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CHERYL KAKAZU PARK  
DIRECTOR

April 3, 2019

VIA EMAIL

Joseph K. Kamelamela, Esq.  
Corporation Counsel, County of Hawaii

Re: Hawaii County Council's Proposed Creation of Investigative Group to Investigate the Budget (CORR 2019-04002-1)

Dear Mr. Kamelamela:

The Office of Information Practices (OIP) received your email dated April 1, 2019, in which you asked for advice regarding potential Sunshine Law concerns raised by the Hawaii County Council's (Council) proposed creation of an investigative group to investigate the Hawaii County (County) budget. I'm writing with general advice under the Sunshine Law, part I of chapter 92, Hawaii Revised Statutes (Sunshine Law) (HRS).

You indicated that the Council's Committee on Finance (Finance Committee) has formed a budget ad hoc committee (Ad Hoc Committee) of four members, i.e., less than a quorum of the Finance Committee's membership, for a proposed three phase review and analysis of the County budget. Based on our telephone discussion on April 1, I understand that the Ad Hoc Committee was formed with the intent that it would operate as a permitted interaction group under section 92-2.5(b)(1), HRS, rather than as a temporary subcommittee holding open meetings, hearing public testimony, keeping minutes, and otherwise following the Sunshine Law's open meeting requirements in the same way the Finance Committee itself does for its own meetings. See OIP Op. Ltr. No. 03-07 at 6 (a committee meeting is subject to the Sunshine Law like a meeting of the full board). You also indicated that in 2011, when a similar investigative group regarding the budget was proposed, then-Corporation Counsel Lincoln Ashida was advised by OIP Staff Attorney Lorna Aratani that even if the proposed investigative group met the statutory requirements for the relevant permitted interaction, it would arguably be prohibited under section 92-5, HRS, as a use of a permitted interaction to circumvent the spirit or requirements of the Sunshine Law. (Although OIP's former paralegal Dawn Shimabukuro sent the email from OIP's account, the advice was provided and signed by Ms. Aratani.)

The schedule for the Ad Hoc Committee described in your email would have the Ad Hoc Committee reporting back to the Finance Committee three times regarding each of three phases of its assigned subject matter, with discussion by the Finance Committee at a separate meeting after each

report, over a period from now until October. The Ad Hoc Committee would operate continuously through this period as it would not dissolve until October. Meanwhile, the Finance Committee as well as the full Council would be holding a series of meetings to discuss the County budget during May and June, while the Ad Hoc Committee's work was ongoing.

As proposed, the Ad Hoc Committee would likely run afoul of the limitations section 92-2.5(b)(1), HRS, places on an investigative task force aka permitted interaction group, as discussed in OIP Opinion Letter Number 06-02. In that opinion, OIP wrote:

The language of the statute . . . anticipates that an investigative task force will undertake an investigation of defined and limited scope and will make a single report back to its board, after which the board (at a later meeting) may discuss and act on the issue. Because the permitted interaction allows board members to privately discuss board business, an exception to the usual open meeting requirements, OIP must strictly construe the statutory requirements. Haw. Rev. Stat. § 92-1(3) (1993).

The proposed timeline would have the Ad Hoc Committee members make two interim reports on aspects of the budget, and discussing them, over a total of six Finance Committee meetings, and participate in four further Finance Committee or Council meetings during which the budget would be discussed. Thus, rather than a single report back to the Finance Committee with no discussion by the full Finance Committee until the next meeting, the Ad Hoc Committee's members would take part in at least eight substantive discussions of the subject matter the Ad Hoc Committee was investigating, including discussion and voting on the budget, before the Finance Committee meeting at which Ad Hoc Committee finally presented its last report and dissolved. This seems likely to present multiple Sunshine Law violations, because the Ad Hoc Committee would be discussing the matters assigned to it as a permitted interaction group under section 92-2.5(b)(1), HRS, with the full Finance Committee and Council membership before the point (when making its final report and then opening it for discussion one meeting later) when it was permitted to do so under section 92-2.5(b)(1), HRS. While the Finance Committee and Council could comply with the requirements of section 92-2.5(b)(1), HRS, by instead refraining from hearing interim reports on or discussing the matters assigned to the Ad Hoc Committee until after the Ad Hoc Committee's report in October, that would seem to present serious practical concerns as it would mean the Council could not discuss the budget during a period in which it needed to discuss and pass out the budget.

I would strongly recommend that the Finance Committee instead form the Ad Hoc Committee as a temporary subcommittee holding open meetings, hearing public testimony, keeping minutes, and otherwise following the Sunshine Law's open meeting requirements for committees of a Sunshine Law board. See OIP Op. Ltr. No. 03-07 at 6. Because such a subcommittee would already be holding its discussions in the public eye, it would not be subject to the same restrictions a permitted interaction group would on discussing its assigned subject matter with councilmembers who are not part of the Ad Hoc Committee during meetings of the Finance Committee or the Council. If the Ad Hoc Committee were a subcommittee holding open noticed meetings, accepting public testimony, and keeping minutes, there would not be a problem with its reports to and participation in Finance Committee and Council meetings on the budget while its work was ongoing. Further, it could report to the Finance Committee and the Finance Committee could discuss its report all in the same meeting, rather than having to hold two separate meetings, as the requirement to wait

Joseph K. Kamelamela, Esq.

April 3, 2019

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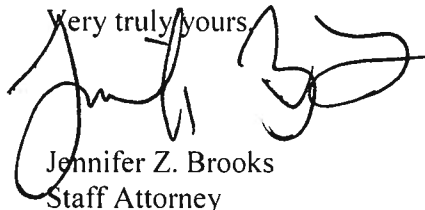
one meeting between the report and the discussion applies specifically to permitted interaction groups, not to committees in general. See OIP Op. Ltr. No. 06-02 at 5. I note that hearing testimony at the Ad Hoc Committee meetings would also be consistent with the requirement in section 10-4 of the County Charter, quoted in your letter, to allow public testimony at any meeting discussing the County operating or capital budget.

You also asked whether the items to be investigated by the Ad Hoc Committee would prevent council members not on the Ad Hoc Committee from discussing the operating and capital improvement budgets with administrative employees and department officials. The Sunshine Law applies to discussions between board members, not a board member and a non-member. For instance, OIP stated in Opinion Letter Number F15-02, "Staffers are not subject to the Sunshine Law in the way that members of the board themselves are, and communications between a board member and staffer, or between two staffers, are not generally subject to Sunshine Law scrutiny in the same way as communications between two board members." OIP Op. Ltr. No. F15-02 at 6. While this general rule does have a limited exception in a situation in which, for instance, a board staffer is "merely [a] go-between[]" tasked with passing on the information" from one member to another, this is a rare case and it seems very unlikely that a Council member's discussion of the operating and capital improvement budgets with administrative employees or department officials could be considered a discussion among Council members subject to Sunshine Law scrutiny. See id.

Finally, I note that Communication 149.1, which you provided for my review, is a memorandum from one Council member to the remainder of the Council. As it was discussed and approved at a public meeting and is stamped as received on the same date as the meeting, I presume that it was not provided to the other Council members until that same public meeting and so was not a written discussion of Council business outside a meeting, which would be inconsistent with the Sunshine Law's requirements.

Thank you for checking with OIP as to the Sunshine Law's requirements before having the Ad Hoc Committee begin its work. This letter also serves as notice that OIP is not representing anyone in this matter. OIP's role herein is as a neutral third party.

If you have any questions concerning this matter, please contact OIP.

Very truly yours,  
  
Jennifer Z. Brooks  
Staff Attorney

JZB:za