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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: Richard E. Mitchell, Esq.
Board: Maui County Council
Date: November 2, 2023
Subject: Maui County Council Members Appointed to Maui Metropolitan Planning Organization Policy Board (S RFO-G 21-2)

REQUEST FOR OPINION

Requester seeks a decision as to whether members of the Maui County Council (COUNCIL-M) appointed to serve as members of the Maui Metropolitan Planning Organization Policy Board (MMPOPB) are required by the Sunshine Law to report their attendance and the matters related to COUNCIL-M's board business discussed during a MPOPB meeting to COUNCIL-M at its next meeting.

Unless otherwise indicated, this advisory opinion is based solely upon the facts presented in Requester's email to OIP dated March 30, 2021; OIP's letter to Requester dated April 15, 2021; and Requester's email to OIP dated May 17, 2021, with attached materials.

QUESTION PRESENTED

Whether the three COUNCIL-M members appointed to serve on the MPOPB are required by section 92-2.5(e), HRS, to report their attendance and the official COUNCIL-M business matters discussed during MPOPB meetings, to COUNCIL-M at its next duly noticed meeting.

BRIEF ANSWER

No. Sections 92-2.5(i) and 279D-9(b), HRS, read in conjunction with each other, permit members of a board who are appointed to serve as members of a metropolitan planning organization (MPO) policy board to freely communicate, discuss, interact, investigate, and present matters during MPO policy board meetings¹, including matters that pertain to board business of the other board they serve as members of. The two statutes jointly create a permitted interaction specifically for members of a board also serving as MPO members, which does not require subsequent reporting, and which applied to the three COUNCIL-M members' attendance and the presentation and discussion of COUNCIL-M business during the MMPOPB meeting.

FACTS

In 2015, the Legislature enacted chapter 279D, HRS, to establish federally mandated² MPOs comprising State and county agencies to, among other things, facilitate and support the continuing, cooperative, and comprehensive transportation planning process between the State, county, and other operators of public transportation receiving federal funds, including the consideration of projects and strategies that support national planning factors as defined in 23 U.S.C. section 134, regional goals and objectives, and consideration of plans and planning activities of others as they affect transportation. HRS § 279D-3(b)(2) (2020).

For each urbanized area with a population of more than 50,000 people, federal transportation legislation requires that an MPO be designated. As a condition of federal aid, the MPO must act as a decision-making agency, receiving funds so that it may carry out a “continuing, cooperative, and comprehensive transportation planning process,” which is designed to provide orderly and reasoned metropolitan planning within the framework of federal law. HRS § 279D-1 (2020); 23 U.S.C. 134(d)(1). MPOs are made up of local elected officials, officials of public agencies that administer or operate major modes of transportation in the metropolitan area, and appropriate state officials. 23 U.S.C. 134 (d)(2).

MPOs have their own policy boards and are responsible for making decisions resulting from the transportation planning process. HRS § 279D-1. To effectively do

¹ A “meeting” is defined as “the convening of a board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power.” HRS § 92-2 (defining “meeting”) (2012).

² The relevant federal transportation statutes include 23 U.S.C. §§ 134-135 and 49 U.S.C. §§ 5303-5304, as amended, and other federal laws. HRS § 279D-1 (2020).

this, MPO policy boards must include representatives from state and county governments, as well as operators of public transportation receiving federal funds, the public at large, and others identified in 23 C.F.R. part 450, subpart C. *Id.* Their membership is addressed by section 279D-6, HRS, which states that they “shall be established by comprehensive agreement, including any applicable supplemental agreements and bylaws[.]” An MPO comprehensive agreement (Agreement) is defined as “the executed agreement between the member jurisdictions or authorities of a metropolitan planning organization concerning the organization and structure of the metropolitan planning organization, the roles and responsibilities of its member jurisdictions or authorities, and the provision of funding and membership dues.” HRS § 279D-2 (defining “[c]omprehensive agreement”) (2020).

