

CADES SCHUTTE LLP

JEFFREY S. PORTNOY 1211-0
ELIJAH YIP 7325-0
1000 Bishop Street, Suite 1200
Honolulu, HI 96813-4212
Telephone: (808) 521-9200

1ST CIRCUIT COURT
STATE OF HAWAII
FILED

2006 FEB 17 PM 3:09

R. HIGA
CLERK

Attorneys for Plaintiffs
RIGHT TO KNOW COMMITTEE; LEAGUE OF
WOMEN VOTERS OF HAWAII; SOCIETY OF
PROFESSIONAL JOURNALISTS, HAWAII
CHAPTER; UNIVERSITY OF HAWAII
CHAPTER OF THE SOCIETY OF
PROFESSIONAL JOURNALISTS; BIG ISLAND
PRESS CLUB, INC.; HAWAII POLITICAL
REFORM PROJECT; CITIZEN VOICE; and
HONOLULU COMMUNITY MEDIA COUNCIL

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

RIGHT TO KNOW COMMITTEE, a
Hawai'i non-profit corporation; et al.,

Plaintiffs,

and

STATE OF HAWAII,

Plaintiff-Intervenor,

v.

CITY COUNCIL, CITY AND COUNTY OF
HONOLULU; et al.,

Defendants.

CIVIL NO. 05-1-1760-10 EEH
(Declaratory Judgment)

ORDER GRANTING PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT
(Filed December 5, 2005) AND
PLAINTIFF-INTERVENOR'S JOINDER
IN PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT FILED ON
DECEMBER 5, 2005 (Filed January 10,
2006)

Hearing:

Date: January 25, 2006

Time: 10:15 a.m.

Judge: The Honorable Eden E. Hifo

No Trial Date.

PLEASE NOTE CHANGES

**ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
(Filed December 5, 2005) AND PLAINTIFF-INTERVENOR'S JOINDER
IN PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
FILED ON DECEMBER 5, 2005 (Filed January 10, 2006)**

On December 5, 2005, Plaintiffs RIGHT TO KNOW COMMITTEE; LEAGUE OF WOMEN VOTERS OF HAWAII; SOCIETY OF PROFESSIONAL JOURNALISTS, HAWAII CHAPTER; UNIVERSITY OF HAWAII CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS; BIG ISLAND PRESS CLUB, INC.; HAWAII POLITICAL REFORM PROJECT; CITIZEN VOICE; and HONOLULU COMMUNITY MEDIA COUNCIL (collectively, "**Plaintiffs**") filed their Motion For Summary Judgment requesting an order granting summary judgment in their favor as follows:

A. That the Council of the City and County of Honolulu's (the "**Council**") interpretation of HRS § 92-2.5 to allow Council members to meet in a series of one-on-one discussions on the same matter of Council business is contrary to the letter, intent, and spirit of Part I of HRS chapter 91 (the "**Sunshine Law**"), and is thus erroneous as a matter of law.

B. That the Council violated the open meeting requirement of the Sunshine Law, HRS § 92-3, by engaging in serial one-on-one discussions to come to a consensus among a majority of the Council regarding the reorganization of the Council's standing committees, and then ceremonially ratifying their decision by a vote on Resolution 05-243 without substantive discussion at a public meeting.

C. That Resolution 05-243 was adopted in violation of HRS § 92-3 and is therefore void as a matter of law.

D. That Plaintiffs are entitled to an award of reasonable attorney fees and costs they incurred in this lawsuit.

On October 24, 2005, CITY COUNCIL, CITY AND COUNTY OF HONOLULU; DONAVAN M. DELA CRUZ; TODD K. APO; BARBARA MARSHALL; CHARLES K. DJOU; ANN H. KOBAYASHI; ROD TAM; ROMY M. CACHOLA; GARY H. OKINO; and NESTOR R. GARCIA, in their official capacities as members of the Honolulu City Council

(collectively, “**Defendants**”), had filed their Motion to Dismiss Complaint Filed October 3, 2005 (“**Motion to Dismiss**”). At the hearing on the Motion to Dismiss held on December 16, 2005, the Court: (1) granted the motion to the extent that the Council’s actions relating to Resolution No. 05-243, which set forth the Council’s current committee structure and subsequent actions relating to the Council’s selection of its standing committees and committee officers are moot; and (2) denied the motion to the extent that there is a continuing controversy as set forth in paragraph 40 of the Complaint and Exhibit “5” to Plaintiffs’ Memorandum in Opposition to the Motion to Dismiss. The Court entered a written order setting forth its ruling on January 24, 2006.

In light of the Court’s ruling on the Motion to Dismiss, on January 6, 2006, Plaintiffs filed their Amendment of Motion For Summary Judgment and Memorandum in Support of Motion in which they amended their Motion For Summary Judgment to exclude items B and C of the request stated in the Motion.¹

On January 10, 2006, Plaintiff-Intervenor STATE OF HAWAII (the “**State**”) filed its Joinder in Plaintiffs’ Motion For Summary Judgment Filed on December 5, 2005 (the “**State’s Joinder**”).

