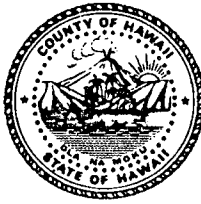


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March 6, 2007

Sent via email; no hard copy will follow

Ms. Brenda Ford
Hawai'i County Council
25 Aupuni St.
Hilo, HI 96720

Dear Ms. Ford:

**RE: Proceedings before the Public Works Committee on
February 21, 2007 concerning Bill 51
Our Entry No.: WRK 07-14264**

On February 22, 2007, our office was contacted by the State of Hawai'i Office of Information Practices (hereinafter "OIP") concerning the above bill heard before the Hawai'i County Council Public Works Committee on February 21, 2007.

In sum, the OIP expressed concern whether there had been a violation of the State Sunshine Law when a member of the public was allegedly denied the opportunity to provide testimony at the Committee meeting on the above bill, prior to the adjournment of the meeting.

In speaking with staff and reviewing the record of the proceedings, there appears to have been an unfortunate and innocent misunderstanding with respect to not allowing Noelani Whittington, a Department of Public Works employee, the opportunity to provide testimony at this meeting.

Although Ms. Whittington may not have initially expressed a desire to provide testimony, she subsequently communicated her desire to do so to the meeting monitor in Hilo (the meeting was held in Kona, but participation was allowed in Hilo via videoconference). Efforts were made during the course of the meeting and at the end to advise the Kona personnel that Ms. Whittington wished to present testimony, but she was ultimately not heard by the Committee. I again stress it is our considered opinion based upon a review of the proceedings that

this was the result of innocent oversight, and not in any way a deliberate attempt to deny Ms. Whittington an opportunity to testify.

Our conclusion that this was not a deliberate attempt by anyone to censor Ms. Whittington is buttressed by an entry in a local blog¹ concerning this matter. In this February 28, 2007, entry, Ms. Whittington admits this was all the likely result of innocent miscommunication and lack of familiarity with the videoconferencing equipment and process.²

One of the salient issues concerning this matter is whether it made any difference Ms. Whittington identified herself as a County employee, and that she was not at the Council Room in Hilo to testify "in her personal capacity." In discussing this matter with the OIP, it is their opinion (and we agree) that it makes no difference with respect to the application of the State Sunshine Law. So long as Ms. Whittington wished to testify, she should have been afforded the right to do so.

Another issue is whether a member of the public (or any person, as the present case involves a government representative) "waives" his or her right to testify, if they do not testify during the portion of the agenda that calls for public testimony (normally at the beginning of the meeting). Simply put, does the person have the right to "change his/her mind," and is the board then obliged to hear the testimony at a later part of the meeting.

In discussing this issue with the OIP, the conservative and recommended approach is to allow such testimony, since the listening public would be denied the opportunity to hear the input of the speaker, who presumably was motivated to speak after hearing what had transpired at the meeting. So long as the Council had not yet begun deliberating on the matter, testimony should be received.

Unfortunately, in the present case, we cannot ascertain whether Ms. Whittington expressed her desire to testify before or after the Committee began deliberating on Bill 51.

Based on the above, it is our considered recommendation that the Committee re-agendize the above bill for action by the Public Works Committee. Since there appears to have been a violation of the Sunshine Law (albeit an unintentional one), it is necessary the Committee rehear the bill to protect the

¹ "Blog" is short for "Weblog," and is defined by Merriam-Webster as "a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer."

² Ms. Whittington purportedly stated in pertinent part as follows: "It was the first time video conferencing took place from Hilo to the Sheraton Keauhou Resort & Spa. From my viewpoint it was chaotic and a few things need to be worked out. I'm confident the Council staff will fine tune these issues. They are talented and know what to do."

Ms. Brenda Ford
March 6, 2007
Page 3

legal integrity of this legislation. In my discussions with the OIP concerning this matter, Executive Director Leslie Kondo concurs with our suggested recommendation (Mr. Kondo is copied on this letter for his information).

I understand in speaking with the County Clerk that the Council Chair may return this bill to Committee, so the Public Works Committee will rehear this matter in any event. This will present the Committee the opportunity to remedy the Sunshine Law defect by affording Ms. Whittington the opportunity to testify, if she so chooses.

If you have any questions concerning this matter, please feel free to contact me.

Very truly yours,



LINCOLN S. T. ASHIDA
Corporation Counsel

c: Honorable Casey Jarman, County Clerk
Honorable Leslie H. Kondo, Office of Information Practices

S: Departments/Council/LSA Corresp./Letter to B Ford re Sunshine 2-26-07/LSAmr