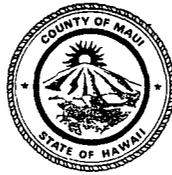


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March 20, 2002

Honorable Michael J. Molina, Chair
Subcommittee on Outdoor Lighting Standards
Public Works and Transportation Committee
County Council
County of Maui
200 S. High Street
Wailuku, Maui, Hawaii 96793

Subject: Applicability of State Sunshine Law

Dear Chair Molina:

This memorandum is sent in response to your request of March 8, 2002 relating to the applicability of Part I of Chapter 92, Hawaii Revised Statutes (commonly referred to as the "Sunshine Law") to the following circumstances:

- (1) The functioning of an informal working group established by the Subcommittee;
- (2) The ability of former Subcommittee members to meet, in whole or in part, once the Subcommittee disbands or allows its term to expire;
- (3) The ability of Subcommittee members to meet if the subcommittee suspends its activities or operations for a specific period of time.
- (4) Relative to section (2) above, the ability of the former committee members to meet formally or informally with County departments to formulate recommendations for setting outdoor lighting standards

State Sunshine Law. Before addressing your subcommittee's specific questions, it is helpful to discuss the application of the state sunshine law to county council proceedings generally. Chapter 92 of the Hawaii Revised Statutes, commonly referred to as the "Sunshine Law", sets forth the state's policy that the discussions, deliberations, decisions, and actions of governmental agencies shall be conducted as openly as possible. This includes

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the requirement for posted agendas (H.R.S. §92-7) with meetings of all boards open to the public (H.R.S §92-3). The term "board" is defined in H.R.S. §92-2(1) as:

"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.

The County council is a "board" under this definition (Atty. Gen. Op. 86-5) and "board" includes committees or subgroups of the board. (Atty. Gen. Op. 85-7)

Standing committees of the County Council are created under the Rules of the Council, Section 5, Committees of the Council. One of these standing committees is the Public Works and Transportation Committee. In addition, the Council may create a subcommittee within a standing committee under Section 5E of the Council rules which state:

A subcommittee within a standing committee may be created. The chair of the committee, subject to approval by a majority of the standing committee, shall appoint the chair and vice-chair of the subcommittee, shall specify the objectives of the subcommittee, and shall set a date on which the subcommittee shall be deemed dissolved. The chair of each subcommittee shall call meetings and preside at all meetings. In the absence of the chair and vice-chair, the subcommittee shall select a temporary chair. Subcommittees shall comply with the procedural requirements applicable to standing committees, to the extent practicable. [emphasis added.]

Therefore, because the Subcommittee on Outdoor Lighting Standards was created officially under the Public Works and Transportation standing committee of the Council and the subcommittee has duties and advisory powers, proceedings of the subcommittee are subject to the Sunshine law.

Establishing an Informal Working Group by the Subcommittee.
The applicability of the Sunshine law becomes more problematic if a smaller "working group" of the subcommittee is established. First, the Rules of the Council do not specifically provide for the creation of working groups within subcommittees. This said, the Sunshine law does anticipate some communication between members outside of committee meetings on a limited basis and for a

particular investigative basis. Under H.R.S. §92-2.5, permitted interactions of members, two or more members of a committee (but less than the number needed for a quorum) may meet to investigate a matter provided the scope is defined by the committee, the results are presented to the committee at a meeting, and deliberation/decision making occurs only at a subsequently noticed meeting.¹ Under this provision, two or more members of the subcommittee could not meet as a working group to discuss the work of the subcommittee generally or to make decisions aimed at reaching compromise or consensus.

Meetings of Former Subcommittee Members, in Whole or in Part, Once the Subcommittee is Dissolves. As cited above, Section 5E of the Council rules provides for the dissolution of Council subcommittees by requiring that a date is set upon which the subcommittee will dissolve. Also as stated above, a subcommittee is a board that has advisory power over specific matters and which is required to conduct meetings and to take official actions. Once dissolved, the subcommittee no longer has any advisory power and is not required to conduct meetings. Therefore, former subcommittee members are free to meet as they wish independently to discuss whatever matters they chose. Such meetings would be outside of the governmental process and not subject to the Sunshine law.

Meetings of Subcommittee Members, if the Subcommittee Suspends its Activities or Operations for a Specific Period of Time. Section 5E of the Rules of the Council does not provide for the suspension of a subcommittee's responsibility. Instead, the rule provides for a specific term for the subcommittee and its dissolution. This rule

¹**H.R.S. §92-2.5, Permitted interaction of members.** (a) Two members of a board may communicate or interact privately between themselves to gather information from each other about official board members to enable them to perform their duties faithfully, as long as no commitment to vote is made or sought.

