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December 12, 2024

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Date: 12/12/24
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ERIN GRAJEK (FOR BARNETT'S OFFICE)

REF No. 24-0631

Honorable Christopher D. Barnett
Chairperson, Committee on Rules and Senator
37th Guam Legislature
Guam Congress Building
163 Chalan Santo Papa
Hagåtña, Guam 96910

**GUAM LEGISLATURE
Protocol Office**

Archuleta's office DEC 12 2024
Time: 107 [] AM [X] PM
Rec. by: AK

Subject: Legal Opinion Open Government Law Compliance

Dear Senator Barnett:

You requested a November 25, 2024 legal opinion as to whether the Guam Housing and Urban Renewal Authority ("GHURA") violated Guam's Open Government Law in its consideration of entering into a loan agreement with the Governor's Office at their May 28, 2024 meeting. For purposes of this legal opinion, we also consider the same question regarding GHURA's acceptance of additional loan proceeds under the same loan agreement at their November 26, 2024 meeting.

Question Presented

What is the minimum amount of information that must be made available as part of an agenda in order to comply with the Open Government Law's requirement that, "*Agenda items must be in sufficient detail, to put the public on notice as to what is to be discussed.*" 5 GCA § 8107(d)?

Summary

We conclude that in both cases, GHURA violated the Open Government Law. The agenda items in question here refer to a potential business transaction, i.e. whether the agency should enter into or expand a loan agreement. We believe that an agency is required to provide the public in advance of a meeting, in writing, the essential terms of the transaction recommended by the agency's staff. In this case the minimum terms of a proposed loan agreement would include the amount to be borrowed, the term of the loan, the interest rate and other charges associated with the loan, a schedule of payments and any collateral offered to secure the loan. The essential terms of other kinds of business transactions may be different.

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Discussion

Guam adopted an Open Government Law to guarantee that “*the public’s business is conducted in a forum open to the public.*” *In re AB Won Pat International Airport Authority*, 2019 Guam 6 ¶ 35. An important part of open government is government’s obligation to provide the public with notice of the day, time, location and agenda of meetings where a quorum of an agency’s directors may be present and taking action on listed items. Guam law requires that this notice “*must be in sufficient detail to put the public on notice as to what is to be discussed.*” 5 GCA § 8107(d).

For purposes of this analysis the term “notice” includes both the meeting notice/meeting agenda typically published in a newspaper and the additional materials made available that support and explain each agenda item. These additional materials are typically collectively known as a “*board packet*” and are made available by agencies, such as GHURA, on their website in advance of any particular meeting.

Our Courts have adopted a reasonableness standard to evaluate whether any particular notice is sufficient. *Joseph v. Guam Board of Allied Health Examiners*, 2015 Guam 4. In *Joseph* the Supreme Court of Guam adopted a multi-factor test set forth by the Wisconsin Supreme Court in *Buswell v. Tomah*, to evaluate reasonableness. *Id.* at 18 citing *State ex rel. Buswell v. Tomah Area School District*, 732 NW2d 804 (Wis. 2007).

The reasonableness of any particular notice will be evaluated on a case-by-case basis and will consider:

The burden of providing more specific information on the body noticing the meeting,

Whether the subject is of particular public interest, and

Whether it involves non-routine action that the public would be unlikely to anticipate.

Id. We will consider the reasonableness of GHURA’s meeting notices at both the May 28 and the November 26 meeting using these three factors.

GHURA’s May 28, 2024 meeting notice informed the public that its’ board may consider a resolution authorizing GHURA to “accept” a loan for up to \$10 million for “community development projects.” Given the formalities GHURA is required to accomplish before it can undertake any project, at a minimum the notice should identify with some specificity the particular project to be considered. See, 12 GCA § 5111 for a description of the requirements GHURA must complete before initiating any project. At the November 26 meeting GHURA considered whether to accept additional loan proceeds of \$2.5 million for the same purpose. The minutes of each meeting indicate that each of these agenda items contemplated final approval by the board for the GHURA to enter into a binding commitment with the lender, in both cases the Governor’s Office. Approval of these resolutions would result in the lender funding the loan and GHURA would be obligated to repay the debt.