In 2016, the County of Maui and the State of Hawaii formed the Maui MPO with the passage of County Ordinance 4293, later codified in Chapter 2.35 of the Maui County Code (Maui Code). Section 2.35.030(A) of the Maui Code provides that the Maui MPO “operates according to executed comprehensive agreements between the state, county, other operators of public transportation receiving federal funds, and other entities as appropriate.” Section 2.35.030(B), Maui Code, requires the Maui MPO to have its own policy board, with its membership established in section 2.35.040, Maui Code, as follows:

- A. The director of the State department of transportation or any successor department thereof with primary responsibility for statewide transportation project implementation.
- B. **Three members of the Maui County council appointed by the council chair.**
- C. The director of the County department of planning.
- D. The director of the County department of public works
- E. The director of the County department of transportation.
- F. One member of the State senate, who shall be a resident of Maui island and shall be appointed by the senate president.
- G. One member of the State house of representatives, who shall be a resident of Maui island and shall be appointed by the speaker of the house.

Maui Code § 2.34.040 (emphasis added).

Requester provided OIP with a copy of an unsigned Agreement between the State and the County of Maui that had been submitted for approval at COUNCIL-M’s Housing, Human Services, and Transportation Committee meeting held on February 26, 2016. According to its terms, MMPOPB is to be composed of seven members, with “[t]hree members of the Maui County Council appointed by

the Council Chair.”³ Other provisions of the Agreement cite to subsections 279D-9(a) and (b), HRS, and the Agreement states that the “[m]eetings of the Policy Board, advisory committees, or subcommittees shall be subject to part I of Chapter 92, HRS, also known as the ‘Sunshine Law,’ provided that participation by members of the Maui County Council in a meeting of the Policy Board shall be a permitted interaction as provided in Section 279D-9(b), HRS.”

DISCUSSION

The Sunshine Law generally requires that board members may only discuss board business⁴ at a properly noticed meeting. HRS § 92-3 (Supp. 2022). There are limited exceptions to this rule. Board members may only communicate about board business outside of a noticed meeting under a “permitted interaction.” A list of board members’ permitted interactions is set forth in section 92-2.5(a) through (h), HRS. Section 92-2.5(i), HRS, states that the “[c]ommunications, interactions, discussions, investigations, and presentations described in this section” are “not meetings” under the Sunshine Law. Section 92-2.5, HRS, authorizing permitted interactions, was added to chapter 92, HRS, by the 1996 Legislature by the passage of Act 267. According to Act 267’s preamble, the Legislature recognized that:

there are instances when it is appropriate for interactions to occur between members of a board or between members of a board and certain other parties outside the realm of a public meeting.

. . .

Accordingly, the purpose of this Act is to specify those instances and occasions in which members of a board may discuss certain board matters . . . in a manner that does not undermine the essence of open government.

³ Although the unsigned Agreement stated that MMPOPB has seven members with three appointees from COUNCIL-M, section 2.35.040 of the Maui Code states that MMPOPB shall have nine members “with three members of the Maui County Council appointed by the council chair.” The information found on Maui MPO’s website confirms that the MMPOPB is made up of nine members. Maui Metropolitan Policy Organization, Policy Board and Policy Board Meetings, <https://www.mauimpo.org/policy-board> (last viewed November 2, 2023).

⁴ Section 92-2, HRS, defines “board business” as “specific matters over which a board has supervision, control, jurisdiction, or advisory power, that are actually pending before the board, or that can be reasonably anticipated to arise before the board in the foreseeable future.” At the time this request for an opinion was filed, there was no statutory definition of “board business” and OIP used its own definition set forth in opinion letters which is substantially similar to the subsequently enacted definition. See, e.g., OIP Op. Ltr. No. F19-03 at 9, n.9.

1996 Haw. Sess. Laws Act 267, § 1 at 628.

The permitted interactions listed in section 92-2.5, HRS, are the only ones generally applicable to all Sunshine Law boards. However, statutes outside the Sunshine Law can and do set forth additional permitted interactions applicable only to specified boards. One such permitted interaction is set forth in section 279D-9, HRS, which addresses the interactions of members of MPO policy boards, advisory committees, and subcommittees, and states, “[p]articipation by members of any other board in a meeting of a policy board shall be a permitted interaction as provided in section 92-2.5(i).” HRS § 279D-9(b) (Supp. 2022).