(a) Two or more members of a board, but less than the number of members which would constitute a quorum for the board, may be assigned to:

(1) Investigate a matter relating to the official business of their board; provided that:

(A) The scope of the investigation and the scope of each member's authority are defined at a meeting of the board;

(B) All resulting findings and recommendations are presented to the board at a meeting of the board; and

(C) Deliberation and decisionmaking in the matter investigated, if any, occurs only at a duly noticed meeting of the board held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the board;

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also provides that the subcommittee shall comply with certain procedural requirements which includes Sunshine law procedures. Therefore, if the subcommittee were to "suspend" its activities by not formally meeting for a period of time, the members would not be free to meet privately to make decisions related to the subcommittee's business. So long as the subcommittee retains its advisory authority to the County Council, meetings of the subcommittee must adhere to the requirements of the Sunshine Law.

The Ability of Former Subcommittee Members to Meet Formally or Informally with County Departments. This question concerns the application of the Sunshine law to committees established within the executive branch of our local government. On April 30, 2001, the Office of Information Practices issued an opinion entitled, "Sunshine Law Application to Vision Teams and Neighborhood Board Members' Attendance at Vision Team Meetings (OIP Op. Ltr No. 01-01)." A review of this opinion indicated that in certain circumstances the Sunshine law might apply when an executive agency sets up a committee that includes members of the public charged with the task of advising the department on a specific matter.

In an effort to determine if the Sunshine law applies to formal meetings with County departments, I spoke with Ms. Carlotta Dias, Staff Attorney, of the State of Hawaii, Office of Information Practices, in Honolulu. I asked Ms. Dias to clarify her office's opinion relating to the application of the state Sunshine Law to executive committees.

Ms. Dias explained that the OIP opinion was a difficult decision to write because there was no other body similar to the Vision Teams. At the time, the City and County of Honolulu was using Vision Teams to determine priorities for capital improvement projects in the team's respective communities. These teams were established pursuant to the Revised Charter of Honolulu which allowed executive departments heads to appoint advisory committees. (Note: Article 7 of the Maui Charter does not include this authority.) Some of the Vision Teams were following the Sunshine law by posting their agendas and receiving public testimony while other teams were not. Ms. Dias also explained that the OIP used the definition of "board" under the Sunshine law and determined that some elements of the Vision Team were clearly like a board and therefore subject to the Sunshine Law.

Ms. Dias cautioned that the OIP opinion was quite specific to the facts presented and suggested that we go through the five-part analysis to analyze whether or not the Sunshine law is applicable to our particular situation. For example, the Vision Teams were organized in such a way that the membership was fluid. Any member of the public who showed up for the meeting was on the "board".

Also, there was no chair or secretary. Ms. Dias also referred me to a 1990 opinion by the Attorney General (90-7) in which a distinction was made between deliberative bodies with defined duties, compensation, and member qualifications (Sunshine law applies) versus technical consultants which function in an individual capacity (Sunshine law inapplicable.)

In order to determine if the Sunshine law applies to your question in particular, Ms. Dias suggested that I apply the 5-part Green Sand test to determine if the proposed task force or executive committee is a "board" within the meaning of the Sunshine law. In Green Sand Community Ass'n v. Hayward, Civ. No. 93-3259, slip op. At 9 (Haw. 1996) (memorandum opinion) (hereinafter "Green Sand")², the Hawaii Supreme Court defined a board using the following test. The Court stated that a board must be:

- (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 supervision, control, jurisdiction, or advisory power over specific matters;
- (4) which is required to conduct meetings; and
- (5) which is required to take official actions.

Clearly, former subcommittee members meeting informally with County departments would not fall within the definition of a board because there would be no committee established to act on any specific matter. Therefore, the Sunshine law would not apply to these future meetings nor prohibit former subcommittee members from meeting, after the fact, on an informal basis to assist a County department in developing rules, regulations or guidelines relating to outdoor lighting standards.

The requirements of the Sunshine law might apply to meetings of former subcommittee members with County departments provided that the departments have acted to establish: (1) an executive committee, (2) pursuant to the charter, a departmental rule or executive order, (3) that has advisory power, (4) is required to conduct meetings, and (5) is required to make recommendations to the department.

²Pursuant to sections 35(b) and (c) of the Hawaii Rules of Appellate Procedure, memorandum opinions are without precedential effect, not published and may not be cited in legal briefs to the court. However, the test is used here for analysis as it was the same test relied upon by the OIP in issuing its opinion.

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For the fifth element of the test, two factors that the court in Green Sand found particularly important in determining whether an executive committee is taking official action are (1) that the committee was first created and heavily supported by the government and (2) that the recommendations of the committee are directly incorporated into the government's proposals and plans.

The draft bill now in consideration before the subcommittee was presented in its original form to the County Council by a citizen's group calling itself the "Ad Hoc Maui Committee for Outdoor Lighting Standards." Once the subcommittee is dissolved, the Sunshine law would not restrict the former subcommittee members continued participation in the Ad Hoc Committee or any other citizen's group.

Very truly yours,



Gregory J. Garneau
Deputy Corporation Counsel

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Approved for transmittal:



James B. Takayesu
Corporation Counsel