The draft resolution provided to GHURA's board and made available to the public in advance of the May 28 meeting indicated that the terms of the loan are "*to be negotiated.*" The draft resolution provided to GHURA's board and made available to the public in advance of the November 26 meeting is silent on the terms and conditions of the additional funding. In its simplest terms, the question presented here is, *whether the agendas for the May 28 and November 26 GHURA board meetings, together with the draft resolutions, meet the Open Government Law's requirements for "sufficient detail" so that the public is aware of what is being considered.*

The first criteria the Court adopted to examine sufficiency is the burden of providing more specific information on the body noticing the meeting. *Id.* We contrast the quantity and quality of information that GHURA was able to provide the public about other business transactions with the quantity and quality of information provided for these two transactions. For example, the May 28 board packet included a report from GHURA's Executive Director on their "Fleet Vehicle Bid." In advance of the meeting the board members and the public knew the identity of all bidders and a description of each bidder's offer. The report included a description of the products on offer, the quantity offered, the unit cost of each product, the unit cost of additional warranties and the total cost of each bidders offer. There was also a short description of why staff undertook this procurement and the rationale for choosing the successful bidder. See, GHURA Board packet for its May 28, 2024 meeting.

The October 15th board meeting packet made available in advance of the meeting included a resolution and supporting materials regarding the write-off of \$24,969.00 in tenant accounts receivable. The write-offs covered accounts receivable at four different GHURA managed properties. To support the request for the write-off each property manager provided a listing of the tenant, why the tenant left the property, and substantial detail as to nature of the due but unpaid charges as well as the local efforts to collect the account. Each property also provided a five-year trend chart detailing approved write-offs, including the net write-off after security deposits were applied. See GHURA Board packet for its October 15, 2024 meeting.

Contrast the detail provided concerning a \$600,000.00 vehicle purchase and a \$25,000.00 bad debt write-off with the detail provided the public concerning the Authority taking on \$12,500,000.00 in debt. The public was made aware of the total amount of the debt but no information was provided to either the Board or to the public regarding the term of the loan, the interest rate or other charges, repayment obligations and collateralization of the loans. In fact, the minutes of the May 28 board meeting report that Vice-Chair Sanchez asked about terms of the loan. GHURA's Deputy Director informed the Vice-Chair, other board members and members of the public that there were no terms available yet, and that GHURA had terms that "*will be asked.*" The Deputy Director suggested that in this case it was the borrower not the lender that would be articulating the terms of the loan. He offered no assurances either orally or in writing that the lender was prepared to agree to these terms. See 5/28/24 GHURA Board Meeting Minutes.

In sum, it is clear that GHURA can and does provide its Board and the public more than cursory information about proposed business transactions. Our review of the 2024 board packets suggests that these two loans are the only business transactions proposed by staff where GHURA's Board and the public were not provided with advance information detailing the fundamental terms of the request.¹

The second factor to evaluate the reasonableness of a public notice requires a judgment as to whether there is significant public interest in a matter under consideration. Generally, the higher the public interest, the greater the expectation that the public will be provided with details concerning governmental action in advance of a meeting. In this instance, there can be no dispute that the matter of a new hospital on Guam, where it will be located, and how to pay for it is a matter of great public interest. That "public interest" is evident by the introduction and passage and failures to pass many legislations and bills pertaining to the existing hospital and Governor's attempt to build a medical complex, as well as the private medical community's outcries. In addition, see, for example:

- A. Pacific Daily News December 1, 2024 article;
- B. Pacific Daily News November 31, 2024 article;
- C. Guam Daily Post October 21, 2024 article;
- D. Guam Daily Post October 15, 2024 article;
- E. Guam Daily Post October 12, 2024 article;
- F. KUAM September 24, 2024 article;
- G. Pacific Daily News September 23 article; and
- H. Pacific Daily News May 30, 2024 article.

In fact, the matter before the Governor and Guam Legislature of fixing or constructing a new hospital has been a topic of significant interest to the public for many years as the current facilities face struggles. See *also* AG Legal Opinion to Gov. (3/31/23).

The third factor to evaluate the reasonableness of a notice is whether the subject is routine or novel. The Supreme Court of Guam noted that, "*novel issues are more likely to catch the public unaware. Novel issues may therefore require more specific notice.*" *Id.* GHURA's involvement in the development of a new hospital on Guam is certainly novel. The Guam Legislature in its enabling law authorized GHURA the task of studying and improving Guam's housing and urban renewal needs. 12 GCA § 5104(r). GHURA has an extensive list of powers and duties, but those powers and duties are limited to those "necessary and convenient to carryout and perform the purposes and provisions of this Chapter . . ." 12 GCA § 5104. In articulating the purpose of GHURA the Guam Legislature charged it with improving the housing stock of Guam. 12 GCA § 5101(a). GHURA was also to engage in "*prompt and vigorous action*" to eliminate and prevent slums and blighted areas. 12 GCA §§ 5101(e) and (f).

