will be discussed in executive session per HRS 92-4 and 92-5.

E. While OIP's public testimony requirement may sometimes be cumbersome and time consuming, this court does not find it palpably erroneous in the context of the facts of this case. Even given the difference between public policy issues (open meeting required) and personnel issues (closed executive session permitted), public testimony on the intertwined factual or policy issues may be helpful to the Board. And if not helpful, public testimony nevertheless arguably furthers the Sunshine Law's policy of encouraging public

participation. This court also finds OIP's public testimony requirement is not contrary to legislative intent, because a primary goal of the Sunshine Law is to conduct business as openly as possible. The requirement of open meetings shall be liberally construed, and exceptions to the open meeting requirement shall be strictly construed against closed meetings. See HRS Section 92-1. Against this backdrop of openness, and because it is not always easy to separate public policy issues and private personnel issues, the court cannot say OIP's public testimony requirement is palpably erroneous.

Based on the above, the Office of Hawaiian Affairs, Board of Trustees' Motion for Summary Judgment (motion filed 3/1/2017) is respectfully DENIED.

Dated: Honolulu, Hawai'i May 1, 2017.

JEFFREY P. CRABTREE
Judge of the Above-Entitled Court