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April 6, 2020

Hon. Michael Victorino  
Mayor  
County of Maui  
200 S. High Street  
Wailuku HI 96793

Hon. Alice Lee  
Chair  
Maui County Council  
200 S. High Street  
Wailuku, HI 96793

*via electronic mail*

Re: Open Government Requirements During Emergency

Dear Mayor Victorino and Chair Lee,

I write you today regarding open government requirements during this COVID-19 emergency and County operations.

As you know the governor in his first Supplemental Proclamation, dated March 16 ,2020, suspended the operation of certain open government laws Chapters 91, 92 and 92F, Haw. Rev. Stat., among others. He encouraged the use of technology to allow remote participation. The purpose of the suspension was “in order for state and county agencies to more effectively provide emergency relief and engage in emergency management functions, including, but not limited to, implementing social distancing measures.” The governor did not suspend any provision of the Charter or the constitution nor is he empowered to suspend the Charter or constitution by statute.

Recent statements by some members of the Council and department directors to the media make it seem as though the Council and county boards and commissions are now exempt from open government requirements. The proclamation did not suspend operation of the County Charter or the state or federal constitutions.

#### Council's Duty to Provide Interactive Communications Access

Section 3-5(5) of the Charter imposes a duty upon the Council to provide interactive communications access to all county council meetings and county council committee meetings for residents of Hana, Lāna`i, Moloka`i and “other geographic areas as the council shall deem appropriate and reasonable.” As the Charter defines such access to “include, but not be limited to, the ability of the public to testify, of council members to ask questions, and of the public to respond to questions.” This obligation does not flow from Chapter 92, Haw. Rev. Stat. but from the County Charter.

The proclamation itself qualified the suspension of Chapter 92, Haw. Rev. Stat. by stating: “Boards shall consider reasonable measures to allow public participation consistent with social distancing practices, such as providing notice of meetings, allowing submission of written testimony on agenda items, live streaming meetings, and posting minutes of meetings online.”

While the Council has the discretion to limit interactive communications access to residents of Hana, Lāna`i and Moloka`i, if the technology deployed does not make such distinctions it may be better to allow all County residents to participate by interactive communications technology.

It does not appear that Section 4-2(6) of the Charter allows the Council to waive the requirements for interactive communications access for emergency ordinances.

### Budget Public Hearing

Section 9-4 of the Charter requires the Council to conduct a public hearing on the proposed budget and capital program during the month of April. This obligation includes providing notice to the public and allowing for interactive communications access. This obligation is independent of Chapter 92, Haw. Rev. Stat. and must be satisfied in order to comply with the Charter's requirements of openness and transparency in the budget process.

### Access to Government Records

Unlike some state agencies, there have been no reports that County agencies have denied reasonable access to government records during the emergency so far. The County must be commended for the proactive and frank manner in which all branches have communicated regarding government operations in this time of uncertainty.

There appears to be some misunderstanding of what Chapter 92F, Haw. Rev. Stat. does and does not do. Chapter 92F, Haw. Rev. Stat. provides a uniform procedure by which a member of the public may inspect and copy a government record as well as protect personal information. It does not establish the right of members of the public to inspect and copy such records and it does not independently establish a duty of an agency to provide access. Those rights and duties are established by several constitutional provisions, the Charter as well as the common law.

The obligation to allow inspection and copying of county records, for example, is a duty imposed by Section 13-9(1) of the Charter. Chapter 92F, Haw. Rev. Stat. merely created a uniform procedure to facilitate access to such information. Suspending Chapter 92F, Haw. Rev. Stat. merely suspends the uniform procedure by which to deal with record requests, it does not suspend the right of the public to seek information or the duty of the government to provide it.

It seems sensible that to the extent agencies can follow the procedures set out in Chapter 92F, Haw. Rev. Stat., the agencies should do so to minimize confusion regarding longstanding procedures for accessing government information. Requests by members of the media for matters of public interest should be resolved expeditiously. Agencies should commit that any requests that cannot be reasonably answered because of disruptions caused by the emergency will be answered after the emergency.

### Meetings of Board and Commissions

Section 13-9(2) of the Charter requires: "All meetings of boards and commissions shall be held in the county building or other publicly owned place. In the event that a publicly owned building is not available or appropriate for the meeting, the meeting can be held in another facility that is accessible to the public."

It does not appear that any board or commission has any business to conduct in furtherance of emergency relief or emergency management functions that would necessitate any board or commission meeting during the emergency. In light of the requirements for social distancing and the logistics necessary to comply with this Charter provision, boards and commissions should not meet during the emergency.

As to contested cases or administrative adjudications, the first Supplemental Proclamation suspended Chapters 91 "to the extent ... any administrative hearing may be conducted by telephone

or video conference without the parties, department, or agency, being physically present in the same location[.]” However, as noted, the Charter imposes a separate requirement that meetings be accessible to the public. Moreover, Chapter 91, Haw. Rev. Stat. establishes a minimum uniform framework by which agencies conduct adjudications as required by constitutional provisions. The proclamation only suspends the uniform procedures. It does not and cannot suspend the obligations imposed by the Constitution.

