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### Time will tell

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#### *Clarity sought before council's transparency talk*

**By Nathan Eagle - The Garden Island**

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LIHU'E — After Kaua'i County Council members Tim Bynum and Lani Kawahara lobbed allegations at Council Chair Kaipo Asing and County Clerk Peter Nakamura earlier this month, more clarity is being sought on existing policies related to government transparency.

Council Vice Chair Jay Furfaro is urging his colleagues and the public, which continues to weigh in on the controversial matter, to examine the rules, legal opinions and laws that govern the seven-member legislative body.

He is seeking some clarification today with the state Office of Information Practices in Honolulu. The office, which issues non-binding legal opinions, has apparently given conflicting pieces of advice over the years on how certain rules should be interpreted, such as adding an item to the council's agenda without notice.

"We're not discussing the merits of what we need to fix," Furfaro said in an interview, adding there needs to be a hard look at how the council changes its rules. "It's just good for all of us to have a better understanding."

Furfaro also said council members should find ways to work around the chair if he consistently refuses to add an item to the agenda. Bynum's attempt to clarify the process by which Asing builds the council's agendas and sets its course fell flat at the council's June 3 meeting on the grounds it violated the state Sunshine Law.

The councilman made a motion to add to the Asing-authorized agenda a proposed resolution clarifying the rules under which the chair is empowered to sanction agendas. Bynum's resolution would have amended Council Rule No. 10(c), which says "bills and resolutions must be initialed by the council chair ... in order to be placed on the agenda," to include clarifying language saying the chair "shall not use this rule to restrict introduction of any bill or resolution introduced by any member indefinitely." This change would bring it into alignment with Council Rule No. 10(a), which says "any bill or resolution may be introduced by any member."

Bynum came to the meeting armed with a communication from OIP staff attorney Jennifer Brooks that supported his attempt to modify the agenda the same day as the meeting.

"I am responding as Attorney of the Day, which means that I'm offering advice rather than a formal legal opinion of this office," Brooks said in a May 15 e-mail to Bynum. "Section 92-7(d) of the Sunshine Law allows a board to add an issue to its agenda on a vote of 2/3 of all members to which the board is entitled, so long as the issue is not of reasonably major importance and action on it would not affect a significant number of people. The proposed change ... does not appear to be of reasonably major importance or to affect a significant number of people. Thus, the resolution appears suitable to be added to the agenda by 2/3 vote, and the council would be acting in good faith in so adding it."

County Attorney Al Castillo shot it down because he believed it would have constituted a "reasonably major importance" and any action on it could only come after members of the public were made aware of the agenda item in advance.

Furfaro said Brooks' "advice" also conflicted with a formal OIP opinion issued Sept. 24, 2002, to a Maui Department of the Corporation Counsel attorney on "actions on bills and resolutions without notice."

That opinion said a committee of the county council should not act on a proposed bill or resolution that is not specifically mentioned in the meeting agenda, particularly if it "could have been foreseen."

Furfaro said this opinion negates the advice Bynum received, so other options to bring the issue to the floor should be pursued.

But if this route is closed and a council member is unable get an item on the agenda because the chair refuses to initial it, what's left?

Furfaro said there is a rule that allows an item to be placed on the agenda via a committee chair if the proposal has been signed by two other council members.

However, he said this conflicts with an Aug. 4, 2005 OIP opinion on "serial one-on-one communications."

Furfaro said if the law forbids a council member to rally support for a bill or resolution before it appears on the agenda by meeting one-on-one with fellow members, then how would it be possible to get a committee chair to introduce such legislation already signed by two other council members?

This is one of the issues Furfaro said he planned to discuss in his meeting with OIP Director Paul Tsukiyama today.

Asing chairs the Committee of the Whole, which would be the most likely to hear the rule change Bynum wants to have on the agenda. The council chair said after the June 3 meeting that he had no intention of putting the item on the next meeting's agenda, and indeed it was not included in the June 16 meeting.

"I can't stand for what Kaipō said," Furfaro said.

Furfaro has encountered frustrations similar to Bynum's when trying to have the chair put an item related to government transparency on the agenda. Furfaro's particular frustration has been further complicated by the council being advised by a succession of five different county attorneys over the last seven months.

In a Jan. 31, 2008 letter to Asing and a follow-up communication months later, Furfaro requested agenda time to discuss a policy concerning the release of opinions provided to the council from the Office of the County Attorney.

The item did not appear on the agenda until after Furfaro became interim council chair when Asing left to become interim mayor following Bryan Baptiste's unexpected June death. There was some discussion on the policy last year, but the council never reached a consensus, and it has not returned to the agenda since Asing resumed his chairmanship.

While a policy concerning the release of county attorney opinions remains in limbo, it appears likely that the council will soon consider Bynum and Kawahara's government transparency concerns due to some nifty political maneuvering at the council's June 16 meeting.

In a move similar to their unsuccessful challenge to Asing's power June 3, the pair sought to amend the agenda at the meeting's outset. But this time around the pair proposed a communication requesting agenda time at a future meeting, sidestepping the Sunshine Law problem that previously stumped them.

Castillo said the new communication itself was not of "reasonably major importance" and therefore the Sunshine Law did not apply.

In the communication, Kawahara and Bynum requested agenda time at the July 8 council meeting to discuss four matters: council members' access to the agenda; the placement of public documents, including meeting minutes, on the county's Web site; equitable and timely circulation of council service documents; and general access to information by the public and council members.

The council unanimously approved a rare amendment to the communication that gave Asing the flexibility and discretion to create agenda time at the July 8 or July 22 meeting.

Furfaro called this "the right move."

Nakamura, whose mayoral appointment the council approved in December, declined to comment on the matter. The council approved its rules — unanimously — at that same meeting.

Asing could not be reached for comment.

When asked where he stood on the issue of posting the council's meeting minutes on the county's Web site, like other Kaua'i boards and commissions do, Furfaro said he would be fine with that policy going forward later this summer.

"Nobody is trying to hide anything," he said.

The public can still access the minutes by going to the Historic County Building, Furfaro said, adding that "I know it's not appropriate we have to go to the counter."

The council is planning to temporarily move to another location around August while the Historic County Building is renovated, he said. The Rice Street building houses council members' offices as well as Council Chambers, where meetings are held.

Trying to archive the past two years' meeting minutes, as Bynum and Kawahara requested through a still unanswered UIPA request, would be tough to do logistically until then, Furfaro said. He noted additional concerns over what minutes should even be posted online, particularly executive session minutes.

"As we find ourselves looking for a unified policy and guidelines, I don't think this confusion is good for any of us," Furfaro said.

To view the agendas in their entirety, visit [www.kauai.gov](http://www.kauai.gov).

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