Plaintiffs’ Amended Motion For Summary Judgment and the State’s Joinder came on for hearing before the Honorable Eden Elizabeth Hifo on January 25, 2006, at 10:15 a.m. Jeffrey S. Portnoy, Esq. and Elijah Yip, Esq. appeared on behalf of Plaintiffs. Charleen Aina, Esq. appeared on behalf of the State. Don S. Kitaoka, Esq., Reid M. Yamashiro, Esq., Derek T. Mayeshiro, Esq., and John S. Mackey, Esq. appeared on behalf of Defendants.

The Court having considered Plaintiffs’ Amended Motion For Summary Judgment; the

¹ Plaintiffs’ Motion For Summary Judgment, as amended, is referred to herein as the “**Amended Motion For Summary Judgment.**”

State's Joinder; and the memoranda, declarations, and exhibits filed by the parties with respect to each motion; the records and files herein; the arguments of counsel; and the Court being otherwise fully advised in the premises and for good cause shown,

IT IS HEREBY ORDERED that Plaintiffs' Amended Motion For Summary Judgment and the State's Joinder requesting that the Court determine that the Council's interpretation of Hawai'i Revised Statutes ("HRS") § 92-2.5 to allow Council members to meet in a series of one-on-one discussions on the same matter of Council business is contrary to the letter, intent, and spirit of the Sunshine Law, and is thus erroneous as a matter of law, is GRANTED.

As a preliminary matter, "serial communications" herein shall refer to a series of private communications between Council members in which at least one Council member participates in more than a single communication in the series.

The open meeting requirement of the Sunshine Law provides, in pertinent part: "Every meeting of all boards shall be open to the public and all persons shall be permitted to attend any meeting unless otherwise provided in the constitution or as closed pursuant to sections 92-4 and 92-5." HRS § 92-3. However, there are specific limitations to the open meeting requirement, including HRS § 92-2.5, entitled "Permitted interactions of members," which states, in pertinent part:

(a) Two members of a board may discuss between themselves matters relating to official board business to enable them to perform their duties faithfully, as long as no commitment to vote is made or sought and the two members do not constitute a quorum of their board.

(b) Two or more members of a board, but less than the number of members which would constitute a quorum for the board, may be assigned to:

(1) Investigate a matter relating to the official business of their board; provided that:

(A) The scope of the investigation and the scope of each member's authority are defined at a meeting of the board;

(B) All resulting findings and recommendations are presented to the board

at a meeting of the board; and

(C) Deliberation and decisionmaking on the matter investigated, if any, occurs only at a duly noticed meeting of the board held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the board;

or

(2) Present, discuss, or negotiate any position which the board has adopted at a meeting of the board; provided that the assignment is made and the scope of each member's authority is defined at a meeting of the board prior to the presentation, discussion or negotiation.

(c) Discussions between two or more members of a board, but less than the number of members which would constitute a quorum for the board, concerning the selection of the board's officers may be conducted in private without limitation or subsequent reporting.

Subsection (a) of HRS § 92-2.5 is silent on whether serial communications are permissible, and therefore, the Court finds that § 92-2.5(a) is ambiguous on the issue of serial communications. Given the ambiguity in the statutory language on the issue of serial communications and consistent with principles of statutory construction, the Court considers the legislative history of § 92-2.5 as an interpretive aid. T-Mobile USA, Inc. v. County of Haw. Planning Comm'n, 106 Hawai'i 343, 347, 104 P.3d 930, 934 (2005). However, a review of the legislative history of § 92-2.5 reveals that it too is silent on the issue of serial communications.

Accordingly, the Court applies other principles of statutory construction. First, all sections and subsections of a statute should be read *in pari materia*, i.e., in reference to each other. See HRS § 1-16. Second, "courts are bound to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." Keliipuleole v. Wilson, 85 Hawai'i 217, 221, 941 P.2d 300, 304 (1997) (internal quotation marks and brackets omitted). Third, the construction of an ambiguous statute rendered by an administrative agency charged with the responsibility of carrying out the mandate of the

statute is to be accorded persuasive weight and followed unless the construction is palpably erroneous. Aio v. Hamada, 66 Haw. 401, 407, 664 P.2d 727, 731 (1983) (citations omitted).

Applying the foregoing principles, the Court gives significant deference to the Office of Information Practice's ("OIP") opinion on the permissibility of serial communications, as set forth in OIP Opinion Ltr. No. 05-105 dated August 4, 2005, while reading subsections (a), (b), and (c) of HRS § 92-2.5 *in pari materia* and deeming each subsection to have distinct meaning. Furthermore, the Court reads HRS § 92-2.5 *in pari materia* with HRS § 92-5(b), which states, in pertinent part, that "no . . . permitted interaction . . . shall be used to circumvent the spirit or requirements of [the Sunshine Law] to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power."

