

SUNSHINE LAW MEETING
MINUTES OF THE HAWAII STATE ETHICS COMMISSION

State of Hawaii

Date: Wednesday, September 24, 2014

Time: 10:00 a.m.

Place: Hawaii State Ethics Commission Conference Room
American Savings Bank Tower
1001 Bishop Street, Suite 960
Honolulu, Hawaii 96813

Present: State Ethics Commission Members
Edward L. Broglio, Chair
David O'Neal, Vice Chair
Susan N. DeGuzman, Commissioner
Ruth D. Tschumy, Commissioner
Melinda Wood, Commissioner

State Ethics Commission Staff
Leslie H. Kondo, Executive Director
Susan D. Yoza, Associate Director
Nancy C. Neuffer, Staff Attorney
Virginia M. Chock, Staff Attorney

Department of the Attorney General
Charleen Aina, Deputy Attorney General
Robyn Chun, Deputy Attorney General

CALL TO ORDER

The meeting was called to order at approximately 10:00 a.m. by Chair Broglio.

SUNSHINE LAW SESSION

Agenda Item No. I: Minutes: Consideration and Approval of the Minutes of the July 23, 2014, Meeting

Commissioner Tschumy asked that the minutes (regarding Agenda Item VII: Act 230, 2014 Session Laws of Hawaii: Discussion of Interpretation and Application

of Act 230) be amended to reflect that Commissioner Tschumy and Vice Chairperson O'Neal requested that their financial disclosure statements be made public immediately. Chair Broglio noted that all commissioners requested that their financial disclosure statements be open to the public and that all of the disclosure statements are now posted on the Commission's website.

Vice Chair O'Neal made and Commissioner DeGuzman seconded a motion to approve the minutes of the July 23, 2014, Sunshine Law meeting, as amended. The motion carried unanimously (Broglio, O'Neal, DeGuzman, Tschumy, and Wood voting).

Agenda Item No. II: Civil Beat's Request for Access to the Financial Disclosure Statements Filed Prior to July 8, 2014, by Members of the Board of Regents, the Land Use Commission, and the Agribusiness Development Corporation

Executive Director Kondo stated that staff received a request from Civil Beat for access to the financial disclosure statements of the members of the Board of Regents, the Land Use Commission, and the Agribusiness Development Corporation. Based upon advice issued by the Attorney General's office, staff provided only those financial disclosure statements filed by the members of the three boards on or after July 8, 2014. Staff denied the request for financial disclosure statements filed by board members before July 8, 2014, citing HRS section 84-17(e), which makes those disclosure statements confidential. Executive Director Kondo said that deputies from the Attorney General's office met with the attorney for Civil Beat and were present to discuss legal issues about this matter with the Commission.

Chair Broglio asked for public testimony on this agenda item.

Brian Black, Executive Director of the Civil Beat Law Center for the Public Interest, stated that he submitted written testimony in support of releasing board and commission financial disclosures filed before July 8, 2014.

Dan Purcell, a member of the public, testified in favor of making all financial disclosures of the affected board members public in accordance with the legislative intent of the law.

Henry Curtis, Executive Director of Life of the Land, testified that he was the author of the bill that became Act 230 and that the new law makes public all financial disclosures filed henceforth but does not suggest that past disclosures be made public.

RECESS OF SUNSHINE LAW MEETING AND CONVENING OF EXECUTIVE SESSION

At approximately 10:10 a.m., Commissioner DeGuzman made and Vice Chair O'Neal seconded a motion to recess the Sunshine Law meeting and to convene

an executive session pursuant to Hawaii Revised Statutes section 92-5(a)(4), to consult with the Commission's attorneys on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities. The motion carried unanimously (Broglio, O'Neal, DeGuzman, Tschumy, and Wood voting).

EXECUTIVE SESSION

The Commission and its attorneys met in Executive Session with Deputies Attorney General Charleen Aina and Robyn Chun.

ADJOURNMENT OF EXECUTIVE SESSION AND RETURN TO THE SUNSHINE LAW MEETING

At approximately 11:01 a.m., the Commission returned to the Sunshine Law meeting.

Commissioner DeGuzman moved and Vice Chair O'Neal seconded a motion that Civil Beat's request for access to the financial disclosure statements filed by members of the Board of Regents, the Land Use Commission, and the Agribusiness Development Corporation prior to July 8, 2014, be denied. The motion carried unanimously (Broglio, O'Neal, DeGuzman, Tschumy, and Wood voting).

