OIP OpenLine

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The Office of Information Practices ("OIP") is charged with the administration of Hawaii's open records law, the Uniform Information Practices Act (Modified), chapter 92F, HRS (the "UIPA"), and Hawaii's open meetings law, part I of chapter 92, HRS (the "Sunshine Law").

RECENT COURT CASES UNDER THE UIPA AND THE SUNSHINE LAW

The Hawaii appellate courts have ruled in two cases that offer guidance under the UIPA and the Sunshine Law. The following briefly summarizes the court rulings and their effect on future OIP opinions.

The first case concerned the serial use of a "permitted interaction" by state or county board members under the Sunshine Law.

"Permitted interactions" are those instances in which board members may interact outside of an open meeting about official board business for the purposes and under the conditions set forth in the statute. *See* Haw. Rev. Stat. § 92-2.5.

The case specifically concerned the permitted interaction that allows two members to discuss board business between themselves as long as no commitment to vote is made or sought (the "two-member permitted interaction").

Prior to the lawsuit, OIP had issued an advisory opinion rejecting the Honolulu City Council's (the "Council") position that a member could use this permitted interaction to discuss Council business with one member, and then use it repeatedly to discuss the same Council business with other members in a series of one-on-one discussions outside of a meeting. *See* OIP Op. Ltr. No. 05-15.

OIP concluded that this serial use violates the Sunshine Law because it circumvents the law's open meeting requirement and is contrary to the law's underlying policy and intent.

The Intermediate Court of Appeals (the "ICA") agreed with this conclusion and recognized that deference should be given to OIP's advisory opinions issued under the Sunshine Law.

RIGHT TO KNOW COMMITTEE V. CITY COUNCIL

Various non-profit organizations (the "plaintiffs") challenged the Council's position that the Sunshine Law's permitted interactions may be used serially.

On appeal, the ICA ruled on the specific question raised by the facts alleged:

Whether a quorum of the Council members improperly used the two-member permitted interaction in a series of one-on-one discussions to deliberate on a resolution.

The ICA generally deferred to OIP's opinion and confirmed the lower court's conclusion that the quorum of the members' serial use of the two-member permitted interaction had violated the Sunshine Law.

The ICA emphasized that when this permitted interaction was used in this manner, "the spirit of the open meeting requirement was circumvented and the strong policy of having public bodies deliberate and decide its business in view of the public was thwarted and frustrated."

The ICA also awarded plaintiffs their attorney's fees in full because the issues litigated were intertwined making it difficult to separate the fees and because the plaintiffs substantially won.

In ruling on the fees issue, the ICA noted its "great public import" given the Sunshine Law's intent to encourage citizens to pursue claims of Sunshine Law violations.

Right to Know Comm. v. City Council, City & County of Honolulu, 175 P.2d 111 (Haw. Ct. App. 2007).

(continued)

Recent Cases (con't.)

The court's decision is important because it recognized that:

* the two-member permitted interaction cannot be used serially by a majority of the members
* attorneys fees should be awarded viewing the issues raised cumulatively
* where a board amends its rules to "cure" a violation, the public may still seek a court's ruling where a challenged act or practice is likely to reoccur
* OIP's Sunshine Law advisory opinions are accorded deference by the court

Effect on Future OIP Opinions:

This case will not affect future OIP opinions on the serial use of the two-member permitted interaction because it upheld OIP's conclusion in Opinion Letter Number 05-15.

However, OIP will use this case as guidance and support when opining on the serial use of other permitted interactions where the same reasoning applies, i.e., where serial use would circumvent the Sunshine Law.

In the second case, the Hawaii Supreme Court ruled on whether Olelo: The Corporation for Community Television ("Olelo"), which among other things administers the public, educational and governmental access channels ("PEGs"), falls within the definition of "agency" under the UIPA.

In determining whether a private entity falls within the UIPA's broadly worded definition of "agency," OIP had found a "totality of circumstances" test to be consistent with the UIPA's policy and legislative history.

Examining the totality of factors, OIP found indicia of indirect state ownership, management and control of Olelo in its performance of a government function, namely the administration of the PEGs on behalf of the State. OIP thus concluded that Olelo was "owned, operated, or managed by or on behalf of this State" and therefore an "agency" for UIPA purposes. *See* OIP Op. Ltr. No. 02-08.

The court disagreed, ruling that Olelo is not an "agency" under the plain language of the statute and the lower court's conclusion that it does not perform a government function.

OLELO: THE CORPORATION FOR COMMUNITY TELEVISION V. OIP

Olelo sought a court ruling on whether it is an "agency" under the UIPA. The court found that Olelo is not state "owned, operated or managed," pointing to, among other things, its non-profit corporate form, its title to property not purchased with PEG fees, its day-to-day management of its operations with non-state employees, and the State's lack of direct and full control over Olelo's activities or business affairs. The court also found that Olelo is not "owned, operated, or managed . . . on behalf of" the State because it is not substituting for the State in performing a governmental function. *Olelo v. OIP*, 173 P.3d 484 (Haw. 2007).

The court's decision instructs that:

* for a private entity to be considered an "agency" the facts must show that:
  (1) the State directly owns all of the entity's assets or exercises day-to-day control; or
  (2) the entity is substituting for the State in performing what is clearly, or directly stated to be, a governmental function
* court will rule on threshold issues of UIPA applicability, such as what is an "agency" or "government record"
* court will give deference to OIP opinions on matters the UIPA gives OIP the discretion to determine (matters within OIP's area of expertise), such as application of the UIPA's exceptions to disclosure or an agency's compliance with the UIPA's disclosure requirements

Effect on Future OIP Opinions:

In accordance with the court's ruling, OIP will not find a private entity to be an "agency" under the UIPA unless it (1) is clearly and fully owned or directly run by the State; or (2) performs what is indisputably a traditional government function, such as where a government service is directly privatized. Few entities will likely meet this strict definition.

Office of Information Practices
Paul T. Tsukiyama
Director

Address: No. 1 Capitol District Building
250 S. Hotel St., Suite 107
Honolulu, Hawaii 96813

Phone: (808) 586-1400 Fax: (808) 586-1412
Internet: www.hawaii.gov/oip E-mail: oip@hawaii.gov