May 28, 2002

Mr. Larry Meacham
Executive Director
Common Cause Hawaii
P. O. Box 235353
Honolulu, Hawaii 96823-3505

Re: Oral Testimony at Honolulu City Council Meetings

Dear Mr. Meacham:

This is in response to your letter to the Office of Information Practices ("OIP") on the above-referenced matter.

ISSUES PRESENTED

I. Whether the Honolulu City Council's ("Council") practice of allowing oral testimony at public meetings only if persons wishing to testify sign up by a certain time is allowed under chapter 92, Hawaii Revised Statutes ("Sunshine Law").

II. Whether the Council's practice of placing time limits on oral testimony is allowed under the Sunshine Law.

BRIEF ANSWERS

I. No. The Sunshine Law requires that boards shall afford all interested persons an opportunity to present oral testimony on any agenda item; and that boards may provide for reasonable administration of oral testimony by rule. Haw. Rev. Stat. §92-3 (1993). In light of the fact that "all interested

persons" shall be allowed the opportunity to present oral testimony, the OIP does not believe it is "reasonable" under section 92-3, Hawaii Revised Statutes, to *require* persons wishing to testify to sign up by a certain time. Such a requirement would preclude all latecomers from testifying orally, as well as those who are not familiar with Council rules. This is not to say that boards cannot *request* that persons wishing to testify orally sign-up by a certain time in the interests of time management. After all those who signed up have testified, boards should inquire whether any other audience members wish to testify orally, and should not preclude such persons from testifying.

II. Yes. The Sunshine Law allows boards subject to it to provide for reasonable administration of oral testimony by rule. Haw. Rev. Stat. § 92-3 (1993). So long as the Council's time restrictions on testimony meet the requirements of the Sunshine Law and the Freedom of Speech and Equal Protection Clauses of the United States Constitution, the Council may put reasonable time limits on oral testimony pursuant to rules adopted under section 92-3, Hawaii Revised Statutes.

FACTS

In a letter to the OIP dated May 9, 2000, you advised that the Council's Budget Committee did not allow people to testify unless they had signed up by 6:30 p.m., even after all other testimony was finished. You asked whether this was a violation of section 92-3, Hawaii Revised Statutes.

Your letter also asked whether the Council and its committees' time limits on oral testimony violated section 92-3, Hawaii Revised Statutes. You stated that "the extreme shortness of time allotted is not considered reasonable by many grass-roots testifiers and because it is not clear whether a rule on this matter has been adopted."

In response to an inquiry by the OIP, former Council Chair Jon Yoshimura set forth the Council's position. In a letter dated May 18, 2000, Council Member Yoshimura stated your complaint appears to have arisen from a Council meeting on the budget, at which persons who had not signed up by 6:00 p.m., as the agenda advised them to do, were not allowed to make oral presentations. Council Member Yoshimura advised that a copy of the agenda for this meeting had been filed with the City Clerk and posted at the meeting site six days prior to the meeting. Council Member Yoshimura advised that at this particular meeting, a gentleman arrived around midnight, and demanded an opportunity to speak although he had not signed up. The gentleman was not allowed to speak, but was advised he may

submit written testimony, and other members of the public who had not signed up to testify were advised the same. The meeting in question allowed for 3 minutes of oral testimony per person.

Council Member Yoshimura also cited to the Council rules (discussed below) that pertain to oral testimony. It is Council Member Yoshimura's understanding that these rules have been in effect since the Legislature amended the Sunshine Law to mandate that boards allow oral testimony, subject to limitation by rules. Council Member Yoshimura advised that the Council was following its rules during the meeting in question.

Council Member Yoshimura also stated the Council's position is that its rules contain a "reasonable administration of oral testimony." Paraphrasing Council Member Yoshimura's letter, the Council believes its rules "are of great assistance to the public as well as to the Council," for the following reasons:

1. The requirement that speakers sign up in advance facilitates the orderly transaction of business. Additionally, although the Legislature allows the public to speak at the end of an agenda, it is not subject to the Sunshine Law's 6 day notice requirement, and therefore should allow latitude to the public under circumstances such as when a committee meets with less than 24 hours' notice.

