DAVID Y. IGE
GOVERNOR

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

CHERYL KAKAZU PARK
DIRECTOR

The Office of Information Practices (OIP) is authorized to resolve complaints concerning compliance with or applicability of the Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes (HRS), pursuant to sections 92-1.5 and 92F-42(18), HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

OPINION

Requester: Jacqui Hoover, President
Hawaii Leeward Planning Conference
Board: Commission on Water Resource Management
Date: January 11, 2018
Subject: Site Visits and Presentations as Adjudicatory Functions
(S APPEAL 15-8)

REQUEST FOR OPINION

Requester seeks a decision as to whether the Commission on Water Resource Management (CWRM), a board under the Department of Land and Natural Resources (DLNR), violated the Sunshine Law by holding a series of site visits and presentations which were not noticed or conducted as Sunshine Law meetings, and which were attended by a majority of CWRM members.

Unless otherwise indicated, this decision is based upon the facts presented in Requester's email to this office dated October 20, 2014, and attached materials; and CWRM's email to this office dated November 10, 2014, and attached materials.

QUESTION PRESENTED

Whether the Sunshine Law's exemption in section 92-6, HRS, for boards' adjudicatory functions allowed CWRM to hold a series of site visits and presentations without conducting them as Sunshine Law meetings.

BRIEF ANSWER

No. The Sunshine Law's exemption in section 92-6, HRS, for boards' adjudicatory functions did not allow CWRM to hold a series of site visits and presentations without conducting them as Sunshine Law meetings. The site visits and presentations were not part of an adjudicatory function exempted from the Sunshine Law by section 92-6, HRS, and thus CWRM should have followed the Sunshine Law's requirements when conducting them.

FACTS

The federal National Park Service (NPS) had petitioned CWRM to designate the Keauhou Aquifer as a ground water management area pursuant to section 174C-41, HRS (Petition for Designation). CWRM's staff consulted with OIP in August 2014 regarding the possibility of holding a limited meeting under section 92-3.1, HRS, for a planned series of site visits in the area of the Keauhou Aquifer. DLNR's Deputy Director for the Division of Water Resource Management (Deputy Director), in which CWRM is housed, informed OIP Staff Attorney Carlotta Amerino by telephone on August 22, 2014, that he had concluded that the site visits were an adjudicatory function exempt from the Sunshine Law.

CWRM subsequently distributed, to its members and the public, "Schedules" for a series of site visits by and presentations to CWRM members on September 17 and October 9, 2014. The September 17 schedule listed six distinct places and times over the course of the day, and the October 9 schedule listed eight, although one of the October 9 visits was listed as canceled. Both schedules stated that the visits were being done "as part of the Commission's process to evaluate the Keauhou Aquifer . . ." and that "[a]n opportunity for public testimony will be provided <u>at a later date.</u>" (Emphasis in original.) Both also stated:

> This investigation and site visit is for the purpose of scientific investigation and study. This is <u>not</u> a public meeting. *No public testimony will be taken at this time. A meeting to take public testimony will be scheduled at a later date.*
> Although the investigation is not a public meeting, there are portions of the site visit which the public may observe . . . .

(Emphases in original.)

Most of the locations listed on the Schedules were harbors, wells, fishponds, and other sites relevant to the Keauhou Aquifer. However, two locations were apparently included as meeting rooms for CWRM to view presentations, rather than as sites of interest. Specifically, Site 6 listed on the September 17 schedule was a presentation by the National Park Service on its Petition for Designation, among

other matters, to be conducted at the King Kamehameha Kona Beach Hotel, and Site 8 on the October 9 schedule was a presentation on the Keauhou Aquifer System Area to be conducted in council chambers in Kailua-Kona.

The October 9 schedule set out the CWRC's plans for further action as follows:

> On December 10, 2014, the Commission has tentatively scheduled a *public meeting* at the West Hawaii Civic Center to decide (pursuant to Haw. Rev. Stat. § 174C-41) whether to continue the process. *Public testimony will be taken at the December 10, 2014 meeting.*
> If the Commission decides to continue the process on December 10, 2014, then a *public hearing* will be scheduled (pursuant to Haw. Rev. Stat. § 174C-42) in the Keauhou area some time in early 2015. *Public testimony will be taken.*
> After the public hearing is closed, the Commission will schedule *another public meeting* to make a final decision on the petition to designate (pursuant to Haw. Rev. Stat. § 174C-46).