The notice must "*inform a person of ordinary education and intelligence*" what an agency is actually contemplating with regard any particular agenda item. *Wilson v. City of Tecumseh*, 194 P.3d 140 (2008). In *Wilson*, the Court concluded that a reference to an employee's employment status was not adequate notice to the public that, under this agenda item, the City was contemplating paying the employee an employment bonus.

Contrast GHURA's legislative purpose with the legislative purpose of the Guam Economic Development Agency ("GEDA"). GEDA, too, is assigned the function of remedying the "*substantial and serious shortage of housing in all categories*" on Guam. 12 GCA § 50103. But, unlike GHURA, GEDA is specifically charged with providing "*the means necessary for the acquisition, construction and provision of hospital facilities to serve the general public . . .*" *Id.* GEDA served as the contracting agency for the procurement of the Guam Medical Campus Master Plan provided by Matrix Design Group, Inc. This Master Plan was published in December of 2022 and appears to continue to serve as the guiding document regarding the development requirements of new hospital complex.

The question for today is not whether GHURA or GEDA has the legal authority to undertake the development of a new hospital on Guam, or to borrow money to facilitate its construction. Our inquiry focuses upon whether GHURA borrowing \$12.5 million is a new or novel undertaking for the agency. "*Novel issues require more specific notice.*" *Joseph v. Guam Board of Allied Health Examiners*, 2015 Guam 4 ¶ 18. Given the Legislative directive to GEDA, no reasonable person would expect GHURA to borrow money for any purpose remotely related to constructing a new hospital. We conclude that this borrowing is a new or novel undertaking, and that more specific notice should have been provided.

This conclusion is further supported by the Guam Legislature's assignment to GEDA, not GHURA, to serve as the "*central financial manager*" for Government agencies requiring financial assistance. This financial assistance includes working with Government agencies and investment bankers to facilitate obtaining funds for development projects. 12 GCA § 5103(k). A reasonable Guam citizen, seeking to understand how the Government planned to pay for a new hospital, would likely start to consider such a question by turning first to the activities of GEDA.

Finally, please note that today our Office also issues a related legal opinion pertaining to GHURA for a requested legal opinion from Minority Leader and Senator Frank F. Blas, Jr. pertaining to GHURA's recent exercise of its purported eminent domain authority in constructing a hospital medical complex.

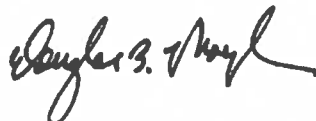
Summary

Based upon the foregoing analysis, GHURA failed to satisfy the three (3) components of the Supreme Court of Guam's test for whether the meeting notices and associated additional materials provided by GHURA concerning the \$10 million loan and the \$2.5 million additional loan gave the public sufficient detail about these proposals. The first component is whether it is a burden on an agency to provide specific detail regarding an action item. As GHURA regularly provides members of the public with advance notice of the business terms of its proposed transactions, we conclude that it was not a burden on GHURA to inform the public not only of the amount of these loans but also their term, interest rate or other charges, repayment obligations and collateralization of the loans.

The second component of the test is an evaluation of whether a reasonable person is likely to care about this particular matter and therefore prefer more information rather than less. As the matter of the development of a new hospital on Guam is likely among the most salient issues to the Guam public, the Open Government Law required that GHURA provided the public with more information in advance about these loans rather than less. The third factor is whether the activity being discussed was a routine, typical activity for the agency or something new and different from the agency's standard affairs. We conclude that borrowing money to facilitate the development of a hospital is a novel activity for GHURA. Again, this opinion does not address whether GHURA's activities regarding the construction of a new hospital exceed its legal authority. Our focus is on whether GHURA's providing the public with no advance information regarding the fundamental terms of its two borrowings was a violation of the Guam Open Government law.

When the GHURA Board considered each of its two borrowings the information provided to the Board and the public as part of the meeting notice contained nothing to explain the terms of the loans other than the amount of each borrowing; the first being \$10 million and the second \$2.5 million. Any reasonable person considering borrowing money would also want to know what is the interest rate, how long to repay the loan, are their other fees and what kind of collateral is required? Whether one is borrowing \$10,000.00 to buy a car or \$1 billion to build a hospital anyone would ask the same basic questions about a loan. Simply put, GHURA should have erred on the side of providing the public with more information than it did. Because GHURA provided almost none of the essential terms of a loan agreement, we conclude that GHURA's Notice failed to satisfy the notice requirements of the Guam Open Government law. All actions taken therein are void, and voidable. Thank you.

Respectfully,

A handwritten signature in black ink, appearing to read "Douglas B. Moylan".

Douglas B. Moylan
Attorney General of Guam