OPEN MEETINGS

Guide to "The Sunshine Law"

for State and County Boards

January 2013

Part I of Chapter 92,
Hawaii Revised Statutes

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INTRODUCTION

This Open Meetings Guide was prepared by the Office of Information Practices ("OIP") as a reference tool for board members and members of the public to understand the open meetings requirements of Hawaii's "Sunshine Law" (Part I of Chapter 92, HRS). This edition of the Open Meetings Guide is applicable to all state and county boards, except neighborhood boards. A separate edition was developed by OIP specifically for neighborhood boards, which have some unique provisions under Part VII of Chapter 92, HRS.

Every year, in response to hundreds of questions and complaints about the manner in which state and county boards conduct their business, OIP initiates numerous investigations into alleged Sunshine Law violations. Many of the questions, complaints, and violations arise because of a misunderstanding or a lack of understanding, and sometimes both, about the statute and its requirements.

The Sunshine Law imposes numerous requirements and restrictions on the manner in which a state or county board can conduct its business. Many board members, especially those who serve or have served on non-governmental boards, are surprised by the restrictions placed on the manner in which they, in their capacity as state or county board members, must

conduct board business.
For instance, with a few exceptions, board members are not allowed to discuss board business with each other outside of a meeting, including by telephone or through e-mail or social media. In addition, a board usually cannot consider at a meeting matters not included in its published agenda.

If you are elected or appointed to a government board, along with the honor and privilege of serving, there is the added responsibility of learning and complying with the Sunshine Law. We hope that this guide will assist you and members of the public in generally understanding the statute's requirements.

We have attempted to present the law in "plain English," through the types of questions that are most frequently asked. We have also included the statute, a flowchart regarding executive meetings, and a checklist for meeting notices. Finally, we have included short summaries of the opinions issued by OIP providing interpretation of the Sunshine Law.

Please note that the comments contained in this guide are general in nature. If you have questions about specific factual circumstances that may not be answered by this guide, you should consult with your attorney, your board's attorney, or OIP. OIP provides an "attorney of the day" service through which you may speak with an OIP staff attorney to receive general legal guidance on and assistance with Sunshine Law issues.

Thank you for your participation in Hawaii's open government.

Cheryl Kakazu Park
Director

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GENERAL INFORMATION

What is the Sunshine Law?

The Sunshine Law is Hawaii's open meetings law. It governs the manner in which all state and county boards must conduct their business. The law is codified at part I of chapter 92, Hawaii Revised Statutes ("HRS").

What is the general policy and intent of the Sunshine Law?

The intent of the Sunshine Law is to open up governmental processes to public scrutiny and participation by requiring state and county boards to conduct their business as openly as possible. The Legislature expressly declared that "it is the policy of this State that the formation and conduct of public policy—the discussions, deliberations, decisions, and actions of governmental agencies—shall be conducted as openly as possible."

In implementing this policy, the Legislature directed that the provisions in the Sunshine Law requiring open meetings be liberally construed and the provisions providing for exceptions to open meeting requirements be strictly construed against closed meetings. Thus, with certain specific exceptions, all discussions, deliberations, decisions, and actions of a board relating to the official business of the board must be conducted in a public meeting.

In other words, absent a specific statutory exception, board business cannot be discussed in secret. There must be public notice; public access to the board's discussions, deliberations, and decisions; opportunity for public testimony; and board minutes.

What boards are covered by the Sunshine Law?

There is no list that specifically identifies the boards that are subject to the Sunshine Law. As a general statement, the Sunshine Law applies to all state and county boards, commissions, authorities, task forces, and committees that have supervision, control, jurisdiction, or advisory power over a specific matter and are created by the State Constitution, statute, county charter, rule, executive order, or some similar official act. A committee or other subgroup of a board that is subject to the Sunshine Law is also considered to be a "board" for purposes of the Sunshine Law and must comply with the statute's requirements.

Examples of state and county boards that are subject to the Sunshine Law include the county councils, the neighborhood boards, the Board of Water Supply, the liquor commissions, the board of the Hawaii Tourism Authority, the police commissions, the board of the Aloha Tower Development Corporation, the Board of Land and Natural Resources, the Board of Agriculture, the Board of Health, the board of the Hawaii Health Systems Corporation, the University of Hawaii's Board of Regents, the Board of Education, the island burial councils, the Small Business Regulatory Review Board, the Real Estate Commission, the board of the Natural Energy Laboratory of Hawaii Authority, and the board of the Stadium Authority.

The Sunshine Law does not apply to the judicial branch or to the adjudicatory functions exercised by certain boards (with the exception of Land Use Commission hearings, which are open to the public). The legislative branch sets its own rules and procedures concerning notice, agenda, minutes, enforcement, penalties, and sanctions, which take precedence over similar provisions in the Sunshine Law.

What government agency administers the Sunshine Law?

Since 1998, OIP has administered the Sunshine Law. OIP also oversees the Uniform Information Practices Act (Modified) ("UIPA"), chapter 92F, HRS, which is commonly referred to as Hawaii's "open records" or freedom of information act.

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PUBLIC MEETINGS

MEETINGS DEFINED

Are all meetings of state and county boards open to the public?

Generally, yes. All meetings of state and county boards are required to be open to the public unless an executive meeting or other exception is authorized under the law. The open meeting requirement also applies to the meetings of a board's committees or subgroups.

Are site inspections, presentations, workshops, retreats and other informal sessions that involve board business considered to be meetings open to the public?

Generally, yes. Apart from the permitted interactions set forth in section 92-2.5, HRS, which are discussed below, the Sunshine Law requires all of a board's discussions, deliberations, decisions, and actions regarding matters over which the board has supervision, control, jurisdiction, or advisory power to be conducted in either an open or executive meeting.

Moreover, based upon the express policy and intent of the legislature—that the formation and conduct of public policy be conducted as openly as possible—OIP interprets the statute to require that any site inspection or presentation regarding a matter before the board, or which is reasonably likely to come before the board for a decision in the foreseeable future, be conducted as part of a properly noticed meeting.

That conclusion is based upon OIP's determination that the site inspection or the presentation is an integral part of the board's deliberation and decision-making process, two types

of actions that the statute expressly requires be conducted in a properly noticed meeting. If it is not practical to allow the public to attend a site inspection as part of a meeting, a portion of the board may still be able to participate in the site inspection under certain circumstances. *See* Permitted Interactions, discussed below.