Executive Director Kondo asked for clarification that the Commission's motion was to reaffirm staff's previous response to Civil Beat denying its records request. Chair Broglio stated that this was correct.

Agenda Item No. III: Act 230, 2014 Session Laws of Hawaii: Consideration of Staff Recommendation that Commission Request Members of the Fifteen Boards and Commissions Added by Act 230 to Hawaii Revised Statutes section 84-17(d) to File Public Disclosures

Chair Broglio asked for public testimony on this agenda item. There was no public testimony offered at this time.

Executive Director Kondo stated it was staff's view that the Legislature intended to make all of the financial disclosure statements of the members of the fifteen boards public and did not intend that there be a difference between current members who filed before July 8, 2014, and current members who filed after July 8, 2014. Executive Director Kondo also stated that the disclosures filed in 2015 may not be very meaningful because it is a "short form" year and filers need only report changes to their financial interests. If a filer has no changes to report, the filer need only check a box on the short form stating that there are no changes. Executive Director Kondo stated that the next filing deadline for a "long form" will be May 31, 2016. For members of the fifteen boards

who filed their disclosure forms before July 8, 2014, it will be roughly twenty months before the public has access to information about the members' financial interests. Executive Director Kondo said that staff does not believe this is what the Legislature intended.

Executive Director Kondo suggested that it would be consistent with the intent of Act 230 to request the members of the fifteen boards to voluntarily allow the Commission to disclose their financial disclosure statements.

Dan Purcell, a member of the public, stated that he intended his previous testimony to be for this agenda item.

Henry Curtis, Executive Director of Life of the Land, stated that he supports the staff's recommendation.

Executive Director Kondo stated that the Commission might want to hear from the Deputies Attorney General as to their legal position concerning staff's recommendation.

At approximately 11:09 a.m., Commissioner DeGuzman made and Commissioner Wood seconded a motion to recess the Sunshine Law meeting and to convene an executive session pursuant to Hawaii Revised Statutes section 92-5(a)(4), to consult with the Commission's attorneys on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities. The motion carried (Broglie, DeGuzman and Wood voting aye; O'Neal and Tschumy voting nay).

After conferring with Deputy Attorney General Aina ("Deputy AG Aina"), Chair Broglie announced that the law requires a vote of two-thirds of the members present to go into executive session. Chair Broglie stated that because two-thirds of the Commission's members did not vote in favor of going into executive session, the Commission would remain in public session.

Deputy AG Aina stated that if the proposition before the Commission is to request that members of the fifteen boards and commissions affected by Act 230 voluntarily file public disclosures, there can be no objection to this. Chair Broglie stated that the State Ethics Commission would recommend to the other boards and commissions that they follow the Commission in voluntarily disclosing their financial disclosure statements.

Executive Director Kondo stated that at a meeting by staff with Attorney General Louie, First Deputy Attorney General Suzuki, and Deputies AG Aina and Chun, the Attorney General expressed concerns about this suggestion. Deputy AG Aina stated that she did not recall this discussion and that there is nothing to preclude the Commission from requesting any official to voluntarily file a public disclosure in anticipation that the next filing will be an abbreviated filing. Deputy AG Aina stated that, as best she can tell, there is no legal consequence to this.

Executive Director Kondo asked Deputy AG Aina to confirm her position that the Commission can write to board members and ask them to consider voluntarily allowing the Commission to disclose their financial disclosure statements. Vice Chair O'Neal suggested that the Commission draft a letter and ask the Attorney General to review it before it is sent out. Executive Director Kondo said that he felt the Commission could go ahead if Deputy AG Aina, who is one of the senior deputies in the department, does not have any objections. Deputy AG Aina said that as long as the request is for voluntary disclosure, she does not think there would be any adverse consequences and she did not believe the Attorney General would disagree with this.

Vice Chair O'Neal moved and Commissioner Wood seconded a motion to accept staff's recommendation to send letters to the members of the fifteen boards and commissions added by Act 230 who have not made public disclosures to voluntarily file public financial disclosure statements. The motion carried (Broglia, O'Neal, Tschumy, and Wood voting aye; DeGuzman abstaining).