The permitted interaction created by section 279D-9(b), HRS, was intended to “[p]rovid[e] a limited exemption to the Sunshine Law to allow members of metropolitan policy organization policy boards to more freely discuss issues that are within the authority of the policy board and also of another body on which they serve.” H. Stand. Comm. Rep. No. 1171, 28th Leg. 2015 Reg. Sess. H.J. 1163 (2015). This permitted interaction serves the statutory requirement for a policy board to have “adequate and informed representatives from state and county governments” who can assist federally funded public transportation operators, the public at large, and others involved in the “continuing, cooperative, and comprehensive planning process.” HRS § 279D-1.

Based on the clear language in section 279D-9(b), HRS, which creates a permitted interaction specifically applicable to members of MPO policy boards when those members also serve on other boards that may have overlapping board business, and based on the legislative intent to create a permitted interaction recognized under the Sunshine Law, OIP concludes that section 279D-9(b), HRS, does indeed create a permitted interaction under the Sunshine Law for “participation by members of any other board in a meeting of a policy board.” OIP further concludes that when members of COUNCIL-M participate in MMPOPB meetings as MMPOPB members, their “[c]ommunications, interactions, discussions, investigations, and presentations” are a permitted interaction distinct from the generally applicable permitted interactions listed within section 92-2.5(a) through (h), HRS. OIP further concludes that like the generally applicable permitted interactions listed within section 92-2.5, HRS, the discussions authorized by the policy board permitted interaction are not a meeting for the purpose of the Sunshine Law. HRS § 92-2.5(i). Because participation in MMPOPB meetings by the COUNCIL-M members appointed to the MMPOPB falls within the permitted interaction created by section 279D-9(b), HRS, they are authorized under the Sunshine Law to freely discuss COUNCIL-M business during MMPOPB meetings without limitation or subsequent reporting.

Requester asked whether COUNCIL-M members who are also MMPOPB members are concurrently subject to the permitted interaction at section 92-2.5(e), HRS, which allows less than a quorum of members to attend an informational

meeting or presentation of another entity and participate in a discussion about official board business so long as there is no commitment to vote. Requester specifically asked whether this “informational meeting” permitted interaction’s reporting requirements apply to the COUNCIL-M members who also serve as MMPOPB members when they attend an MMPOPB meeting. Section 92-2.5(e), HRS, states:

(e) Two or more members of a board, but less than the number of members which would constitute a quorum for the board, may attend an informational meeting or presentation on matters relating to official board business, including a meeting of another entity, legislative hearing, convention, seminar, or community meeting; provided that the meeting or presentation is not specifically and exclusively organized for or directed toward members of the board. The board members in attendance may participate in discussions, including discussions among themselves; provided that the discussions occur during and as part of the informational meeting or presentation; and provided further that no commitment relating to a vote on the matter is made or sought.

At the next duly noticed meeting of the board, the board members shall report their attendance and the matters presented and discussed that related to official board business at the informational meeting or presentation.

HRS § 92-2.5(e) (Supp. 2022) (emphasis added).

Each permitted interaction, whether created within section 92-2.5, HRS, itself or created for a specific board in a statute outside the Sunshine Law, has its own distinct set of conditions and requirements that must be met for the interaction to be authorized under the Sunshine Law. An interaction among board members outside a meeting only needs to fall within the terms of one permitted interaction for it to be authorized under the Sunshine Law. Conditions and requirements for one type of permitted interaction are not implicitly added to the requirements for another type of permitted interaction, even when two or more permitted interactions could potentially apply. So long as an interaction outside a meeting is consistent with the requirements of at least one permitted interaction, including a permitted interaction created outside the Sunshine Law, the Sunshine Law’s requirements are satisfied.

Because OIP has determined that participation in a MMPOPB meeting by COUNCIL-M members who are also MMPOPB members is authorized by a separate permitted interaction specific to MPO policy boards, as explained above, OIP concludes that the requirements for “informational meetings” at section 92-2.5(e), HRS, do not apply to this separate permitted interaction. OIP therefore

concludes that COUNCIL-M members in this situation need not comply with the reporting or other requirements of section 92-2.5(e), HRS, when they attend MMPOPB meetings in their capacities as MMPOPB members.

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

/s/ Edith A. Feldman
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APPROVED:

/s/ Cheryl Kakazu Park
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