(Emphases in original.) In contrast to the statements that no public testimony would be taken on the dates covered by the schedules, the October 9 schedule did not state one way or the other whether public testimony would be taken at the final meeting.

According to Requester, no public testimony was accepted on September 17 or October 9, but several persons "were allowed to make presentations that went beyond merely identifying what was being observed on the site visits." More specifically, Requester alleges that the presentations "oftentimes went directly to the issue of designation of the Keauhou Aquifer as a ground water management area."

Also according to Requester, in addition to the listed site visits and presentations, more than two commissioners traveled together in a van on both occasions. Further, more than two commissioners lunched together at an undisclosed location on each day, together with some NPS representatives on October 9. Requester also noted that members of the public were not allowed on Kohanaiki site, but an NPS representative was included in that site visit.

DISCUSSION

CWRM does not dispute that it is a "board" as defined in the Sunshine Law, and thus generally subject to the Sunshine Law. See HRS § 92-2 (2012). The Sunshine Law requires that board members consider board business only during a board meeting, or as otherwise permitted under the Sunshine Law in section 92-2.5, HRS, (listing permitted interactions outside a meeting) or elsewhere. See HRS §

92-2.5 and -3 (2012). While board meetings are generally required to be open to the public, the Sunshine Law does allow a board to hold a limited meeting when public attendance is impracticable, as set out in section 92-3.1, HRS.

In this case, CWRM members clearly traveled together and visited several sites on September 17 and October 9, 2014, during what was described as an investigation and "not a public meeting," at which no public testimony would be taken. The subjects considered in the course of these events clearly comprise board business for CWRM as set forth in chapter 174C, HRS, and CWRM does not argue otherwise. Requester argues that CWRM did not follow the requirements to hold a limited meeting under the Sunshine Law, and CWRM does not contend that the discussions taking place during these events were conducted as a limited meeting or other type of Sunshine Law meeting, or fell within one of the permitted interactions under the Sunshine Law.[1] Rather, CWRM contends that its activities on the relevant dates were exempted from the Sunshine Law by section 92-6, HRS, because the series of site visits and presentations comprised an "investigation" that was part of a broader statutory scheme.[2]

Section 92-6, HRS, exempts the state judicial branch from the Sunshine Law, and also exempts the "adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9, or authorized by other sections of the [HRS]." HRS § 92-6(a).[3] OIP understands CWRM's argument to be that if CWRM's discussions or

---

[1] Requester's complaint included the specific allegation that the discussions during the lunch period did not follow the Sunshine Law's requirements. CWRM did not deny the allegation that those discussions involved CWRM business, but instead relied generally on its argument that all activities were exempted from the Sunshine Law by section 92-6, HRS.

[2] The specific statutory process that CWRM argues is exempt from the Sunshine Law is the Hawaii Water Code, Chapter 174C, HRS (Water Code), which CWRM describes as establishing "a detailed, complex, multi-stage, and unique process to determine when an area should be designated for management and subsequent water use permitting."

[3] In full, section 92-6, HRS, reads as follows:

> **§ 92-6 Judicial branch, quasi-judicial boards and investigatory functions; applicability.** (a) This part shall not apply:
>
> (1) To the judicial branch.
>
> (2) To adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9, or authorized by other sections of the Hawaii Revised Statutes. In the application of this subsection, boards exercising adjudicatory functions include, but are not limited to, the following:
>
> (A) Hawaii labor relations board, chapters 89 and 377;

other activities are part of a broad statutory process "authorized by other sections of the [HRS]" and including a public hearing at some point, that by itself is enough to exempt those discussions or other activities from the Sunshine Law because requiring a board to follow the Sunshine Law when the authorized statutory process itself would not specifically require an open meeting or acceptance of public testimony would add additional steps to that statutory process.