2. Limitations on the length of oral testimony are not viewed as particularly onerous by most members of the public. Written testimony is always accepted, and is reviewed by council members or their staffs. The public also has the unfettered ability to contact council members in person, by telephone, by facsimile, or by e-mail in circumstances where no time limits apply.

DISCUSSION

I. ORAL TESTIMONY MUST BE ALLOWED EVEN IF PERSON WISHING TO TESTIFY DID NOT SIGN UP

The Sunshine Law governs boards[1] that are required to conduct public meetings. It is well established that the Council is a "board" subject to the Sunshine Law. See Haw. Att'y Gen. Op. No. 86-5.

In regard to receiving public testimony, section 92-3, Hawaii Revised Statutes, states:

> The boards shall afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item. The boards shall also afford all interested persons an opportunity to present oral testimony on any agenda item. The board may provide for reasonable administration of oral testimony by rule.

Haw. Rev. Stat. § 92-3 (1993).

The Council, as allowed by section 92-3, Hawaii Revised Statutes, adopted Rule No. 20 of the Rules of the Council of the City and County of Honolulu, which provides:

> 2. Persons wishing to present oral testimony relating to items on the morning calendar at a Council meeting shall register to speak with the City Clerk no later than the time posted for the start of the morning session. Persons wishing to testify on items posted on the afternoon calendar shall register to speak no later than the time posted for the reconvening of the Council meeting for the afternoon session. Persons wishing to present oral testimony on items posted on the evening calendar shall register no later than the time posted for the start of the evening session. Upon request, the Presiding Officer may waive the registration requirement.
>
> Any person who was unable to register prior to the foregoing deadlines may submit written testimony to the Council by filing same with its Clerk at any Council meeting.

The Council also adopted Rule 31, which provides:

[1] The term "board" means "any agency, board, commission, authority, or committee of the State or its political subdivisions which is created by constitution, statute, rule, or executive order, to have supervision, control, jurisdiction or advisory power over specific matters and which is required to conduct meetings and to take official actions." Haw. Rev. Stat. § 92-2 (1993).

Pursuant to State law, any private citizen may speak at any Council or committee meeting, subject to the following:

(a) Council meeting. Persons wishing to present oral testimony at a Council meeting shall register to speak as provided in Rule 20. Oral testimony by members of the public on items listed on a Council Agenda for public hearing shall be limited to one minute. By a vote of the majority of the members present, time for the public to speak may be extended.

(b) Committee meeting. Persons wishing to present oral testimony at a committee meeting shall register with the committee clerk no later than the time posted on the agenda for the meeting. The time allotted to members of the public to present oral testimony on an agenda item shall be set by the committee chair. The time allotted shall be specified on the applicable posted committee meeting agenda.

The OIP was unable to find any Hawaii Supreme Court cases that have dealt with the issue of whether boards may require persons wishing to testify to register in advance. Therefore, in applying the law to the facts of this case, the OIP looks to the laws of other jurisdictions for guidance.

Some States have enacted laws that allow boards to require persons wishing to testify at public meetings to register, or to identify themselves in advance. For example, Nebraska boards can "require any member of the public desiring to address the body to identify himself or herself." Neb. Rev. Stat. § 84-1412(3) (1988 Cum. Supp.). Michigan allows its public bodies to adopt rules requiring that those speaking identify themselves in advance to facilitate allocation of time. 5218 Mich. Op. Att'y Gen. (Sep. 13, 1977); 5716 Mich. Op. Att'y Gen. (June 4, 1980). West Virginia law states "persons who desire to address the governing body may not be required to register to address the body more than fifteen minutes prior to time the scheduled meeting is to commence." W.Va. Code Ann. § 6-9A-3 (1993). At board meetings in Wyoming, "[a] person seeking recognition at the meeting may be required to give his name and affiliation." Wyo. Stat. § 16-4-403(b) (1997).

Hawaii law contains no similar explicit statutory authority allowing boards to *require* registration or identification prior to testifying. The Sunshine Law states only that a board "*may* provide for reasonable administration of oral testimony by rule." Haw. Rev. Stat. § 92-3 (1993) (emphasis added).