With respect to board retreats, **if board business is to be discussed at the retreat**, the retreat must be conducted as a meeting, which requires public notice, the keeping of minutes, the opportunity for public testimony, and public access to the board's discussions, deliberations, and decisions.

Telephonic and Videoconference Meetings

May a board hold a meeting via telephone?

Yes. As of July 1, 2012, board members may participate in a board meeting by "interactive conference technology," which includes teleconference, Skype, videoconference, or voice over internet protocol. See answer below for further details.

May a board convene a meeting via videoconference?

Board members may remotely participate in a board meeting through "interactive conference technology," which includes teleconference, Skype, videoconference, or voice over internet protocol. If audio communication cannot be maintained at all locations, then the meeting must be terminated, even if a quorum of board members is physically present in one location.

Members generally may only participate in a meeting from **public** locations listed in the meeting notice. But "a board member **with a disability** that limits or impairs the member's ability to physically attend the meeting" may attend a meeting via a connection by **audio and video** means (*i.e.*, by videoconference, Skype) from a **private** location not open to the public, such as a home or hospital room. A disabled board member attending from a private location must identify the location and any persons who are present at that location with the member. To protect the disabled member's privacy interests and because members of the public are not able to participate from the private location, the disabled member's location during a meeting may be generally identified, such as "home" or "hospital," without providing an exact address.

When noticing a meeting to be held using interactive conference technology, boards must indicate all locations where board members will be physically present, and must indicate that the **public can attend the meeting at any of the specified locations**. A disabled member's private address need not be identified as a meeting location on the notice.

If copies of visual aids are brought to the meeting by board members or members of the public, they must be available to all meeting participants at all locations. If audio-only interactive conference technology (*e.g.*, teleconference) is being used, all visual aids must be available within 15 minutes to all participants, or those agenda items for which visual aids are not available cannot be acted upon at the meeting.

Testimony

Must a board accept testimony at its meetings?

Yes. Boards are required to accept testimony from the public, both oral and written, on any item listed on the meeting agenda. Boards can decline to accept public testimony that is unrelated to a matter listed on the agenda.

Can the public provide testimony from a remote location by telephone, videoconference, or using other interactive technology?

OIP has interpreted HRS section 92-3.5 to allow **board members'** remote participation in a meeting, and when board members are present at more than one location, members of the

public may participate (including providing testimony) from any site listed on the notice as a location where board members would be present. However, this section has NOT been interpreted to **require** a board to allow public testimony or participation from a remote location which has not been properly noticed and when there are no board members present at that location and participating remotely in the meeting. Thus, a board may choose, but is not required by the Sunshine Law, to hear speakerphone testimony from members of the public who are not physically present at a meeting location. Similarly, a board may accept public testimony via videoconference or Skype from sites that were not included in the public notice. A board may also list in its notice a courtesy videoconference or teleconference site where the public can attend and offer testimony, even though no board member will be physically present, and the board would not be required to cancel the remainder of its meeting if a courtesy site were to lose its audio or video connection to the meeting site. To avoid public confusion, however, the board's notice must make clear that no board member will be physically attending from that videoconferenced or teleconferenced site and that the meeting **will** continue even if the connection to the site is lost.

Is a board required to read aloud the written testimony during its meeting?

No. There is no requirement that a board read aloud each piece of written testimony during its meeting for the benefit of those attending the meeting. A board, however, must ensure that written testimony is distributed to each board member for that member's consideration before the board's action. Moreover, upon request, any member of the public is entitled to receive copies of the written testimony submitted to the board.

Is written communication received by only one board member regarding a matter on the board's meeting agenda considered written testimony?

Possibly. For instance, on occasion, the board chair or individual board members may receive e-mail or other written correspondence regarding a matter on the board's agenda. If a writing is received prior to the meeting and reasonably appears to be testimony relating to an agenda item (as opposed to correspondence directed only to the recipient), irrespective of whether the writing is specifically identified as "testimony," the board member receiving the communication must make reasonable efforts to cause the testimony to be distributed to the other members of the board.

How can a board avoid the possible problem of only one board member receiving testimony intended for the entire board?

To avoid possible confusion as to whether an e-mail or other written communication received by only one board member is intended as to be "testimony" to the entire board, the meeting notice could specifically identify a mailing address and an e-mail address to where written testimony should be directed.

While such a process does not completely relieve individual board members of their obligation to consider whether written communication that they individually receive is intended by the sender to be "testimony" for consideration by the entire board, it may reduce the likelihood of written testimony being received by individual board members and may excuse a board member's reasonable failure to recognize that a written communication was intended to be "testimony."

How must a board distribute written testimony to its members?

The board is empowered to determine how to best and most efficiently distribute the testimony to its members, *e.g.*,

whether to transmit it electronically or to circulate copies in paper format, so long as the testimony is distributed in a way that is reasonably calculated to be received by each board member.

May a board limit the length of each person's oral testimony offered at its meetings?

Yes. Boards are authorized to adopt rules regarding oral testimony, including, among other things, rules setting limits on the amount of time that a member of the public may testify. For instance, a council could adopt rules limiting each person's oral testimony to three minutes. Boards also are not required to accept oral testimony unrelated to items on the agenda for the meeting.

Recessing and Reconvening Meetings

Can a board recess and later reconvene a meeting?

Boards are authorized to recess their meetings, both public and executive meetings, and reconvene at another date and time to continue and/or complete public testimony, discussion, deliberation, and decision-making relating to the items listed on the agenda. The meeting must be continued to a reasonable date and time, and the date, time, and location of the reconvened meeting must be announced at the time that the meeting is recessed.

Can the meeting be reconvened at a different location?

Yes. A board may reconvene a meeting at a location different from where the meeting was initially convened, as long as the board announces the location where the meeting is to be reconvened at the time when it recesses the meeting. OIP also strongly recommends that the new location be included in all announcements and other such publications, if any, regarding the reconvened meeting.

Discussions Between Board Members Outside of a Meeting

Can board members discuss board business outside of a meeting?

The Sunshine Law generally prohibits discussions about board business between board members outside of a properly noticed meeting, with certain statutory exceptions. While the Sunshine Law authorizes certain interactions between board members outside of a meeting, the statute expressly cautions that such interactions cannot be used to circumvent the requirements or the spirit of the law to make a decision or to deliberate towards a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power.

