

THE CIVIL BEAT  
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***VIA ELECTRONIC MAIL***

July 22, 2021

Cheryl Kakazu Park, Director  
Office of Information Practices  
State of Hawaii  
No. 1 Capitol District Building  
250 South Hotel Street, Suite 107  
Honolulu, HI 96813

**Re: Honolulu Police Commission: Sunshine Law Concerns**

Dear Director Park:

We request that the Office of Information Practices (OIP) determine whether the Honolulu Police Commission (Commission) violated Hawai'i Revised Statutes (HRS) ch. 92 (the Sunshine Law) in the following ways.<sup>1</sup>

**The Commission Fails to Specify the Basis for Each Executive Discussion**

For the last six months, regardless the topics to be discussed, the agenda for every Commission meeting includes the same boilerplate language to justify an omnibus executive session for multiple agenda topics.<sup>2</sup> The agenda cites every Sunshine Law

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<sup>1</sup> The Commission's agendas are posted at [www.honolulu.gov/hpc/agendas.html](http://www.honolulu.gov/hpc/agendas.html), and its public session minutes at [www.honolulu.gov/hpc/minutes.html](http://www.honolulu.gov/hpc/minutes.html).

<sup>2</sup> The paragraph reads:

The following agenda items will be reviewed in executive session pursuant to: HRS 92-5(a), subsections (2), (4), (5), (6) and (8): to consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved; to consult with its attorneys on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities; to investigate proceedings regarding criminal misconduct; to consider sensitive matters related to public safety or security; to deliberate or make a decision upon a matter that requires the consideration of information that must be kept confidential pursuant to state or federal law, or a court order. During this meeting, there may be discussion with the Chief of Police and her staff regarding internal strategies and sensitive criminal investigation matters relating to public

exception that could possibly apply to the Commission.<sup>3</sup> At the meetings, a Commission member repeats the agenda boilerplate as a motion, which the members then approve unanimously. The Commission thus never identifies the specific reasons that justify an executive session as to each topic that the Commission plans to discuss behind closed doors.

A board's decision to close its doors to the public is discretionary within the limits of the Sunshine Law. *Civil Beat Law Ctr. for the Public Interest, Inc. v. City & County of Honolulu*, 144 Hawai'i 466, 477, 445 P.3d 47, 58 (2019). The Sunshine Law, however, requires that the board's exercise of that discretion be subject to public scrutiny. On the agenda, "in the case of an executive meeting the purposes shall be stated." HRS § 92-7(a); accord OIP Op. No. 03-22 at 7 ("At a minimum, an executive agenda must refer to the specific subsection of section 92-5(a), HRS, which is the basis for the executive meeting."). And in the meeting, "[t]he reason for holding such a meeting shall be publicly announced and the vote of each member on the question of holding a meeting closed to the public shall be recorded, and entered into the minutes of the meeting." HRS § 92-4. These procedural requirements serve the intent of the Sunshine Law to "protect the people's right to know" and ensure that board business is conducted "as openly as possible." HRS § 92-1. At the very least, public details on the purpose for an executive session requires a board to "thoughtfully weigh the interests at stake before voting" to close a meeting. *Civil Beat Law Ctr.*, 144 Hawai'i at 477, 445 P.3d at 58.

Because the Commission routinely violates these procedural requirements, it is impossible for the public to determine whether it is properly exercising its discretion to conduct its business in secret. Does the Commission claim that its "Discussion of Legislative Bills" on April 7, 2021, concerned criminal misconduct proceedings or information protected by a confidentiality statute? Is the Commission claiming (improperly) that its discussion of the "Selection process for next Chief of Police update" on July 21, 2021, is protected by the personnel-privacy exception? The Commission's omnibus practice of citing nearly every exception for a wide variety of topics is no different from simply asserting that its executive sessions are exempt without any specificity as the reason for excluding the public.

The Commission must identify on its agenda and in its vote, for each agenda topic, the specific exceptions that justify closing its doors.

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safety that disclosure could significantly risk the circumvention of law and undermine the effectiveness of the public's protection by the police.

<sup>3</sup> The Commission is not involved in professional or vocational licensing, labor or property acquisition negotiations, or private donations. HRS § 92-5(a)(1), (4), (7).

### **The Commission Fails to Provide Adequate Specificity in Its Agendas**

Board agendas must provide public notice of the items to be discussed. HRS § 92-7(a). “The Sunshine Law requires that meeting notices include an agenda for a public meeting to be sufficiently detailed so as to provide the public with reasonable notice of what the board intends to consider. The statute’s notice requirement is intended to, among other things, give interested members of the public enough information so that they can decide whether to participate in the meeting.” OIP Op. No. F16-02 at 3.

The public cannot be required to refer to a source other than the agenda to understand what will be discussed at the board meeting. OIP Op. No. 07-02 at 4-5. For example, reference to topics by a tracking or bill number alone does not give the public fair notice of what will be considered. *E.g.*, OIP S Memo. No. 18-03 at 2-4. These same principles apply equally to anticipated executive sessions so long as the details will not “defeat the purpose of the executive meeting.” OIP Op. No. 03-22 at 7; *e.g.*, OIP S Memo. No. 11-02 at 2 (consulting with counsel on “approval of a proposed settlement in an arbitration case” insufficiently vague “[b]ecause of the lack of any description or identification of what arbitration was to be discussed”).

The public has the right to testify as to any matter listed on the agenda, including executive session items. HRS § 92-3; *accord* OIP Op. No. F15-02 at 8. Sufficiently detailed agendas “give the public the opportunity to exercise its right to know and to scrutinize and participate in the formation and conduct of public policy.” OIP Op. No. 06-05 at 6. The public cannot decide whether to testify nor provide meaningful testimony when the board fails to explain what it will actually be discussing.