Although the Council's Rule 20 requiring registration prior to a meeting by persons wishing to testify does further the orderly transaction of business, it also can preclude persons from testifying orally if they fail to register by the prescribed time. In light of the Sunshine Law's policy that the "provisions requiring open meetings shall be liberally construed," and the clear requirement that boards "afford ***all interested persons*** an opportunity to present oral testimony on any agenda item," the OIP is of the opinion that to disallow testimony from anyone who

has not signed up by a specific time would be contrary to a basic policy of the Sunshine Law. Haw. Rev. Stat. §§ 92-1(2), 92-3 (1993) (emphasis added). The fact that written testimony is always allowed, and that council members make themselves available to the public outside of meetings does not lessen the statutory requirement that all interested persons be allowed to testify orally on any agenda item.

The OIP advises that boards may ask persons wishing to testify orally to sign up prior to meetings. After all persons who signed up have testified, the OIP recommends that boards allow anyone who has not signed up the opportunity to present oral testimony. Boards should not prevent individuals from testifying orally solely because they did not sign up by the requested time. If a board is running short on time, it has the option of continuing a meeting in accordance with section 92-7(b), Hawaii Revised Statutes.[8]

Finally, the OIP notes that an argument can be made that because Rule 20 allows the presiding officer of a Council meeting to waive the registration requirement, the Council could discriminate against certain persons. The OIP recommends that the Council ensure that its rules are applied fairly and evenly.

I. REASONABLENESS OF TIME LIMITS ON ORAL TESTIMONY

The OIP has not been asked to opine on a specific factual scenario in which a person was not allowed by the Council to testify. Instead, the OIP has been asked to look at the Council's practice generally of placing time restrictions on oral testimony. The following discussion, therefore, is general in nature, and sets forth the criteria that must be met in order for a government body to place time restrictions on speech.

Hawaii boards are allowed to "provide for reasonable administration of oral testimony by rule." Haw. Rev. Stat. § 92-3 (1993). You stated it was not clear whether a rule had been adopted by the Council regarding the short time allowed for oral testimony, and thus, whether it was reasonable to impose such limitations. In response to the OIP's inquiry, Council Member Yoshimura cited to Rule 31. This Rule allocates one minute to each member of the public for oral testimony at Council meetings. For committee meetings, the Committee Chair sets the time limits for members of the public to present oral testimony.

A review of the Sunshine Law's legislative history did not provide any insight as to what "reasonable administration of oral testimony" means; nor did the OIP find any relevant Hawaii appellate opinions on this issue. The OIP therefore looks

[8] Incorrect reference to section 92-7(d), Hawaii Revised Statues, corrected and revised July 11, 2002.

to the United States Supreme Court for guidance on the right to freedom of speech as set forth in the First and Fourteenth Amendments[2] of the United States Constitution.[3]

It is axiomatic that freedom of speech is not absolute. A violation of free speech occurs when the restricted speech is constitutionally protected and when the government's justification for the restriction is insufficient. Scroggins v. City of Topeka, 2 F. Supp 2d 1362, 1369, (1998) ("Scroggins") *citing* Frisby v. Schultz, 487 U.S. 474, 479, 108 S. Ct. 2495 (1988).[4]

A three-tiered forum-based test for determining whether violations of the right to free speech have occurred has been articulated by the Supreme Court: (1) whether the speech is protected by the First Amendment, (2) what the nature of the forum is, and (3) whether the government's justifications for limiting the speech satisfy the requisite standard. Scroggins at 1368, *citing* Cornelius v. Schultz, 487 U.S. 474, 479, 108 S. Ct. 2495 (1988); and Summum v. Callaghan, 130 F. 3d 906, 913 (10th Cir. 1997).

A. Protected Speech

The "protected speech" tier of the Supreme Court's three-tiered test is not discussed in great detail in the cases cited herein. The court in Scroggins did note that the right to freedom of speech "extends to a broad range of speech and expressive conduct," and that the First Amendment recognizes "the importance of 'uninhibited, robust, and wide-open' debate on public issues." Scroggins at 1368 (citations omitted).

B. Nature of the Forum

The Supreme Court has recognized three types of forums that may exist on government property:

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[2] The First Amendment to the United States Constitution states "Congress shall make no law . . . abridging the freedom of speech, or of the press. . ."

The Fourteenth Amendment of the United States Constitution, which prohibits state governments from infringing on a person's freedom of speech, reads:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any to any person within its jurisdiction the equal protection of laws.