In practical terms, this means that board members cannot "caucus" or meet privately before, during, or after a meeting to discuss business that is before the board or that is reasonably likely to come before the board in the foreseeable future.

The statute, however, does not prohibit discussion between board members outside of a properly noticed meeting about matters over which the board does not have supervision, control, jurisdiction, or advisory power. For instance, where the chair of a board has the sole discretion and authority to dictate how the board will expend certain funds allocated to it, the board has no "power" over that decision and, therefore, board members may discuss the expenditure outside of a properly noticed meeting.

Does the Sunshine Law also prohibit board members from communicating between themselves about board business by telephone, memo, fax, or e-mail outside of a meeting?

Yes. Board members cannot discuss board business between themselves when they are outside of a properly noticed meeting by way of the telephone or by memoranda, fax, e-mail, or social media, such as Facebook. As a general rule, if the

statute prohibits board members from discussing board business face-to-face, board members cannot have that same discussion through another type of media.

Can board members discuss board business with non-board members outside of a meeting?

Generally, yes. The Sunshine Law only applies to boards and their discussions, deliberations, decisions, and actions. Because the Sunshine Law does not apply to **non**-board members, a board member may discuss board business with **non**-board members outside of a meeting.

It is contrary to the spirit of the statute, however, for a board member to engage in a public discussion with non-board members about a matter that is board business in the presence of other board members. For instance, four county council members cannot participate in a discussion at a neighborhood board meeting about a matter that is council business, even if the council members do not discuss the matter between themselves. In OIP's opinion, such an exchange is part of the discussion and deliberation process that can only take place in a properly noticed meeting. Additionally, board members should not discuss with non-board members any matters discussed during a closed executive session, or the members could risk waiving the board's ability to keep the matters confidential.

Social Events

What about social and ceremonial events attended by board members?

The Sunshine Law does not apply to social or ceremonial gatherings at which board business is not discussed. Therefore, board members can attend functions such as Christmas parties, dinners, inaugurations, orientations, and ceremonial events without posting notice or allowing public participation,

so long as they do not discuss official business that is pending or that is reasonably likely to come before the board in the foreseeable future.

If I am a board member, what should I do if another board member starts talking about board business at a social event?

The Sunshine Law is, for the most part, self-policing. It is heavily dependent upon board members understanding what they can and cannot do under the law. In the situation where a board member raises board business with other board members outside of a meeting, board members should remind each other that such discussion can only occur at a duly noticed meeting. If a board member persists in discussing the matter, the other board members should not participate in the discussion and should physically remove themselves from the discussion.

Permitted Interactions

What are "permitted interactions"?

In 1996, the Legislature added six "permitted interactions" to the law that are designed to address instances and occasions in which members of a board may discuss certain board matters outside of a meeting and without the procedural requirements, such as notice, that would otherwise be necessary. The statute specifically states that the "[c]ommunications, interactions, discussions, investigations, and presentations described in [the permitted interaction] section are not meetings for purposes of [the Sunshine Law]."

In 2008, the Legislature added a new permitted interaction for neighborhood boards only. This neighborhood board provision was modified and extended to all Sunshine Law boards in a new permitted interaction added in 2012. Another new permitted interaction relating to cancelled meetings was also added in 2012. All permitted interactions are summarized below.

What are the types of "permitted interactions" allowed by the statute?

• ***Two Board Members***. Two board members may discuss board business outside of a meeting as long as no commitment to vote is made or sought. Nevertheless, it would be contrary to the Sunshine Law for a board member to discuss the same board business with more than one other board member through a series of one-on-one meetings.

• ***Investigations***. A board can designate two or more board members, but less than the number of members that would constitute a quorum of the board, to investigate matters concerning board business. The board members designated by the board are required to report their resulting findings and recommendations to the entire board at a properly noticed meeting. This permitted interaction can be used by a board to allow some of its members (numbering less than a quorum) to participate in, for instance, a site inspection outside of a meeting or to gather information relevant to a matter before the board.

• ***Presentations/Negotiations/Discussion***. The board can assign two or more of its members, but less than the number of members that would constitute a quorum of the board, to present, discuss, or negotiate any position that the board has adopted.

• ***Selection of Board Officers***. Two or more board members, but less than the number of members that would constitute a quorum of the board, can discuss between themselves the selection of the board's officers.

• ***Acceptance of Testimony at Cancelled Meetings***. If a board meeting must be cancelled due to lack of quorum or conference technology problems, the board members present may still receive testimony and presentations on agenda items from members of the public and may question them, so long as there is no deliberation or decision-making at the cancelled meeting. The members present must create a record of the oral

testimony or presentations. At the next duly noticed meeting of the board, the members who were present at the cancelled meeting must provide the record and copies of the testimony or presentations received at the cancelled meeting. Deliberation and decision-making on any item, for which testimony or presentation were received at the cancelled meeting, can only occur at a subsequent duly-noticed meeting of the board.

• ***Discussions With the Governor***. Discussions between one or more board members and the Governor are authorized to be conducted in private, provided that the discussion does not cover a matter over which a board is exercising its adjudicatory function.

• ***Administrative Matters***. Certain routine administrative matters, such as board budget or employment matters, can be discussed between two or more members of a board and the head of a department to which the board is administratively assigned.

• ***Attendance at Informational Meetings or Presentations***. In 2008, HRS § 92-82 was added to allow less than a quorum of the membership of a **neighborhood board** to attend an informational meeting or presentation at which official board business may be discussed, and may participate in discussion of the official board business, but only during and as part of the informational meeting or presentation. The meeting or presentation cannot be specifically and exclusively organized for the neighborhood board. After attending an informational meeting or presentation that included a discussion about official board business, the neighborhood board members must report at the next duly noticed meeting of their neighborhood board (1) their attendance, and (2) the official board business matters presented and discussed at the informational meeting or presentation.

While the neighborhood board provision described above does not apply to all other Sunshine Law boards, a similar permitted interaction was added to the Sunshine Law in 2012 to apply to all Sunshine Law boards. HRS § 92-2.5(e) now allows two or

more members of a board, but less than a quorum, to attend an informational meeting or presentation on matters relating to official board business, including a meeting of another entity, legislative hearing, convention, seminar, or community meeting, so long as the meeting or presentation was not specifically and exclusively organized for or directed toward the board members. The board members may participate in discussions, even among themselves, so long as the discussions occur as part of the informational meeting or presentation and no commitment relating to a vote on the matter is made or sought. At the next duly noticed meeting of the board, the members who attended the informational meeting or presentation must report their attendance and the matters presented and discussed that related to official board business.