Accordingly, serial communications are not permitted unless they are allowed by an exception specified in the Sunshine Law. HRS § 92-2.5 describes instances in which a board member may communicate privately with each other. Subsection (b) allows two or more board members assigned by the board, but less than a quorum of the board, to interact outside of a public meeting for the purpose of investigating a matter relating to official board business or presenting, discussing, or negotiating a position that the board has adopted at an open meeting. Under subsection (b), the assigned board members may interact privately with each other, including serially, provided that the requirements of subsection (b) are followed, including, *inter alia*, that the board members participating in such interactions (i) total less than a quorum of the board, and (ii) do not decide or deliberate toward a decision on matters of board business. Similarly, subsection (c) contemplates that two or more board members, but less than a quorum of the board, may interact privately with each other, including serially, concerning the selection of the board's officers.

Both interpretations are consistent with the principles of legislative and may commit and/or trade votes regarding the selection of ~~board~~ officers/committee chairs. *llh*

interpretation, as well as the spirit of the law, and do not extend those exceptions beyond their specific language, nor impact the spirit or the rule of law set forth in Chapter 92.

Unlike subsections (b) and (c), however, subsection (a) of HRS § 92-2.5 does not expressly allow more than two members to interact privately with each other. Moreover, OIP, the agency to which the legislature has assigned the task of interpreting and applying the Sunshine Law, has opined that two members may discuss a matter of board business privately under subsection (a) but that there cannot be any other private discussion about that same matter by either member with any other member of the board. OIP's interpretation is not unreasonable or "palpably erroneous," and is therefore accepted by this Court.

Therefore, the Court holds that ^{Section 92-2.5 of Hawaii Revised Statutes, *JH*} the Sunshine Law does not permit Council members to engage in serial communications regarding matters of Council business except to the extent allowed under subsections (b) or (c) of HRS § 92-2.5.

This interpretation of the Sunshine Law not only comports with settled principles of statutory construction, but it also accommodates the concerns raised by Defendants regarding the ability of the Council to conduct its business efficiently. For example, Defendants fear that a prohibition on serial communications would make it difficult for Council members to share ideas or information with each other. Subsection (b) of HRS § 92-2.5 addresses this concern, as it would allow ^{up to four (less than a quorum) *JH*} Council members to engage in information sharing and brainstorming, even by way of private serial communications, provided they do not decide or deliberate toward a decision on matters of Council business except at a public meeting.

Defendants also contend that a prohibition on serial communications would require that a duly noticed public meeting be convened even to discuss procedural matters such as scheduling a special meeting of the Council. However, Plaintiffs concede, and the Court agrees, that such

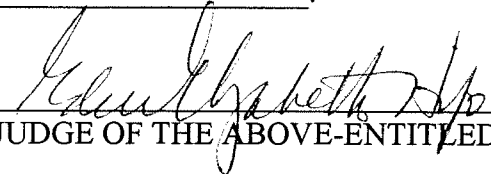
PLEASE NOTE CHANGE

purely procedural matters are not the kind of "board business" that board members are precluded from discussing by way of serial communications under HRS § 92-2.5(a).

Another hypothetical scenario that Defendants cite as an illustration of the impracticality of prohibiting serial communications is the discussion of individual line items in a budget bill. Defendants contend that under the interpretation of the Sunshine Law advocated by Plaintiffs and the State, two Council members who privately discuss a particular budget line item are then precluded from discussing another line item in the same budget bill with different Council members because the budget bill in its entirety is Council business. However, the Court considers each budget line item a separate item of Council business. Therefore, subsection (a) of HRS § 92-2.5 would not prohibit Council member A from discussing a particular budget line item with Council member B and then discussing a different budget line item with Council member C in a separate conversation.

DATED: Honolulu, Hawai'i, _____

FEB 14 2006


JUDGE OF THE ABOVE-ENTITLED COURT



APPROVED AS TO FORM:

CARRIE K. S. OKINAGA
Corporation Counsel

By: _____

DON S. KITAOKA
REID M. YAMASHIRO
DEREK T. MAYESHIRO
JOHN S. MACKAY
Deputies Corporation Counsel
Attorneys for Defendants

MARK J. BENNETT
Attorney General

By: Charleen M. Aina
CHARLEEN M. AINA
Deputy Attorney General
Attorneys for State of Hawaii

Right to Know Committee, et al. v. City Council, City and County of Honolulu, et al., CIVIL NO. 05-1-1760-10
EEH; ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (Filed December 5, 2005)
AND PLAINTIFF-INTERVENOR'S JOINDER IN PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
FILED ON DECEMBER 5, 2005 (Filed January 10, 2006)