The following are deficient agenda items used by the Commission in the last six months:

- “Legal update by Deputy Corporation Counsel, if necessary” (recurring)
- “Executive Officer’s confidential report on matters that must be kept confidential” (recurring)
- “Salary Commission” (March 3): discussion specifically intended to address whether to request a more competitive salary for the chief of police
- “Discussion of Legislative Bills” (March 3, 17 and April 7): identifying bill numbers and subjects will not defeat the purpose of any executive session
- Discussion of complaints identified by complaint number only (*e.g.*, “Review of complaints HPC No. 20-046 and 20-088” on June 23)

The Commission routinely fails to give reasonably fair notice of the topics that it plans to discuss in meetings, limiting the public’s right to meaningfully participate in civilian oversight of the Honolulu Police Department.

### **The Commission Discusses Topics Not Listed on the Agenda**

The Sunshine Law requires that the agenda identify “all items to be considered at the forthcoming meeting.” HRS § 92-7(a). Boards may not “discuss items at meetings unless such items have been properly listed on an agenda.” OIP Op. No. 02-09 at 4. “Discussion of an item not properly agendaized would prevent the public from preparing meaningful testimony.” *Id.* Thus, agenda references to staff reports are insufficient to provide the public with notice of what will be discussed, and the Sunshine Law tolerates such references solely to the limited extent that “the board only listened to the staff report and did not discuss, act on, or otherwise consider any of the matters being reported on.” OIP S Memo. No. 14-14 at 13; OIP, *Agenda Guidance for Sunshine Law Boards* at 4 (rev. July 2019).

The Commission, however, has used the “Chief of Police Report” item as a catch-all category to routinely consider items not otherwise on the agenda. For example, on March 3, then-Chief Ballard reported on, among other things, a City Council resolution regarding an audit of HPD overtime. 3/3/21 Minutes at 8. The Commission extensively questioned the chief of police regarding that topic. *Id.* at 9-10. The March 3 agenda had no reference to overtime concerns.

Similarly, on June 2, Interim Chief Vanic reported on HPD’s annual training for police officers. 6/2/21 Minutes at 4-6. After that report, the Commission questioned him regarding annual police training, even though it was not on the agenda. *Id.* at 6. Then, when the chief finished his report, the Commission started questioning him about the Iremamber Sykap and Lindani Myeni shootings – again a subject not otherwise on the agenda. *Id.* at 7-8.

The subjects discussed on March 3 and June 2 by the Commission were matters of significant public concern. If members of the public had known what would be discussed by the Commission, they could have taken steps to participate in the meeting by testimony or observation. By failing to agendaize topics, the Commission violated the Sunshine Law and deprived members of the public of their statutory rights.

### **Discussions Exceeding Permitted Scope of Executive Session**

The exceptions under the Sunshine Law must be “strictly construed against closed meetings.” HRS § 92-1. The attorney consultation exception only permits a board to close its doors to the public when the meeting is “directly related” to questions of the “board’s powers, duties, privileges, immunities, and liabilities.” HRS § 92-5(a)(4), (b). The exception is “far narrower than the attorney-client privilege.” *Civil Beat Law Ctr.*, 144 Hawai‘i at 489, 445 P.3d at 70.

The Hawai`i Supreme Court explained:

[A]n attorney is not a talisman, and consultations in executive sessions must be purposeful and unclouded by pretext. At all times, the “attendance [of] the [board]’s attorneys at executive meetings must conform to [the] policy” of requiring “policy-making . . . [to] be conducted in public meetings, to the extent possible. As such, “once the [board] receives the benefit of the attorney’s advice, it should discuss the courses of action in public, and vote in public, unless to do otherwise would defeat the lawful purpose of having the executive meeting.” Moreover, “[i]f a non-board member, including the board’s attorney remains in an executive meeting after his or her presence is no longer required for the meeting’s purpose, the executive meeting may lose its ‘executive’ character.”

*Id.* (citations omitted).

On March 3 and 17 and April 7, the Commission held an executive session to discuss “Legislative Bills”.<sup>4</sup> Because of the Commission’s practice of voting on an omnibus closure motion without specificity, it is not possible for the public to know why exactly the Commission considered this discussion exempt from the Sunshine Law.<sup>5</sup> But the only exception that might arguably apply is the attorney consultation exception.

Any discussion of legislative bills, however, largely should have occurred in public. Even explanations from the Commission’s attorney analyzing potential legislation would not be a closed session – unless the bill directly related to the Commission’s powers, duties, privileges, immunities, and liabilities, which would be few, if any, bills. Moreover, even if the explanation could occur in closed session, any subsequent discussion by the Commission regarding possible actions would need to be open to the public. Nevertheless, the Commission held closed sessions on the topic in three different meetings without any public discussion after the executive meeting.<sup>6</sup>

We request that OIP investigate whether the Commission exceeded the scope of permitted exceptions to the Sunshine Law in its executive meetings to discuss legislation on March 3 and 17 and April 7.

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<sup>4</sup> For the reasons above, the agenda description itself is inadequate.

<sup>5</sup> For the reasons above, that lack of specificity violates the Sunshine Law.

<sup>6</sup> Before the executive session on March 3, the Commission did question HPD about the Department’s legislative priorities during the chief of police’s report.

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If further clarification of these concerns is needed, I may be contacted by e-mail at [info@civilbeatlawcenter.org](mailto:info@civilbeatlawcenter.org) or telephone at 531-4000.

Regards,

A handwritten signature in blue ink, appearing to read 'R. Brian Black', with a stylized, flowing script.

R. Brian Black  
Executive Director  
Civil Beat Law Center for the Public Interest