

May 19, 1994

The Honorable Debi Hartmann  
Chairperson, Board of Education  
Liliuokalani Building, Room 405  
1390 Miller Street  
Honolulu, Hawaii 96813

Dear Mrs. Hartmann:

Re: Scope of Permissible Disclosure of Executive Session Deliberations and Decision on the Appointment of the Superintendent of Education

This letter is written to clarify oral advice which was previously provided concerning the extent to which members of the Board of Education may disclose and comment upon what occurred during the executive session meeting of the Board on April 30, 1994 which resulted in the appointment of Herman Aizawa, Ph.D., as Superintendent of Education. More particularly, this letter responds to the following questions:

- (1) Are the members of the Board permitted to disclose whether they voted for Dr. Aizawa's appointment?
- (2) Are the members permitted to disclose why they voted as they did?
- (3) What other aspects, if any, of the deliberations and decisions made during the executive session meeting on April 30th are the members prohibited from disclosing?

We answer the first question in the affirmative. A brief answer to both the second and third questions is that members are free to discuss what occurred during the executive session as long as their discussion is not inconsistent with and does not defeat the purpose of the executive session. That is, as a general matter, the Board members may not disclose matters affecting Dr. Aizawa's or any of the other applicants' privacy, which is the reason for convening the executive session under Haw. Rev. Stat. § 92-5(a)(2) in the first place.

The Sunshine Law is not clear with respect to how board and commission members are to conduct themselves after deliberating and making decisions in executive session. There are no express provisions in the law for resolving the three questions posed. ([top](#))

Nevertheless, established rules of statutory construction counsel that when provisions of a comprehensive statute are unclear, they should be construed by reading them in the context of the entire statute and in light of the general legislative scheme, *Kam v. Noh*, 70 Haw. 321, 770 P.2d 414 (1989), and that laws which relate to the same subject must be construed with reference to each other, *State v. Kumukau*, 71 Haw. 218, 787 P.2d 682 (1990). Haw. Rev. Stat. § 1-16 provides: "What is clear in one statute may be called in aid to explain what is doubtful in another."

Haw. Rev. Stat. § 92-5(a)(2)[1/](#) of the Sunshine Law specifies the process boards and commissions are to use when considering matters affecting the privacy of candidates for employment by the board or commission. It anticipates that such matters will be discussed in these kinds of situations and expressly allows a board or commission to consider the hire in a meeting closed to the public.[2/](#) However, only deliberations and decisions which relate directly to hiring may be made in the executive session,[3/](#) and even those deliberations and decisions must be made in a meeting open to the public if the person being considered for hire so requests. ([top](#))

Haw. Rev. Stat. § 92-9 describes how minutes of board and commission meetings are to be kept and disclosed.[4/](#) The Board is required to keep written minutes of all of its meetings. While a full transcript or recording of the meeting is not required, the minutes must give a true reflection

of the matters discussed and the views of the participants. At a minimum, § 92-9(a) requires that the minutes include:

- (1) The date, time and place of the meeting;
- (2) The members of the board recorded as either present or absent;
- (3) The substance of all matters proposed, discussed or decided; and a record, by individual member, of any votes taken; and
- (4) Any other information that any board member requests to be included in the minutes.

Subsection (b) provides that "[t]he minutes shall be public records and shall be available within thirty days after the meeting except where such disclosure would be inconsistent with section 92-5 [executive meetings]; provided that minutes of executive meetings may be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer." (Emphasis added.) ([top](#))

We are of the opinion that read together, Haw. Rev. Stat. §§ 92-5(a)(2) and 92-9 permit board and commission members to disclose some matters which are deliberated or decided in executive session. However, they cannot disclose matters which "would be inconsistent with section 92-5[(a)(2)]," i.e., "matters affecting the privacy" of individuals under consideration for hire, and they must maintain this confidentiality for as long as the disclosure "would defeat the purpose of [convening] the executive meeting."

To be of assistance to the members of the Board, we must therefore determine what kinds of matters affect the privacy of individuals, and when disclosure would defeat the purpose of the executive session. ([top](#))

Again we note that the Sunshine Law does not elaborate on what kinds of "matters [affect] privacy." Further, the legislative history of § 92-5(a)(2) does not discuss the phrase. Nevertheless, we do know that Haw. Rev. Stat. ch. 92, pt. V, "Public Records" which included the definition of the term "public record" in effect at the time § 92-9(b) was enacted, was replaced by our Uniform Information Practices Act ("UIPA"), Haw. Rev. Stat. ch. 92F, and that under the rules of statutory construction cited above, it is appropriate to look to the UIPA for guidance in construing the phrase in question. ([top](#))

In Haw. Rev. Stat. § 92F-2 the Legislature declared that "it is the policy of this State that the formation and conduct of public policy -- the discussions, deliberations, decisions, and action of government agencies -- shall be conducted as openly as possible" but acknowledged that that policy "must be tempered by a recognition of the right of the people to privacy, as embodied in section 6 and section 7 of Article I of the Constitution of the State of Hawaii." ([top](#))

Haw. Rev. Stat. § 92F-13(1) provides that chapter 92F does not require disclosure of "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy."