This new Sunshine Law provision thus allows less than a quorum of board members to attend, for example, neighborhood board meetings, legislative hearings, and seminars, at which official board business is discussed, so long as no commitment to vote is made and the subsequent reporting requirements are met. The law is intended to improve communication between the public and board members and to enable board members to gain a fuller understanding of the issues and various perspectives. As with the rest of the law, this new permitted interaction will be interpreted to prevent circumvention of the spirit of the Sunshine Law and its open meeting requirements.

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EXECUTIVE MEETINGS

What is an executive meeting?

An executive meeting is a meeting of the board that is closed to the public. Executive meetings are authorized in eight specific circumstances and cannot be convened for any other purpose.

What are the eight purposes for which an executive meeting can be convened?

• ***Licensee Information***. A board is authorized to meet in executive session to evaluate personal information of applicants for professional and vocational licensees.

• ***Personnel Decisions***. A board may hold a meeting closed to the public to consider the hire, evaluation, dismissal or discipline of an officer or employee, if consideration of the matters may affect that individual's privacy. However, if the person who is the subject of the board's meeting requests that the board conduct its business about him or her in an open meeting, the request must be granted and an open meeting must be held.

• ***Labor Negotiations/Public Property Acquisition***. A board is allowed to deliberate in an executive meeting concerning the authority of people designated by the board to conduct labor negotiations or to negotiate the acquisition of public property, or during the conduct of such negotiations.

• ***Consult with Board's Attorney***. Boards are authorized to consult in an executive meeting with their attorneys concerning the board's powers, duties, immunities, privileges, and liabilities.

• ***Investigate Criminal Misconduct***. A board with the power to investigate criminal misconduct is authorized to do so in an executive meeting.

• ***Public Safety/Security***. A board may hold an executive meeting to consider sensitive matters related to public safety or security.

• ***Private Donations***. A board may consider matters relating to the solicitation and acceptance of private donations in executive meetings.

• ***State/Federal Law or Court Order***. A board may hold an executive meeting to consider information that a state or federal law or a court order requires be kept confidential.

Does "embarrassing" or "highly personal" information allow a board to hold an executive meeting?

Not unless the discussion falls within one of the eight circumstances listed in the statute for which an executive meeting is allowed.

Can confidential or proprietary information be considered in a closed door meeting?

Again, unless there is an exception that permits the board to convene in an executive meeting, no matter how sensitive the information may be, a board cannot consider such information outside of an open meeting.

Must a board give notice that it intends to convene an executive meeting?

Yes, if the executive meeting is anticipated in advance.

What must the agenda contain when the board anticipates convening an executive meeting?

Generally, the agenda for the open meeting must indicate that an executive meeting is anticipated. The agenda also must state, at a minimum, the statutory authority for convening the anticipated executive meeting and should describe the subject of the executive meeting with as much detail as possible without compromising the closed meeting's purpose.

For instance, if the board is to consider a proposed settlement of a lawsuit in an executive meeting, the agenda could note that the meeting will be convened for the purpose of consulting with the board's attorney on questions or issues regarding the board's powers, duties, privileges, immunities, and liabilities, and cite section 92-5(a)(4), HRS. Unless such description would compromise the purpose of closing the meeting from the public, the agenda should describe the purpose of the meeting as a proposed settlement and state the case name and civil number.

Can a board convene an executive meeting when it is not anticipated in advance?

The statute also allows the board to convene an executive meeting when the need for excluding the general public from the meeting was not anticipated in advance. If, for example, during the discussion of an open meeting agenda item, the board determines that there are legal issues that need to be addressed by its attorney, the board is entitled to immediately convene an executive meeting to discuss those matters pursuant to section 92-5(a)(4), HRS.

The board, however, **cannot** convene an executive meeting to discuss a matter that is not on the meeting agenda without first amending the agenda in accordance the statute's requirements. *See* the Executive Meeting Flowchart on page 32.

How does a board convene an executive meeting?

To convene an executive meeting, a board must vote to do so in an open meeting and must publicly announce the purpose of the executive meeting. Two-thirds of the board members present must vote in favor of holding the executive meeting, and the members voting in favor must also make up a majority of **all** board members, including members not present at the meeting or membership slots not currently filled. The minutes of the open meeting must reflect the vote of each board member on the question of closing the meeting to the public.

Can non-board members participate in an executive meeting?

The board is entitled to invite into an executive meeting any non-board member whose presence is either necessary or helpful to the board in its discussion, deliberation, and decision-making regarding the topic of the executive meeting. Once the non-board member's presence is no longer needed, the non-board member must be excused from the executive meeting.

Because the meeting is closed to the general public, the board should allow the non-board members to be present during the executive meeting only for the portions of the meeting for which their presence is necessary or helpful. OIP, however, interprets the statute to allow the board's attorney to participate in the entire executive meeting, even when the executive meeting is called for a purpose other than to consult with the board's attorney.

May a board vote in an executive meeting?

Generally, no. In most instances, the board must vote in an open meeting on the matters considered in an executive meeting. In rare instances, the Sunshine Law allows the board to vote in the executive meeting when the vote, if conducted in an open meeting, would defeat the purpose of the executive meeting, such as by revealing the matter for which confidentiality may be needed.

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OTHER TYPES OF MEETINGS

EMERGENCY MEETINGS

Where public health, safety, or welfare requires a board to take action on a matter, can a board convene a meeting with less than six days' notice?

A board may hold an emergency meeting with less notice than required by the statute or, in certain circumstances, no notice when there is "an imminent peril to the public health, safety, or welfare." When the board finds that an emergency meeting is appropriate, (1) the board must state its reasons in writing, (2) two-thirds of all members to which the board is entitled must agree that an emergency exists, and (3) the board must file an emergency agenda and the board's reasons in its office and with the Office of the Lieutenant Governor or the appropriate county clerk's office.

Unanticipated Events

What happens when an unanticipated event requires a board to take immediate action—can a board convene a meeting with less than six days' notice?