Any administrative hearing that cannot “be held in another facility that is accessible to the public” because of limitations related to social distancing, stay-at-home order, lack of access to internet service, lack of assistance with using new technology, etc., cannot be conducted because of the obligation imposed by the Charter.

Furthermore, the public and the media have a qualified right of access to administrative proceedings adjudicative in nature under the First Amendment and the state constitution the same as court proceedings. See *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 US 751 (2001) (“the proceeding walks, talks, and squawks very much like a lawsuit and that its placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication.” internal citations omitted) The caselaw is clear that the “rudiment of fair play” required by due process mandate that administrative adjudications be “fair and open.” See *Ohio Bell Tel. Co. v. Pub. Utilities Commission of Ohio*, 301 U.S. 292, 304-05 (1937)

This right of access can only be restricted if a particularized showing is established justifying a denial of access in each particular case where access is denied:

1. Whether an open proceeding is substantially likely to prejudice another transcendent interest; *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 (1980); *Globe Newspaper v. Superior Court for Norfolk County*, 457 U.S. 596, 606-07 (1982)
2. If so, whether any alternative exists to avoid that prejudice without limiting public access; *Press-Enterprise Co. v. Superior Court of California* (Press II), 478 U.S. 1, 14 (1986); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984).
3. If not, whether the limitation of access is narrowed (in scope and time) to the minimum necessary; *Press-Enterprise Co. v. Superior Court of California* (Press I), 464 U.S. 501, 510 (1984), *United States v. Antar*, 38 F.3d 1348, 1362-63 (3d Cir. 1994)
4. Whether the limitation of access effectively avoids the prejudice it is intended to address. *Globe Newspaper*, 457 U.S. at 610; *In re Charlotte Observer*, 882 F.2d 850, 854-55 (4th Cir. 1989).

This includes both the evidentiary part of a contested case proceeding as well as any conferences or other hearings conducted before the reception of evidence.

The only transcendental interests implicated during this emergency are relief efforts and emergency management functions. Unless a specific finding that a particular contested case must proceed to support relief efforts or emergency management functions, a contested case proceeding must be suspended until after the emergency to ensure that the proceeding is fair and open.

### Scope of Emergency Rules

Emergency rules adopted by a mayor pursuant to Haw. Rev. Stat. 127A-25 only extend to “the purpose of carrying out any provision of this chapter [127A].” Any lawful suspension of open government laws only extend to providing relief and emergency management functions. They do not expand or modify the powers assigned by the Charter to a particular body or officer and they do not allow actions that are prohibited during ordinary time to be done simply because of the fact that the county is in a state of emergency.

Emergency rules cannot be used to defeat the host of laws designed to secure regular and appropriate review, related to environmental quality, of development projects, not related to relief or emergency management functions. For example, building a field hospital to treat patients during a public health emergency would be allowed without the otherwise necessary regular review required by law. Allowing building or development to occur that was proposed before the emergency to occur without review simply because the applicant seeks to move forward during the emergency would not be permissible.

As recently as several months ago, the governor was enjoined by the First Circuit Court from using his emergency powers under Chapter 127A, Haw. Rev. Stat. to infringe upon the constitutionally protected traditional and customary practices of Native Hawaiian practitioners at Mauna Kea. An emergency does not suspend the rule of law or common sense but is designed to "protect the public health, safety, and welfare, and to preserve the lives and property of the people of the State[.]" HRS 127A-1

In sum, I thank the County of Maui for its efforts in supporting transparency in government operations and the formation of policy during this time of great uncertainty. I ask that the County be mindful of its duties and obligations under the Charter and Constitution by ensuring appropriate access to meetings and records as required by law and by postponing those meetings and adjudications that are not required for the relief effort or emergency management functions until the end of the state of emergency.

Finally, I strongly encourage the County to consider adopting the interim procedures and standards relating to open meetings and government record requests proposed by Common Cause Hawai'i and the Civil Beat Law Center for the Public Interest as guidance for county agencies during the emergency.

Please do not hesitate to call or write me if you have any questions. I am happy to discuss this matter further to assist the County.

Very truly yours,  
LAW OFFICE OF LANCE D. COLLINS



LANCE D. COLLINS

- c: Members, Maui County Council
- Moana Lutey, Corporation Counsel
- David Raatz, Supervising Legislative Attorney
- Michele McLean, Planning Director
- Jeffrey Pearson, Water Supply Director
- Georgette Tyau, Acting Liquor Control Director
- Sandy Ma, Common Cause Hawai'i
- Brian Black, Civil Beat Law Center for the Public Interest
- Mateo Caballero, ACLU of Hawai'i