However, OIP has not previously found the fact that a board's actions and discussions are part of a non-Sunshine Law statutory process, by itself, to be sufficient to exempt those actions and discussions from the Sunshine Law under section 92-6, HRS. See OIP Op. Ltr. No. 01-06 at 5-7 (a board must still follow the Sunshine Law's requirements in the course of rulemaking, in addition to the requirements specific to rulemaking set out in chapter 91, HRS). Section 92-6, HRS, applies specifically to boards' **adjudicatory** functions, rather than applying generally to all functions for which the board follows a statutory process. The exemption is primarily intended to cover contested cases subject to sections 91-8 and 91-9, HRS, but its language allows for the possibility of a similar **adjudicatory** function for which the process is set out elsewhere in HRS. Consistent with the plain language of the exemption, the legislative history gives no indication of a legislative intent to extend it beyond the quasi-judicial proceedings described in the statute. The Senate Judiciary Committee explained the reasoning behind this exemption at the time it was created:

> Quasi-judicial boards in exercise of adjudicatory functions are also specifically exempted because closed deliberation is traditional in quasi-judicial proceedings. Your Committee sees no objection to maintaining the practice, as **availability of procedural safeguards, transcripts, written declarations, and the appellate process, all permit adequate public scrutiny** as well as insure fairness and the required observance of constitutional rights.

(B) Labor and industrial relations appeals board, chapter 371;
(C) Hawaii paroling authority, chapter 353;
(D) Civil service commission, chapter 26;
(E) Board of trustees, employees' retirement system of the State of Hawaii, chapter 88;
(F) Crime victim compensation commission, chapter 351; and
(G) State ethics commission, chapter 84.

(b) Notwithstanding provisions in this section to the contrary, this part shall apply to require open deliberation of the adjudicatory functions of the land use commission.

HRS § 92-6 (2012).

S. C. Rep. No. 878, reprinted in Reg. Sess. 1975 Senate Journal at 1177-1178 (emphasis added). According to the report, the Senate Judiciary Committee added "a non-exclusive list of State quasi-judicial agencies" that it expected would use the exemption for a board's exercise of its adjudicatory functions, and asked the Attorney General to report whether any other agencies should be included. The non-exclusive list of quasi-judicial boards in section 92-6(a)(2), HRS, does not include the CWRM. However, as the list is non-exclusive, that exclusion shows only that the Legislature did not have CWRM in mind as one of the quasi-judicial boards it was concerned about, and is not determinative of whether CWRM in fact has an adjudicatory function.

The legislative history thus indicates that the exemption in section 92-6, HRS, was directed toward quasi-judicial proceedings with such features as procedural safeguards, transcripts of proceedings, declarations by witnesses, and an appellate process, as exemplified by the proceedings held by the boards specifically listed in the statute. The legislature recognized that such proceedings must balance public scrutiny with the constitutional due process rights that arise in proceedings determining individual rights and obligations. OIP finds that the board actions at issue here, by contrast, involved a policy decision rather than determination of individual rights and obligations, lacked procedural safeguards similar to those found in contested case proceedings, and did not feature transcripts of what was said, written declarations, or an appellate process. The process thus did not "permit adequate public scrutiny as well as insure fairness" as the Senate Judiciary Committee had contemplated would occur in quasi-judicial proceedings.

Further, there is no reason to conclude that the Legislature considered an "investigation" to be an adjudicatory function. CWRM appears to be relying on the word "investigatory functions" in the title of section 92-6, HRS, to support its contention that the site visits and presentations, which it terms an "investigation," were an adjudicatory function exempted under section 92-6, HRS. See HRS § 92-6 (2012). The word "investigation," however, appears nowhere in the text of section 92-6, HRS. Id. When the title of a statute is inconsistent with its text, it is the text that controls; "the title of an act cannot limit the plain meaning of its text, although it may be looked to to aid in construction in cases of doubt." Advertiser Publishing Co. v. Fase, 43 Haw. 154, 165 (Haw. 1959); see also Tauese v. State Dep't of Labor & Indus. Relations, 113 Haw.1, 37, 147 P.3d 785, 821 (2006) (title may be used to aid construction of an ambiguous statute). Following this principle, the Hawaii Intermediate Court of Appeals stated, "All things considered, we view the language of the text, as well as the context of other provisions and the legislative history . . ., to be of greater significance than the title[.]" State v. Dunbar, 139 Haw. 9, 16, 383 P. 3d 112, 119 (Haw. App. 2016) (determining that a reference to "other release" in a statute's title should not be read to broaden its application when its text referred only to release when "the person is on probation or parole for any felony offense").