A board may convene a special meeting with less than six calendar days' notice because of an unanticipated event when a board must take action on a matter over which it has supervision, control, jurisdiction, or advisory power. The law defines an unanticipated event to mean (1) an event that the board did not have sufficient advance knowledge of or reasonably could not have known about; (2) a deadline beyond the board's control established by a legislative body, a court, or an agency; and (3) the consequence of an event for which the board could not have reasonably taken all necessary action.

The usual rule is that a state or county board may deliberate and decide whether and how to respond to the unanticipated event as long as (1) the board states, in writing, its reasons for finding that an unanticipated event has occurred and that an emergency meeting is necessary; (2) the attorney general and two-thirds of all members to which the board is entitled concur with the board's finding; and (3) the board's findings and the agenda for the emergency meeting are filed in the board's office and with the Office of the Lieutenant Governor or the appropriate county clerk's office. At an emergency meeting, the board can only take those actions that need to be immediately taken.

Limited Meetings

If a board finds it necessary to inspect a location that is dangerous or impracticable for public attendance, may the board hold a meeting that is not open to the public?

Boards may hold a "limited meeting" that is not open to the public when it determines it necessary to inspect a location that is dangerous or that is impracticable for public attendance, and the OIP director concurs in that determination. The board must deliberate on the need for the limited meeting at the prior open meeting of the board, and two-thirds of the board's members must then agree that it is necessary to hold the limited meeting at the specified location.

If a limited meeting is held, notice must be provided, and a videotape of the meeting must be made available at the next regular board meeting, unless the OIP director waives the videotape requirement. No decision-making can occur during the limited meeting.

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PROCEDURAL REQUIREMENTS

Notice and Agenda

What are the Sunshine Law's requirements for giving notice of meetings?

With the exception of emergency meetings, a board must give at least six calendar days' advance notice of any regular, special, or rescheduled meeting or any anticipated executive meeting.

The notice must be filed with either the Office of the Lieutenant Governor or the appropriate county clerk's office, and posted at the meeting site, whenever feasible.

In addition to the date, time, and place of the meeting, the meeting notice must include an agenda, which lists all of the items to be considered at the forthcoming meeting. If an executive meeting is anticipated, the notice must also state the purpose of the executive meeting. *See* the Public Meeting Notice Checklist on page 33.

Does a board have to notify individual members of the public of every meeting?

The statute requires the board to maintain a list of names and addresses of those persons who have requested notification of meetings and to mail a copy of the notice to those persons at the time that the notice is filed.

What happens if a board files its notice less than six days before the date of the meeting?

If a board files its notice less than six calendar days before the meeting, the meeting is cancelled as a matter of law and no meeting can be held. The Lieutenant Governor or the appropriate county clerk is to notify the board chair or the director of the department within which the board is established of the late filing, and the board must post a notice canceling the meeting at the meeting site.

What must the agenda contain?

The agenda must list all of the business to be considered by the board at the meeting. It must be sufficiently detailed so as to provide the public with adequate notice of the matters that the board will consider so that the public can choose whether to participate.

For anticipated executive meetings, as noted above, the agenda must be as descriptive as possible without compromising the purpose of closing the meeting to the public and must identify the statutory basis that allows the board to convene an executive meeting regarding the particular matter.

Are general descriptions such as "Unfinished Business" or "Old Business" allowed?

No. The practice of certain boards of listing general descriptions on their agendas such as "Unfinished Business" or "Old Business" without any further description is insufficient and does not satisfy the agenda requirements.

Can a board amend its meeting agenda once it has been filed?

Boards may amend an agenda during a meeting to add items to be considered by the board by the affirmative vote of two-thirds of **all** board members, including members not present at the meeting or membership slots not currently filled. Adding an item to the agenda, however, is **not** permitted if (1) the item to be added is of reasonably major importance and (2) action on the item by the board will affect a significant number of persons. Determination of whether a specific matter may be added to an agenda must be done on a case-by-case basis.

Minutes

Is a board required to keep minutes of its meetings?

Written minutes must be kept of all meetings and must include the date, time, and place of the meeting; the members recorded as either present or absent; the substance of all matters proposed, discussed, or decided; a record by individual member of votes taken; and any information that a board member specifically asks at the meeting to be included. Boards are not required to create a transcript of the meeting or to electronically record the meeting.

Are the minutes of a board's meeting available to the public?

Yes. Minutes of public meetings are required to be made available to the public within 30 days after the meeting. If the official minutes are not available within 30 days after the meeting, the board must make available, upon request, the draft or yet-to-be-approved minutes of the meeting. Minutes of executive meetings can be withheld only so long as publication would defeat the lawful purpose of the executive meeting.

Once disclosure of the executive meeting minutes would not defeat the purpose of closing the meeting to the public those minutes should be made available to the public. For example, minutes of an executive meeting to discuss a property's acquisition should be disclosed after the property has been acquired.

Recordings

Must a board allow a member of the public to tape record or video record the meeting?

The board must allow the public to tape record any portion or all of an open meeting as long as the recording does not actively interfere with the meeting. The current statute does not address newer technologies, such as videotaping or live streaming. Given the intent of the law, however, if recording activities do not unduly interfere with a board's ability to do its business, OIP suggests that a board should allow them.

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SUIT TO VOID BOARD ACTION

Can a member of the public file a lawsuit for an alleged Sunshine Law violation?

Yes. When the open meetings and the notice provisions of the Sunshine Law are not complied with, any person may file a lawsuit to void the board's action within 90 days of the allegedly improper board action. Enforcement is in circuit court of the circuit in which the prohibited act occurred.

Under certain circumstances, the judge may grant an injunction, but the filing of a lawsuit challenging a board's action does not stay enforcement of the action. Attorneys' fees and costs may be awarded to the prevailing party.

What is the penalty for an intentional violation of the statute?

A willful violation of the Sunshine Law is a misdemeanor and, upon conviction, may result in the person being removed from the board. The Attorney General and the county prosecutor have the power to enforce any violations of the statute.

Can a board appeal an OIP decision regarding the Sunshine Law?

Yes, effective January 1, 2013, a board may appeal an OIP decision to the courts in accordance with Section 92F-43, HRS. For more information, see OIP's Guide to Appeals to the Office of Information Practices, available on OIP's website at **www.hawaii.gov/oip**.