[3] The OIP does not have jurisdiction to rule on the constitutionality of laws.

[4] Although Scroggins is not a Supreme Court case, it sets forth federal law in this area in a detailed and clear fashion, and, as such, the OIP refers to it frequently herein.

1. traditional public forums (places like streets and parks that traditionally have been devoted to assembly and debate);

2. designated public forums (those opened by the government for use by the public at large for assembly and speech, for use by certain speakers, or for discussion of certain subjects, which may be limited in terms of participants and subject matter); and

3. nonpublic forums (public property that the government has not opened to public communication either by tradition or by designation).

Scroggins, at 1369 (citations omitted).

For purposes of this opinion letter, the OIP treats Council meetings as a designated public forum, as was done by the court in Scroggins, because it is a governmental body affording the public "an opportunity to address the body at its meeting." Scroggins, at 1369 *citing* White v. City of Norwalk, 900 F. 2d 1421, 1425 (9th Cir. 1990) ("White"). Courts in different jurisdictions, however, are not in agreement as to whether meetings of government bodies are designated public forums. The court in Scroggins noted that, while the Supreme Court has not taken an absolute position, some courts treat meetings of government bodies as public forums, and the Ninth Circuit even entertained the idea that a city council meeting is a nonpublic forum. Scroggins, at 1369-1370 (citations omitted).

A. Whether Government's Justifications for Limiting Speech Satisfy Requisite Standard

Governmental regulation of speech is examined under strict scrutiny by courts. Scroggins, at 1370. In a designated public forum, such as a Council meeting, time, place, and manner restrictions are permissible if they are content neutral[5], narrowly tailored to serve a significant government interest, and leave open ample channels of communication. Scroggins, at 1371, *citing* Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746 (1989) ("Ward") (city ordinance regulating noise at amphitheater on city property by requiring use of city sound equipment found constitutional as a content-neutral restriction).[6]

[5] The Supreme Court has noted that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746 (1989), *citing* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986).

[6] The government may also enforce a content-based exclusion of speech, but only if it can show that its regulation is necessary to serve a compelling state interest, and that the regulation is narrowly tailored to achieve that end. Perry Educ. Assn. v. Perry Local Educators' Assn., (1983),

Content-neutral time-based restrictions on speech should be narrowly tailored; however, a court need not find that the regulation was the least restrictive or least intrusive means for doing so. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" Scroggins, at 1374, *citing* Ward at 798; *quoting* United States v. Albertini, 472 U.S. 675, 689, 105 S. Ct. 2897 (1985).

1. Content Neutral

The time limits on oral testimony imposed by the Council appear to be content-neutral time limitations on speech under the test discussed in Scroggins, because they are not restricting the substance of what is being said. To pass Constitutional muster, the Council, as a designated public forum, may impose content-neutral time limitations on protected speech so long as the limitations on speech are narrowly tailored to serve a significant government interest, and they leave open ample channels of communication.

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460 U.S. 37, 103 S. Ct. 948, 955. The OIP does not discuss content-based limitations on speech here, as it was only asked to address what appear to be content-neutral time limitations on speech. The OIP does note, however, that content-based restrictions on speech by councils are constitutional in appropriate circumstances. For example, the Ninth Circuit has articulated that:

> a City Council meeting is still just that, a government process with a governmental purpose. The Council [for the City of Norwalk, California] has an agenda to be addressed and dealt with. Public forum or not, the usual first amendment antipathy to content-oriented control of speech cannot be imported to the Council chambers intact.[footnote omitted] In the first place, in dealing with agenda items, the Council does not violate the first amendment when it restricts public speakers to the subject at hand.

White, at 1426.

2. Narrowly Tailored to Serve a Significant Government Interest

Council Member Yoshimura articulated the government interest in adopting Rule 31 as the "orderly transaction of business." The OIP believes this would qualify as a "significant government interest" discussed in Scroggins. Some courts have ruled that boards may place time limitations on oral testimony in order to further legitimate business of the board. For example, in Commonwealth v. Eisemann, 308 Pa. Super. 16, 453 A. 2d 1045 (1982) ("Commonwealth"), Pennsylvania's Lock Haven City Council voted to end discussions on a particular topic when a speaker's oral testimony before the council "disintegrated into a belabored 'shouting match.'" Appellant then sued claiming "official oppression." The court in Commonwealth ruled that:

> there is no requirement that any individual attending a public meeting be given unlimited time to address the body on real or imagined evils or on any other matter. To rule otherwise would be to permit any person to destroy the effectiveness of a local government by monopolizing its time at public meetings where its business must be done.