Looking to the factors identified as significant by the Dunbar court, OIP concludes that the language of the exemption's text in section 92-6, HRS, does not refer to an investigation or investigatory function at all. Its legislative history, as discussed above, does not show an intent to exempt any type of board actions beyond the adjudicatory functions discussed in the statute itself. With regard to the context provided by other Sunshine Law provisions, OIP notes that another section of the Sunshine Law allows a board to hold a closed executive session as part of a Sunshine Law meeting "[t]o investigate proceedings regarding criminal misconduct." HRS § 92-5(a)(5) (2012). Indeed, the same Senate Judiciary Committee report that discussed the exemption for boards' adjudicatory functions also discussed separately how the Sunshine Law's executive session provisions would allow a board subject to the Sunshine Law to hold a closed session for a criminal investigation, which reflected an assumption that a board's investigation would not be exempted from the Sunshine Law as an adjudicatory function. In other words, the Legislature did consider the possibility that a board would need to discuss an investigation out of the public eye, and provided for it by including certain investigations in the Sunshine Law's executive meeting provisions in sections 92-4 and -5, HRS, rather than by exempting investigations from the Sunshine Law entirely under section 92-6, HRS.

CWRM and Requester both agree that the matter CWRM was considering on the dates at issue, the Petition for Designation, did not comprise a contested case. Indeed, the Petition for Designation was not a determination of individual rights, but instead a policy decision with broad effect. As the matter under consideration was a policy decision and not a contested case, the facts do not support CWRM's argument that the matter was an adjudicatory function exempted by section 92-6, HRS, but rather weigh against it. The Sunshine Law was created to ensure public participation in "the formation and conduct of public policy," which is why exceptions to its general open meeting requirement must be "strictly construed against closed meetings." HRS § 92-1 (2012). The exception in section 92-6, HRS, covers those limited situations where a board generally subject to the Sunshine Law is also responsible for decisions that do determine individual rights (and may give rise to individual due process rights) and must therefore follow the contested case process for those decisions, or a similar statutory process.

CWRM also argues that conducting the site visits and presentations in compliance with the Sunshine Law would be infeasible, so those activities must fall within the exemption set out by section 92-6, HRS.[4] OIP is not aware of legal

[4] CWRM does not cite to any specific Water Code provision that would be violated or impossible to abide by when following the Sunshine Law's requirements, so OIP does not understand CWRM to be arguing that there is a conflict of laws between the Water Code and the Sunshine Law. See OIP Op. Ltr. No. 01-06 at 6 (finding no conflict between the Sunshine Law and section 91-3, HRS, because a board could follow the requirements of both without violating either).

authority for the proposition that if something a board wants to do is challenging or infeasible to do in compliance with the Sunshine Law, that activity must be exempt from the Sunshine Law; indeed, this is basically a circular argument. However, even assuming for the sake of argument that the infeasibility of doing something under the Sunshine Law could suggest the activity was exempt from the Sunshine Law, CWRM is incorrect in its contention that site visits and presentations of the sort at issue here cannot feasibly be done in compliance with the Sunshine Law. In fact, the Sunshine Law provides a mechanism for just the sort of site visits that took place here; specifically, a limited meeting when a board needs to meet at a location where public attendance is impracticable, as set out in section 92-3.1(a), HRS. HRS § 92-3.1(a) (Supp. 2017).