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OFFICE OF INFORMATION PRACTICES

If I have additional questions about the Sunshine Law, where can I go?

For general information on the Sunshine Law or alleged violations by state and county boards, please visit OIP's website at **www.hawaii.gov/oip**, call OIP at (808) 586-1400, or e-mail **oip@hawaii.gov**. The full text of the Sunshine Law, as well as OIP's opinions relating to various open meeting issues, are posted on the website.

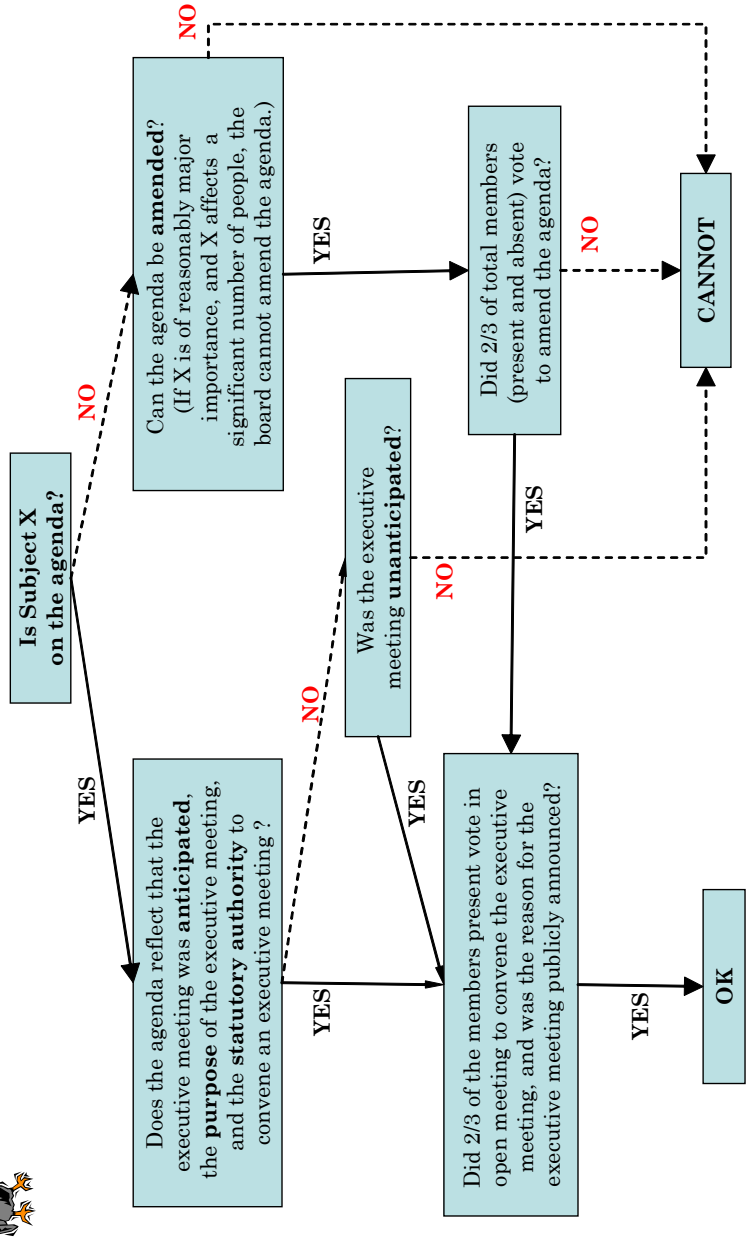
For neighborhood boards only:

Sunshine Law questions concerning neighborhood boards should first be directed to the Neighborhood Commission, which has primary jurisdiction over neighborhood board issues. Calls or e-mail correspondence relating to a pending request for OIP's investigation or advisory opinion should be initially directed to the Neighborhood Commission by calling its office at (808) 768-3710, e-mailing **nco@honolulu.gov**, or visiting the Commission's website at **www1.honolulu.gov/nco**.

The Neighborhood Commission office will undertake the initial investigation, will determine if any issues are Sunshine Law questions appropriately directed to OIP, and may subsequently submit those questions to OIP. Requests for opinions or investigations relating to neighborhood boards should not be sent directly to OIP, as they will be returned to the senders with directions to submit the requests through the Commission. However, requests for opinions or investigations relating to the Commission's own compliance with the Sunshine Law may still be directly addressed to OIP.

EXECUTIVE MEETINGS

Can the board convene an executive meeting to talk about Subject X?



Office of Information Practices

Sunshine Law:
PUBLIC MEETING NOTICE CHECKLIST

1. Notice Includes:

- ☐ Date
- ☐ Place
- ☐ Time
- ☐ Agenda - describing with reasonable specificity matters to be considered
- ☐ If an executive meeting is anticipated, agenda describes purpose and statutory authority

2. Filing Notice:

- ☐ 6 calendar days prior to meeting, file at:
  - ☐ Lieutenant Governor's Office (State) **or** County Clerk (county)
  - ☐ State Calendar: http://calendar.ehawaii.gov/calendar/html/event (State only)
  - ☐ Board's Office
  - ☐ Site of meeting (when feasible)
  - ☐ Mailing list

3. Meeting Cancelled for Late Filing of Notice:

- ☐ Notice cancelling meeting posted at meeting site
- ☐ State Calendar: http://calendar.ehawaii.gov/calendar/html/event (State only)

4. Special Instructions for Emergency Meetings
(less than 6 calendar days prior to meeting):

- ☐ File emergency agenda and board's findings justifying emergency meeting at:
  - ☐ Lieutenant Governor's Office (State) **or** County Clerk (county)
  - ☐ Board's Office
  - ☐ State Calendar: http://calendar.ehawaii.gov/calendar/html/event (State only)
  - ☐ Persons on mailing list contacted by mail or telephone

OIP Notice Checklist Rev. 09/08

Chapter 92, Hawaii Revised Statutes
PUBLIC AGENCY MEETINGS AND RECORDS

The following is an unofficial copy of part I of chapter 92, Hawaii Revised Statutes, which is current through the 2012 legislative session. Amendments may have been made to the Sunshine Law after publication of this manual. To view these amendments, please visit OIP's website at www.hawaii.gov/oip and look under Laws/Rules/Opinions.