During the vote, Commissioner Tschumy asked for discussion as to whether the Commissioners could see the draft letter before it is sent. Commissioner Tschumy said that she would like to see the draft. Executive Director Kondo stated that the draft letter could be brought to the Commission at its next meeting. Vice Chair O'Neal and Commissioner DeGuzman said they did not need to see the letter; Vice Chair O'Neal stated that he would rather the letter be sent out before waiting for the next meeting. Commissioner Wood agreed.

Chair Broglia called again for a vote on the motion to accept staff's recommendation to send letters to the members of the fifteen boards and commissions added by Act 230 who have not made public disclosures to voluntarily file public financial disclosure statements. The motion carried (Broglia, O'Neal, Tschumy, and Wood voting aye; DeGuzman abstaining).

Agenda Item No. IV: League of Women Voters' Request for Access to the Attorney General Letters to the Commission Regarding the Interpretation of Act 230, 2014 Session Laws of Hawaii, Pursuant to the Uniform Information Practices Act (Modified), Hawaii Revised Statutes chapter 92F: Discussion and Consideration to Waive the Attorney-Client Privilege With Respect to the Requested Records

Chair Broglia asked for public testimony on this agenda item.

Wynnie Hee, on behalf of the League of Women Voters of Hawaii ("League"), stated that she submitted written testimony and that the League was asking the Commission to publicly disclose any written legal advice from the State Attorney General or any other party which might justify the Commission's decision not to disclose the financial disclosure statements of the members of the fifteen boards and commissions affected by Act 230 that were filed before the Act's effective date.

Executive Director Kondo stated that unless the Commission decides to waive the attorney-client privilege, it can deny the League's request to access the opinion letters that it received from the Attorney General. Executive Director Kondo stated that staff would not recommend the Commission waive its attorney-client privilege with respect to the Attorney General's opinion letters.

Vice Chair O'Neal moved and Commissioner DeGuzman seconded a motion not to waive the Commission's attorney-client privilege and to deny the request from the League of Women Voters to release the Attorney General's opinion. The motion carried unanimously (Broglio, O'Neal, DeGuzman, Tschumy, and Wood voting).

Executive Director Kondo suggested that the Commission recess the Sunshine Law meeting to begin the adjudicatory meeting due to scheduled appearances by people requesting to address the Commission in matters to be discussed in the adjudicatory meeting.

At approximately 11:34 a.m., Vice Chair O'Neal made and Commissioner DeGuzman seconded a motion to recess the Sunshine Law meeting. The motion did not carry (O'Neal and DeGuzman voting aye; Broglio and Tschumy voting nay; Wood abstaining).

Agenda Item No. V: Interpretation of Hawaii Revised Statutes Sections 84-14(d), 84-18(b), and 84-18(c)

Chair Broglio asked for public testimony on this agenda item. There was no public testimony.

Deputies AG Aina and Chun left the meeting at approximately 11:35 a.m.

Executive Director Kondo stated that staff has been re-examining some of the Commission's previous interpretations of certain sections of the State Ethics Code, including HRS section 84-14(d), one of the conflicts-of-interests provisions; HRS section 84-18(b), one of the post-employment provisions that applies to legislators; and HRS section 84-18(c), one of the post-employment provisions that applies to employees.

Executive Director Kondo explained that HRS section 84-14(d) prohibits an employee from assisting or representing any person or business for pay on matters before the employee's agency. Executive Director Kondo said the Commission has not construed this provision to prohibit an employee from performing services for his agency himself or through a business entity comprised of only the employee and perhaps a nonprofessional staff. Executive Director Kondo stated that he believes allowing an employee to do business with his own agency is troubling. Executive Director Kondo explained that the same language is used in the post-employment provisions.

Executive Director Kondo stated that if the Commission changes its interpretations of these provisions, this will impact a number of state agencies that have contracts with their employees. Executive Director Kondo stated that staff will reach out to some of these agencies to obtain their comments or positions. Executive Director Kondo stated that this issue will be brought back to the Commission at a future meeting.

Vice Chair O'Neal stated that when this matter is brought to the Commission, he would like to know how the Commission's decision will be applied to existing contracts--for example, will these contracts have to be cancelled and what will happen if there is a penalty for cancelling a contract? Executive Director Kondo stated that the Commission may have to wrestle with this question and may consider a grandfather provision or may allow employees or agencies a grace period that will allow them to go to the legislature to amend the law.