Had CWRM noticed its site visits as limited meetings (as it originally considered), following the requirements set out in section 92-3.1(a), HRS, it could have complied with the Sunshine Law while visiting the locations it needed to see, and could still have stated in its notice (as it did in its "Schedules") that the public was welcome to join the CWRM at certain sites but not at others with access limitations. CWRM took video of all proceedings and posted it online, so clearly it could have met the statute's requirement to video record a limited meeting and make the recording available at the next regular meeting. See HRS § 92-3.1(c). Thus, CWRM's suggestion that the site visits were infeasible under the Sunshine Law is incorrect.

CWRM's activities on the dates in question included not only the site visits, but also presentations conducted in meeting rooms. These presentations likely would not have qualified to be held as a limited meeting under section 92-3.1, HRS, since there is no indication that public attendance at the meeting rooms in question was impracticable (particularly given that one meeting room was actually the Kailua-Kona council chambers), nor that it was necessary for CWRM to visit the meeting room locations specifically. With respect to the presentations, OIP understands CWRM to be arguing that the Sunshine Law made it infeasible for CWRM's members to all gather together in a meeting room to view a presentation about board business. So, it instead proceeded with its "Schedules" without filing a meeting notice and agenda, taking public testimony, or otherwise following the requirements of the Sunshine Law. While it may have been deemed inconvenient by CWRM's Deputy Director, CWRM could certainly have viewed the presentations during a regular Sunshine Law meeting held on Hawaii island either before or after any scheduled limited meetings. The fact that the Sunshine Law would not have allowed CWRM to skip the Sunshine Law's usual meeting requirements (including accepting public testimony) when hearing the presentations does not support CWRM's argument that the presentations were therefore exempt from the Sunshine Law. Similarly, if CWRM members discussed CWRM business during their lunches or in transit on the dates in question, those discussions would likely not have been permitted under the Sunshine Law, but CWRM could have held those discussions during a noticed meeting.

CWRM also asserts that its members were not in a meeting during the events at issue, apparently to support its argument that no Sunshine Law violation transpired. Both Requester and CWRM thus agree that CWRM did not hold a meeting on the dates at issue, and indeed it was CWRM's failure to hold a meeting that gave rise to Requester's complaint. It is not entirely clear why CWRM believes its failure to hold a meeting supports its position that no Sunshine Law violation occurred. However, if CWRM's argument is meant to be that its members' discussions and interactions are only subject to the Sunshine Law when they are actually in a meeting, that argument would be inconsistent with the structure of the Sunshine Law, which limits the discussions that may be held by board members outside a meeting to those delineated in the permitted interactions listed in section 92-2.5, HRS. See HRS § 92-2.5 (2012). CWRM has not argued that the site visits at issue were covered by a permitted interaction, nor does it appear that any permitted interaction would apply, given that a majority of its members participated in the events at issue. See id.

Because CWRM's actions on the relevant dates were not part of an adjudicatory function exempted from the Sunshine Law by section 92-6, HRS, CWRM violated the Sunshine Law by conducting them outside a noticed meeting and without falling under any permitted interaction. OIP finds that CWRM could have conducted the site visits in essentially the same way, while complying with the Sunshine Law, if it had followed the requirement to hold a limited meeting under section 92-3.1, HRS. Thus, OIP finds that although CWRM's failure to treat the **site visits** as limited meetings and comply with the relevant Sunshine Law requirements did indeed violate the Sunshine Law, the public impact of that particular violation was minimal. Rather, the public impact of CWRM's violations arose primarily from CWRM's denial of public testimony at the **presentations**, the public's exclusion from any discussion of board business that may have occurred during lunch or while in transit, and CWRM's failure to subsequently prepare meeting minutes as required by section 92-9, HRS.

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. HRS § 92-12 (2012). 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. HRS § 92-11 (2012). A suit to void any final action must be commenced within ninety days of the action. Id.

This opinion constitutes an appealable decision under section 92F-43, HRS. A board may appeal an OIP decision by filing a complaint with the circuit court within thirty days of the date of an OIP decision in accordance with section 92F-43. HRS §§ 92-1.5, 92F-43 (2012). The board shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court's review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-43(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR. This rule does not allow for extensions of time to file a reconsideration with OIP.

This letter also serves as notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES

_____

Jennifer Z. Brooks
Staff Attorney

APPROVED:

_____

Cheryl Kakazu Park
Director