PART I. -- MEETINGS

Section

92-1 Declaration of Policy and Intent
92-1.5 Administration of This Part
92-2 Definitions
92-2.5 Permitted Interactions of Members
92-3 Open Meetings
92-3.1 Limited Meetings
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92-4 Executive Meetings
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92-7 Notice
92-8 Emergency Meetings
92-9 Minutes
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92-11 Voidability
92-12 Enforcements
92-13 Penalties

§92-1 Declaration of policy and intent. In a democracy, the people are vested with the ultimate decision-making power. Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore, the legislature declares that 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. [L 1975, c 166, pt of §1]

§92-1.5 Administration of this part. The director of the office of information practices shall administer this part. The director shall establish procedures for filing and responding to complaints filed by any person concerning the failure of any board to comply with this part. An agency may not appeal a decision by the office of information practices made under this chapter, except as provided in section 92F-43.The director of the office of information practices shall submit an annual report of these complaints along with final resolution of complaints, and other statistical data to the legislature, no later than twenty days prior to the convening of each regular session.
[L 1998, c 137, §2; am L 2012, c 176, §2]

§92-2 Definitions. As used in this part:

"Board" means 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.

"Chance meeting" means a social or informal assemblage of two or more members at which matters relating to official business are not discussed.

"Interactive conference technology" means any form of audio or audio and visual conference technology, including teleconference, videoconference, and voice over internet protocol, that facilitates interaction between the public and board members.

"Meeting," means the convening of a board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power. [L 1975, c 166, pt of §1; am L 1976, c 212, §1; am L 2012, c 202, §1]

§92-2.5 Permitted interactions of members.

(a) Two members of a board may discuss between themselves matters relating to official board business to enable them to perform their duties faithfully, as long as no commitment to vote is made or sought and the two members do not constitute a quorum of their board.

(b) Two or more members of a board, but less than the number of members which would constitute a quorum for the board, may be assigned to:

(1) Investigate a matter relating to the official business of their board; provided that:

(A) The scope of the investigation and the scope of each member's authority are defined at a meeting of the board;

(B) All resulting findings and recommendations are presented to the board at a meeting of the board; and

(C) Deliberation and decisionmaking on the matter investigated, if any, occurs only at a duly noticed meeting of the board held subsequent to the meeting at which the

findings and recommendations of the investigation were presented to the board; or

(2) Present, discuss, or negotiate any position which the board has adopted at a meeting of the board; provided that the assignment is made and the scope of each member's authority is defined at a meeting of the board prior to the presentation, discussion or negotiation.

(c) Discussions between two or more members of a board, but less than the number of members which would constitute a quorum for the board, concerning the selection of the board's officers may be conducted in private without limitation or subsequent reporting.

(d) Board members present at a meeting that must be canceled for lack of quorum or terminated pursuant to section 92-3.5(c) may nonetheless receive testimony and presentations on items on the agenda and question the testifiers or presenters; provided that:

(1) Deliberation or decisionmaking on any item, for which testimony or presentations are received, occurs only at a duly noticed meeting of the board held subsequent to the meeting at which the testimony and presentations were received;

(2) The members present shall create a record of the oral testimony or presentations in the same manner as would be required by section 92-9 for testimony or presentations heard during a meeting of the board; and

(3) Before its deliberation or decisionmaking at a subsequent meeting, the board shall:

(A) Provide copies of the testimony and presentations received at the canceled meeting to all members of the board; and

(B) Receive a report by the members who were present at the canceled or terminated meeting about the testimony and presentations received.

(e) Two or more members of a board, but less than the number of members which would constitute a quorum for the board, may attend an informational meeting or presentation on matters relating to official board business, including a meeting of another entity, legislative hearing, convention, seminar, or community meeting; provided that the meeting or presentation is not specifically and exclusively organized for or directed toward members of the board. The board members in attendance may participate

in discussions, including discussions among themselves; provided that the discussions occur during and as part of the informational meeting or presentation; and provided further that no commitment relating to a vote on the matter is made or sought.

At the next duly noticed meeting of the board, the board members shall report their attendance and the matters presented and discussed that related to official board business at the informational meeting or presentation.

(f) Discussions between the governor and one or more members of a board may be conducted in private without limitation or subsequent reporting; provided that the discussion does not relate to a matter over which a board is exercising its adjudicatory function.

(g) Discussions between two or more members of a board and the head of a department to which the board is administratively assigned may be conducted in private without limitation; provided that the discussion is limited to matters specified in section 26-35.

(h) Communications, interactions, discussions, investigations, and presentations described in this section are not meetings for purposes of this part. [L 1996, c 267, §2; am L 2005, c 84, §1; am L 2012, c 177, §1]

§92-3 Open meetings. Every meeting of all boards shall be open to the public and all persons shall be permitted to attend any meeting unless otherwise provided in the constitution or as closed pursuant to sections 92-4 and 92-5; provided that the removal of any person or persons who wilfully disrupts a meeting to prevent and compromise the conduct of the meeting shall not be prohibited. The boards shall afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item. The boards shall also afford all interested persons an opportunity to present oral testimony on any agenda item. The boards may provide for reasonable administration of oral testimony by rule. [L 1975, c 166, pt of § 1; am L 1985, c 278, §1]

§92-3.1 Limited meetings.

(a) If a board determines that it is necessary to meet at a location that is dangerous to health or safety, or if a board determines that it is necessary to conduct an on-site inspection of a location that is related to the board's business at which public attendance is not practicable, and the director of the office of information practices concurs, the board may hold a limited meeting at that location that shall not be open to the public; provided that at a regular meeting of the board prior to the limited meeting:

(1) The board determines, after sufficient public deliberation, that it is necessary to hold the limited meeting and specifies the reasons for its determination that the location is dangerous to health or safety or that the on-site inspection is necessary and public attendance is impracticable;

(2) Two-thirds of all members to which the board is entitled vote to

adopt the determinations required by paragraph (1); and

(3) Notice of the limited meeting is provided in accordance with section 92-7.

(b) At all limited meetings, the board shall:

(1) Videotape the meeting, unless the requirement is waived by the director of the office of information practices, and comply with all requirements of section 92-9;

(2) Make the videotape available at the next regular meeting; and

(3) Make no decisions at the meeting. [L 1995, c 212, §1; am L 2008, c20, §1]

§92-3.5 Meeting by interactive conference technology; notice; quorum.