Agenda Item No. VI: Fundraising by State Employees for Private Organizations Using State Resources: Status and Update Regarding Discussion Group Meetings; Tentative Timeline for Publication of Staff Recommendation and Commission Consideration of Staff Recommendation

Staff Attorney Neuffer explained that staff is drafting recommendations for this matter and hopes to bring its recommendations, with input from the fundraising discussion group, to the Commission in October.

Agenda Item No. VII: Executive Director Performance Review: Consideration of Establishing Goals and Other Criteria to Review and Evaluate the Executive Director's Work Performance; Consideration of Forming a Permitted Interaction Group to Investigate and Recommend Appropriate Goals and Other Performance Review Criteria

Chair Broglio said he asked that this item be placed on the agenda because he believes it is important to set goals for an agency. He stated that he would like to have the Commission set goals with the Executive Director and establish procedures for a yearly performance review for the Executive Director, who would then follow up and do the same for staff.

Commissioner DeGuzman asked whether this has already been done. Chair Broglio stated that a performance review was done two or three years ago but goals were not agreed upon ahead of time. Commissioner DeGuzman said it was her understanding that the Executive Director was going to be evaluated using the Commission's previous evaluation form.

Commissioner DeGuzman stated that she thought the Executive Director should decide what goals to set based on his knowledge of the budget, workload, and staff. Chair Broglio stated that he wanted to establish a process so the Commission and the Executive Director could come to an agreement about future goals. Chair Broglio stated

that the goals would be set for the Executive Director and the Executive Director would involve staff in working together to meet the goals.

Commissioner DeGuzman suggested that the evaluation form last used by the Commission for the Executive Director be provided to the Commissioners at the next meeting so they can see what it looks like. Chair Broglio said that his request was for a committee of two commissioners to work with the Executive Director to establish a process for goal setting and review. He said the committee could look at the previous evaluation form and then make recommendations to the full Commission.

Commissioner Wood said that goals can change over time and she thought it would be a good process to have the Commission and the Executive Director work together on a plan.

Chair Broglio stated that he wanted to form a permitted interaction group to investigate and recommend goals and performance review criteria for the Executive Director. Chair Broglio stated that he would like to be one of the members of the group. Commissioner DeGuzman agreed to serve as the other member of the group.

Commissioner Wood moved and Vice Chair O'Neal seconded a motion to form a committee of two commissioners to start the process of establishing goals and criteria for the performance evaluation of the Executive Director. The motion carried unanimously (Broglio, O'Neal, DeGuzman, Tschumy, and Wood voting).

Vice Chair O'Neal moved and Commissioner Wood seconded a motion to form a Permitted Interaction Group comprised of Chair Broglio and Commissioner DeGuzman as its members for the purpose of investigating and recommending appropriate goals and other performance review criteria for the Executive Director.

Commissioner Tschumy asked whether members of the permitted interaction group would be designated each year. Executive Kondo responded that the permitted interaction group is being formed for a specific purpose and will not be a standing committee. Chair Broglio stated that the permitted interaction group would bring information to the Commission and the Commission would decide what to do going forward.

The Commission voted on the motion and the motion carried unanimously (Broglio, O'Neal, DeGuzman, Tschumy, and Wood voting).

Agenda Item No. VIII: Executive Director's Report

1. Education Schedule

Executive Director Kondo updated the Commission on recently held and upcoming ethics training sessions. Executive Director Kondo stated that staff would also like to do a training session on the Lobbyists Law for lobbyists before the end of the year.

2. Council on Government Ethics Laws (COGEL): Annual Conference (Pittsburgh, Pennsylvania; Sunday, December 7 through Wednesday, December 11, 2014)

Executive Director Kondo stated that he will be attending the COGEL Conference in Pittsburgh and the program for the conference is now available.

Agenda Item No. IX: Executive Session Minutes: Consideration and Approval of the Minutes of the July 23, 2014, Executive Session

Commissioner DeGuzman made and Vice Chair O'Neal seconded a motion to approve the minutes of the July 23, 2014, Executive Session. The motion carried unanimously (Broglia, O'Neal, DeGuzman, Tschumy, and Wood voting).

ADJOURNMENT

At approximately 12:03 p.m., Vice Chair O'Neal made and Commissioner DeGuzman seconded a motion to adjourn the Sunshine Law meeting. The motion carried unanimously (Broglia, O'Neal, DeGuzman, Tschumy, and Wood voting).

The meeting was adjourned at approximately 12:03 p.m.

Minutes approved on November 19, 2014.