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May 17, 2021

VIA EMAIL

Councilmember Michael J. Molina, Chair
Government Relations, Ethics, and Transparency Committee
Maui County Council

Re: Sunshine Law and Consent Calendar (CORR # 2021-0511-03)

Dear Chair Molina:

The Office of Information Practices (OIP) received your email dated May 11, 2021, attaching your letter dated May 10, 2021, in which you asked for OIP's thoughts on proposed rule amendments adding a process for a Consent Calendar for matters that will not require discussion at a Council meeting, specifically as it may be affected by the Sunshine Law, part I of chapter 92, Hawaii Revised Statutes (HRS).

It doesn't appear that anything in the proposed process directly conflicts with the Sunshine Law's requirements – in other words, there is nothing where following a requirement in the Consent Calendar process would itself be a Sunshine Law violation – but if Council members were to focus only on following the Consent Calendar process set out by the rule without also considering whether the Sunshine Law allows the actions they are taking, they could very well end up acting contrary to the Sunshine Law's requirements even while following the Consent Calendar process.

The items listed on the Consent Calendar in the agenda as filed with the meeting notice are unlikely to give rise to Sunshine Law problems, assuming they are described with sufficient detail to meet the notice requirement, because they will meet the Sunshine Law's notice requirements and presumably the Council will accept public testimony on them and otherwise follow the Sunshine Law's public meeting requirements. The more likely hazards lie in the provision allowing Council members to add or remove Consent Calendar items at the meeting and discuss the proposed additions or removals.

Your letter mentioned that Consent Calendar items might include communications received by the Council that will be filed, not discussed or acted on; or communications that will be referred (perhaps for further action); or bills on second reading. In addition, an email to OIP from Legislative Attorney James Forrest, also asking OIP's thoughts on the proposed process, mentioned that it might also be used for receiving reports, adopting minutes, or approval of "noncontroversial" items that require Council action.

It sounds like most if not all of the items that may appear on the Consent Calendar will be Council business, being items within the Council's authority that are appearing on a Council agenda in the foreseeable future. While there may be an argument that some items are not truly within the authority of the full Council as opposed to Council staff – for instance, the filing of a communication on which no action is expected to be taken could be considered a ministerial act rather than something the Council is considering – bills on second reading or other noncontroversial items requiring Council action are clearly Council business even if the current action to be taken on them is routine or noncontroversial. Thus, Council members will need to follow the Sunshine Law's requirements for these items. To begin with, that means that Council members should not discuss them with other Council members outside a meeting except as allowed by the Sunshine Law's permitted interactions in section 92-2.5, HRS. OIP's three part Quick Review on Who Board Members Can Talk to and When, available in the training section of OIP's website (<https://oip.hawaii.gov/training/>), explains those permitted interactions.

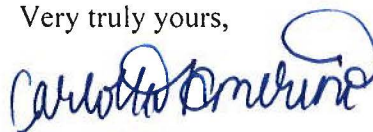
Further, when a Council member wants to add an item to the Consent Calendar at a meeting, the Council will need to follow the Sunshine Law's requirements for adding an item to the agenda at a meeting, as set forth in section 92-7(d), HRS. A board cannot add an agenda item at the meeting if it is "of reasonably major importance and action thereon by the board will affect a significant number of persons," but presumably the items proposed for the Consent Calendar will meet this qualification. The Council will still need the affirmative vote of two-thirds of all members to which it is entitled to add an item to the agenda, though, taken prior to the board's discussion of the item itself (since the item must be added to the agenda before the Sunshine Law allows it to be considered).

Removal of an item from the Consent Calendar will present less difficulty, since there is no requirement of a supermajority vote to remove an item. However, OIP reminds the Council that if it will be discussing an item, even if the discussion is just in the context of whether to remove it from the Consent Calendar, it should still treat the item as an agenda item in the sense of allowing public testimony on the item, if any, prior to the Council's discussion as required by section 92-3, HRS.

I hope this gives you insight into the potential Sunshine Law implications of the Council's new Consent Calendar process. 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 further questions concerning this matter, do not hesitate to contact OIP.

Very truly yours,



Jennifer Z. Brooks
Staff Attorney

JZB:rt

cc: James Forrest, Esq.