Commonwealth at 1048. See also White, at 1426 (a speaker may disrupt a council meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies); See also: 5218 Mich. Op. Att'y Gen. (Sep. 13, 1977); 5716 Mich. Op. Att'y Gen. (June 4, 1980) (Michigan public bodies may adopt rules limiting length of time a person may speak, and portion of agenda set aside for public to speak, to facilitate allocation of time).

The legislative intent behind the enactment of the Sunshine Law's provision allowing reasonable administration of oral testimony by rule also shows an intent to allow boards to conduct business in an orderly fashion:

> Section 92-3: This section was revised to require the board to hear oral testimony but allow the board to establish its own rules governing oral testimony. This amendment will give the board the authority to reasonably administer the presentation of oral testimony.

H.R. Conf. Comm. Rep. No. 41, 13th Leg., 1985 Reg. Sess., H.R.J. 907 (1985). The House of Representatives Committee on Judiciary also noted that it wanted "to ensure that interested persons be allowed to present their views but it felt that there had to be some balance between access to the boards and the boards ability to

conduct business." H.R. Stand. Comm. Rep. No.889, 13th Leg., 1985 Reg. Sess., H.R.J. 1424 (1985). In light of this legislative history, and of the language of the statute itself, the OIP believes that the orderly transaction of business is a significant government interest that would satisfy the Scroggins test.

3. Ample Open Channels of Communication

Council Member Yoshimura also advised that the public has the "unfettered ability to contact council members in person, by telephone, by facsimile, or by e-mail in circumstances where no time limits apply." In addition, Council Rule 31(a) states that by vote of a majority of the members present, the one-minute time limit for the public to speak at Council meetings may be extended. The OIP is informed that oral testimony time limits are not strictly enforced.[7] These facts show that the public has ample other channels of communication, which would satisfy the final prong of the Scroggins test.

Based on the discussion above, the OIP advises the Council may place restrictions on length of oral testimony by members of the public so long as these restrictions are "reasonable" under the Sunshine Law, and comport with Constitutional requirements. The OIP cannot opine that Council Rule 31, on its face, violates section 92-3, Hawaii Revised Statutes, because the OIP does not believe that Rule 31 constitutes an unreasonable administration of oral testimony in all circumstances. The OIP cannot opine that the time limits would be unreasonable in all circumstances because what is reasonable must be decided on a case-by-case basis within the context of each set of circumstances. The OIP has not been presented with specific allegations of a person claiming he was not allowed to testify before the Council, and does not opine on any specific set of circumstances in this opinion.

CONCLUSION

Boards subject to the Sunshine Law should not make registering or signing up a prerequisite to allowing a member of the public to testify orally, as the Sunshine Law requires that all interested persons be afforded an opportunity to present oral testimony. Haw. Rev. Stat. § 92-3 (1993). In the interest of facilitating the orderly transaction of business, boards may request that persons wishing to testify sign up beforehand. Boards should nonetheless allow persons to present oral testimony even if they have not signed up. If time is running short, boards have the option of continuing meetings in accordance with section 92-7(b), Hawaii Revised Statutes.

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[7] An argument can be made that by not strictly enforcing oral testimony time limits, the Council and its committees can discriminate against certain persons. To remain content- neutral, Rule 31's provisions on time limits should not be applied selectively in a way that discriminates against particular persons wishing to testify. The OIP recommends that the Council ensure that its rules are applied fairly and evenly.

The Sunshine Law allows boards to provide for reasonable administration of oral testimony by rule. Haw. Rev. Stat. § 92-3 (1993). The OIP believes it is not unreasonable to impose time restrictions on those presenting oral testimony, so long as the time restrictions comport with the Sunshine Law and pass Constitutional muster.

Very truly yours,

Carlotta Dias
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

CMD: ankd

cc: The Honorable John DeSoto, Chair, Honolulu City Council
The Honorable Jon Yoshimura, Council Member, Honolulu City Council