Haw. Rev. Stat. § 92F-14(b) lists eight examples of information in which individuals have a significant privacy interest which nevertheless may be disclosed if in balancing the public interest in disclosure against them, "the public interest in disclosure outweighs the privacy interests of the individual." ([top](#))

- (1) Information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation, other than directory information while an individual is present at such facility;
- (2) Information identifiable as part of an investigation into a possible violation of criminal

law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(3) Information relating to eligibility for social services or welfare benefits or to the determination of benefit levels;

(4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except:

(A) Information disclosed under section 92F-12(a)(14); and

(B) The following information related to employment misconduct that results in an employee's suspension or discharge:

- (i) The name of the employee;
- (ii) The nature of the employment related misconduct;
- (iii) The agency's summary of the allegations of misconduct;
- (iv) Findings of fact and conclusions of law; and
- (v) The disciplinary action taken by the agency;

when the following has occurred: the highest non-judicial grievance adjustment procedure timely invoked by the employee or the employee's representative has concluded; a written decision sustaining the suspension or discharge has been issued after this procedure; and thirty calendar days have elapsed following the issuance of the decision; provided that this subparagraph shall not apply to a county police department officer with respect to misconduct that occurs while the officer is not acting in the capacity of a police officer; ([top](#))

(5) Information relating to an individual's nongovernmental employment history except as necessary to demonstrate compliance with requirements for a particular government position;

(6) Information describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness;

(7) Information compiled as part of an inquiry into an individual's fitness to be granted or to retain a license, except:

(A) The record of any proceeding resulting in the discipline of a licensee and the grounds for discipline;

(B) Information on the current place of employment and required insurance coverages of licensees; and

(C) The record of complaints including all disposition; and

(8) Information comprising a personal recommendation or evaluation. ([top](#))

The constitutional history of section 6 of Article I of the State Constitution indicates that the provision was added for two purposes: to protect against "possible abuses in the use of highly personal and intimate information in the hands of government or private parties but is not intended to deter the government from the legitimate compilation and dissemination of data," and to ensure freedom of choice "in certain highly personal and intimate matters [citing to cases relating to birth control and abortion]." Comm. of the Whole Rep. No. 15, I Proceedings of the Constitutional Convention of Hawaii of 1978 at 1024. In *Nakano v. Matayoshi*, 68 Haw. 140, 706 P.2d 814 (1985), the court, in a footnote suggests that the former objective was adopted to

preserve "an individual[']s right] not to have his private affairs made public by the government." Id. at 148 n. 6 quoting from n. 24 of *Whalen v. Roe*, 429 U.S. 589, 599 (1977). In *State v. Lester*, 64 Haw. 659, 649 P.2d 346 (1982), the court did note that Article I, section 6 "encompass[es] the common law right to privacy or tort privacy, and the ability of a person to control the provacy [sic] of information about himself, such as unauthorized public disclosure of embarrassing or personal facts about himself." Id. at 667, citing *Stand. Comm. Rep. No. 69, I Proceedings of the Constitutional Convention of Hawaii 1978 at 674-76 (1978)*. Finally, in *Painting Industry of Hawaii Market Recovery Fund v. Alm*, 69 Haw. 449, 746 P.2d 79 (1987), recognizing that the public record law in effect at the time was enacted to implement Article I, section 6, the court made two practical observations. When information which would otherwise be required to be kept confidential under the public record law is already public, there is no privacy interest to protect. Id. at 451-52. The mere mention of an individual's name in a document does not preclude a document from being disclosed. Id. at 453. ([top](#))

Relying on all of the previously cited rules of statutory construction, statutory provisions, and case law, we are of the opinion that members may disclose how they voted to fill the vacant superintendent of education position. Disclosure would not defeat the purpose of the executive session. In this instance, the executive session was convened to hire a superintendent of education. Prior to the executive session, the names of all five candidates had been published in both the Honolulu Star-Bulletin and the Honolulu Advertiser. After the session, Dr. Aizawa's appointment was announced and the announcement was carried by all major television stations and published in the Sunday Honolulu Advertiser.

Our prior oral advice may have left a misimpression that only the final voting result could be disclosed. That was not intended, and to the extent that the misimpression was conveyed, we hereby rescind it.

With respect to the second and third questions, given the discussion above, members may also disclose the reasons they voted as they did. In doing that, they cannot disclose information discussed in the executive session if the information is of the type listed in Haw. Rev. Stat. § 92F-14(b) without first determining to what extent disclosure is in the public interest. Personnel matters which could infringe upon an individual's right of privacy continue to be confidential, and disclosure of that information exposes a Board member to a civil action brought against the member personally. ([top](#))

Inasmuch as the Sunshine Law does not compel individual Board members to make any disclosure, we advise members to give the benefit of the doubt to ensuring an individual's privacy. We are also available to assess and advise members with respect to particular situations as they arise.

Very truly yours,

Robert A. Marks  
Attorney General

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1/The section provides:

92-5 Exceptions. (a) A board may hold a meeting closed to the public pursuant to section 92-4 for one or more of the following purposes:

. . .

2) 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; provided that if the individual concerned requests an open meeting, an open meeting shall be held; . . . .

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2/In enacting the provision, the Legislature found that some types of deliberations and decision-making needed to take place in meetings closed to the public: "To preserve the sanctity of certain matters--such as personnel matters, labor negotiations and consultation with attorneys--that must of necessity require private deliberation, this bill excludes 'executive meetings' from the open meeting requirement." H. Stand. Comm. Rep. No. 485, Haw. H.J. 1183 (1975).

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3/Haw. Rev. Stat. § 92-5(b) provides in pertinent part: "In no instance shall the board make a decision or deliberate toward a decision in executive meeting on matters not directly related to the purposes specified in subsection (a)."

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4/Haw. Rev. Stat. § 92F-12(a)(7) also provides in pertinent part:

92F-12 Disclosure required. (a) Any provision to the contrary notwithstanding each agency shall make available for public inspection and duplication during regular business hours:

. . . .

(7) Minutes of all agency meetings required by law to be public; . . . .

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