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POLITICAL RADAR

« Reapportionment Opinion

Common law »

Sunshine

July 20th, 2011
By ddepledge

The state Office of Information Practices has ruled that the state Reapportionment Commission is subject to the state's open-meetings law.

In a July 12 advisory opinion, the OIP held that the Reapportionment Commission meets the definition of a "board" covered by the open-meetings law.

> 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.

Deputy Attorney General Robyn Chun, the attorney for the Reapportionment Commission, had argued that the

constitutional provision that created the Reapportionment Commission did not expressly provide that it be covered under the open-meetings law. She also contended that the chance that someone might sue to overturn final action by the Reapportionment Commission under the open-meetings law would conflict with constitutional guidance that legal challenges be reviewed by the Supreme Court. She argued that the Reapportionment Commission is a part of a legislative function and, like the state House and Senate, should not have to follow the open-meetings law.

The Reapportionment Commission, however, maintains that it has been operating under the open-meetings law.

The OIP advisory, issued after a request by Common Cause Hawaii, notes that anyone can file a lawsuit against the Reapportionment Commission under the open-meetings law.

Larry Geller, a blogger at Disappeared News, has filed a complaint with the OIP alleging that the Reapportionment Commission did not provide adequate public notice before taking action on June 28 to include the military and their dependents, nonresident students and incarcerated felons in the population count for purposes of drawing state political boundaries. Geller also alleges that the commission's technical committee, which is drafting political boundaries, is improperly meeting in private.

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2 Responses to "Sunshine"

1. **whale**:
   July 21st, 2011 at 11:25 am

   Who cares what OIP says anymore? Park has taken the position that they have no enforcement power. Obviously a punt to protect the Governor's office. Now the rest of the boards may as well ignore them too.

2. **Bart Dame**:
   July 21st, 2011 at 12:43 pm

   As someone who has attended the last 4 or 5 meetings of the Commission, I agree with Geller. Here is an excerpt from Act 92, Hawaii's "Sunshine Law":

   it is the policy of this State that the formation and conduct of public policy – the discussions, deliberations, decisions, and action of governmental agencies – shall be conducted as openly as possible. To implement this policy the legislature declares that:

   (1) It is the intent of this part to protect the people's right to know;

   (2) The provisions requiring open meetings shall be liberally construed; and

   (3) The provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings.

   The Commission has made several very important decisions during this time and most of the "discussions, deliberations and decisions" on these important matters have occurred during executive session, outside the scrutiny of the public, denying the public any real opportunity to try to persuade the commissioners.

   I have testified at several of these meetings, but without having heard any discussion or debate between them, it was difficult to know what their opinions were, what evidence or arguments had been presented to

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them in their closed door sessions.

They justified their lengthy private meetings by saying they needed to consult with their attorney. But that excuse was applied in such a way the public was shut out of and unaware of the content of their most important deliberations, violating the imperative of Act 92 that exceptions to the law be used as narrowly as possibly.

As a result of their excessive secrecy, when the Commissioners each explained the rationale behind their votes on the question of counting the military, they cited reasons which had not been discussed in open session as having played a major role in their decision. For example, several said they believed the State would face a challenge in Federal Court for a “civil rights” violation if the military were excluded, yet that legal argument had never been discussed in open session, allowing the public to understand and, perhaps, offer contrary opinions. Some said the methods available for extracting the military from the civilian population was too imprecise, yet there had been no public discussion of how accurate those methods were nor what standard of accuracy was appropriate. One commissioner said he refused to even consider evidence of “legislative intent,” a rather extreme position, and there was no open discussion between members over the meaning of the constitutional mandate that only “permanent residents” should be counted, nor how to proceed if they found that term to be ambiguous. I have since learned they had been advised by their attorney if they found the constitution to be ambiguous, they had the discretion to impose their own interpretation upon its language. Why that advice needed to be kept secret from the public is not clear to me.

As someone who has often testified before legislative committees, this has been an odd experience. No legislative committee would hear testimony behind closed doors and then use the arguments heard in secrecy as the basis for their votes. No court would hear testimony in secrecy and then base a verdict on any such secret testimony or secret evidence.

Yet this is how the Reapportionment Commission has routinely dealt with the major questions they have wrestled with.

The Commission expects to face a legal challenge. So they use the threat of a lawsuit as an excuse to hide much of the evidence and arguments which have influenced their decisions. They have conducted any meaningful debates behind closed doors, for fear members of the public might learn something from their deliberations which might strengthen a legal challenge against their decisions. They have denied testifiers the opportunity to try to offer meaningful input to those deliberations. As a result, ironically, they have increased the chance their decisions will be overturned in court.

The Commission is not the only government body which is applying the lawyer-client privilege” in an overly-broad manner. But how they have conducted their meetings has been contrary to the law. Just as their decision to count the military is contrary to the state constitution.

I thank Mr. Geller for filing this complaint on behalf of the public.

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