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Councilman wants legal opinions public

by Nathan Eagle - THE GARDEN ISLAND

Responding to a recurring public push for greater government transparency, Kaua'i County Councilman Tim Bynum has drafted ordinances to release certain legal opinions and post meeting minutes online.

Despite requests, the matters have yet to make it on the agenda for the seven-member legislative body's consideration.

Bynum said yesterday that it is time to open the dialog with the community on these critical issues. The proposed policy changes will keep residents better informed while ridding a perception that government agencies have something to hide, he said.

"It's extremely important for the county to do everything possible to promote openness," North Shore resident Carl Imperato said. "I can't understand how even one County Council member would not want to, in their hearts, bring as much sunshine as possible into policy-making."

Bynum draws an important line between what legal opinions should be made available to the public — a line based in large part on a 1991 state Office of Information Practices advisory opinion.

His draft ordinance says Hawai'i Revised Statutes recognizes two separate and distinct forms of legal guidance: "opinions" on questions of law submitted by public officers on matters connected to their public duties, and "advice and counsel" to public officers on matters connected to their public duties.

Bynum said the former should be public, as dictated by state law and supported by the OIP opinion. Legal advice on matters such as pending litigation or personnel, however, should be kept confidential under attorney-client privilege, he said.

The councilman cited Maui County as an example of a government body that has decided as policy to make public its legal opinions relating to questions of law.

Maui County routinely posts Department of the Corporation Counsel opinions on its Web site — roughly 20 to 30 annually. Seven opinions have been posted so far in 2008, ranging from board nominations to a circuit breaker tax credit.

Kaua'i County has previously made public its legal opinions, but stopped years ago for unclear reasons.

County Attorney Matthew Pyun has said the council, as the client, has the authority to release the opinions it requests from his office and forgo the confidentiality privilege.

While the council does not have a policy to release county attorney opinions, there are at least two avenues it could take.

An ordinance, such as the draft bill Bynum wants to propose, could establish a policy. It would require the county attorney to file a copy of each opinion with the county clerk within three days of the date of its issue to become available for public inspection.

The council could also opt to authorize the release of opinions by vote. But first the body must decide how many votes that would take, such as a majority or supermajority.

Bynum has said a supermajority, five votes, seems appropriate.

The council has not put such a matter on the agenda to resolve this issue despite several vocal residents testifying for months that answers are needed to these and related questions.

The buck appears to stop at the council chair, Bill "Kaipo" Asing, who determines what goes on the agenda.

Bynum said he has a standing request to have his draft ordinances placed on the agenda, but to date the chair has declined to do so.

Asing could not be reached for comment at press time.

Bynum said he is looking into whether the chair has the sole power to put items on the agenda, or if it is just how the county has historically done it.

Critics have said they fear a blurring in what is made public, including executive session minutes containing sensitive information. But Bynum said his draft ordinance would be limited to legal opinions on questions of law.

"I feel we should have accountability," he said.

Residents for at least the past several months have told the council it is extremely difficult to offer meaningful testimony on proposed policies without having access to the county attorney's opinions on the matters.

For example, the council obtained numerous legal opinions on its bills related to transient vacation rentals, gated communities, lateral access and shoreline certifications — but they were never disclosed to the public.

"It's unnecessarily damaging to the council's credibility," said Imperato, who frequently provides input on pending legislation. "If there's any discretion whatsoever that the council has, it should be used in favor of releasing opinions so the public is well-informed."

Bynum said there are still some concerns to iron out, but provisions could be made to address them.

"For the most part, it's clear," he said. "What does the law say about TVRs on ag land? What does the law say about shoreline setback requirements for a building permit? What does the law say about entering into executive session?"

Aside from making certain legal opinions public, Bynum wants to have the minutes to council meetings posted online as some other county government agencies routinely do.

The councilman has drafted an ordinance requiring the minutes to be placed on the Internet for the public's convenience.

The council posts its agendas online and some other documents, but not its minutes.

Other county government boards and commissions, such as the Ethics Board, post the minutes and the agenda on the Web.

The chair has refused to place this draft ordinance on the agenda, too, Bynum said.

"We need to make government more transparent," he said. "Maybe council would choose not to vote for these, but we're not even having the discussion."