(a) A board may hold a meeting by interactive conference technology; provided that the interactive conference technology used by the board allows interaction among all members of the board participating in the meeting and all members of the public attending the meeting, and the notice required by section 92-7 identifies all of the locations where participating board members will be physically present and indicates that members of the public may join board members at any of the identified locations.

(b) Any board member participating in a meeting by interactive conference technology shall be considered present at the meeting for the purpose of determining compliance with the quorum and voting requirements of the board.

(c) A meeting held by interactive conference technology shall be terminated when audio communication cannot be maintained with all locations where the meeting is being held, even if a quorum of the board is physically present in one location. If copies of visual aids required by, or brought to the meeting by board members or members of the public, are not available to all meeting participants, at all locations where audio-only interactive conference technology is being used, within fifteen minutes after audio-only communication is used, those agenda items for which visual aids are not available for all participants at all meeting locations cannot be acted upon at the meeting.

(d) Notwithstanding the other provisions of this section to the contrary, a board member with a disability that limits or impairs the member's ability to physically attend the meeting may participate in a board meeting from a location not accessible to the public; provided that the member with a disability is connected to other members of the board and the public by both visual and audio means, and the member identifies where the member is located and who, if anyone, is present at that location with the member. [L 1994, c 121, §1; am L 2000, c 284, §2; am L 2006, c 152, §1; am L 2012, c 202, §2]

§92-4 Executive meetings. A board may hold an executive meeting closed to the public upon an affirmative vote, taken at an open meeting, of two-thirds of the members present; provided the affirmative vote constitutes a majority of the members to which the board is entitled. A meeting closed to the public shall be limited to matters exempted by section 92-5. The reason for holding such a meeting shall be publicly announced and the vote of each member on the question of holding a meeting closed to the public shall be recorded, and entered into the minutes of the meeting. [L 1975, c 166, pt of §1; am L 1985, c 278, §2]

§92-5 Exceptions.

(a) A board may hold a meeting closed to the public pursuant to section 92-4 for one or more of the following purposes:

(1) To consider and evaluate personal information relating to individuals applying for professional or vocational licenses cited in section 26-9 or both;

(2) To consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved; provided that if the individual concerned requests an open meeting, an open meeting shall be held;

(3) To deliberate concerning the authority of persons designated by the board to conduct labor negotiations or to negotiate the acquisition of public property, or during the conduct of such negotiations;

(4) To consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities;

(5) To investigate proceedings regarding criminal misconduct;

(6) To consider sensitive matters related to public safety or security;

(7) To consider matters relating to the solicitation and acceptance of private donations; and

(8) To deliberate or make a decision upon a matter that requires the consideration of information that must be kept confidential pursuant to a state or federal law, or a court order.

(b) In no instance shall the board make a decision or deliberate toward a decision in an executive meeting on matters not directly related to the purposes specified in subsection (a). No chance meeting, permitted interaction, or electronic communication shall be used to circumvent the spirit or requirements of this part to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power. [L 1975, c 166, pt of §1; am L 1985, c 278, §3; gen ch 1985; am L 1996, c 267, §3; am L 1998, c 48, §1; am L 1999, c 49, §1]

§92-6 Judicial branch, quasi-judicial boards and investigatory functions; applicability.

(a) This part shall not apply:

(1) To the judicial branch.

(2) To adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9, or authorized by other sections of the Hawaii Revised Statutes. In the application of this subsection, boards exercising adjudicatory functions include, but are not limited to, the following:

(A) Hawaii labor relations board, chapters 89 and 377;

(B) Labor and industrial relations appeals board, chapter 371;

(C) Hawaii paroling authority, chapter 353;

(D) Civil service commission, chapter 26;

(E) Board of trustees, employees' retirement system of the State of Hawaii, chapter 88;

(F) Crime victim compensation commission, chapter 351; and

(G) State ethics commission, chapter 84.

(b) Notwithstanding provisions in this section to the contrary, this part shall apply to require open deliberation of the adjudicatory functions of the land use commission. [L 1975, c 166, pt of §1; am L 1976, c 92, §8; am L 1985, c 251, §11; am L 1998, c 240, 86]

§92-7 Notice.

(a) The board shall give written public notice of any regular, special, or rescheduled meeting, or any executive meeting when anticipated in advance. The notice shall include an agenda which lists all of the items to be considered at the forthcoming meeting, the date, time, and place of the meeting, and in the case of an executive meeting the purpose shall be stated. The means specified by this section shall be the only means required for giving notice under this part notwithstanding any law to the contrary.

(b) The board shall file the notice in the office of the lieutenant governor or the appropriate county clerk's office, and in the board's office for public inspection, at least six calendar days before the meeting. The notice shall also be posted at the site of the meeting whenever feasible.

(c) If the written public notice is filed in the office of the lieutenant governor or the appropriate county clerk's office less than six calendar days before the meeting, the lieutenant governor or the appropriate county clerk shall immediately notify the chairperson of the board, or the director of the department within which the board is established or placed, of the tardy filing of the meeting notice. The meeting shall be canceled as a matter of law, the chairperson or the director shall ensure that a notice canceling the meeting is posted at the place of the meeting, and no meeting, shall be held.

(d) No board shall change the agenda, once filed, by adding items thereto without a two-thirds recorded vote of all members to which the board is entitled; provided that no item shall be added to the agenda if it is of reasonably major importance and action thereon by the board will affect a significant number of persons. Items of reasonably major importance not decided at a scheduled meeting shall be considered only at a meeting continued to a reasonable day and time.

(e) The board shall maintain a list of names and addresses of persons who request notification of meetings and shall mail a copy of the notice to such persons at their last recorded address no later than the time the agenda is filed under subsection (b). [L 1975, c 166, pt of §1; am L 1976, c 212, §2; am L 1984, c 271, § 1; am L 1985, c 278, §4; am L 1995, c 13, §2; am L 2012, c177, §2]

§92-8 Emergency meetings.

(a) If a board finds that an imminent peril to the public health, safety, or welfare requires a meeting in less time than is provided for in section 92-7, the board may hold an emergency meeting provided that:

(1) The board states in writing the reasons for its findings;

(2) Two-thirds of all members to which the board is entitled agree that the findings are correct and an emergency exists;

(3) An emergency agenda and the findings are filed with the office of the lieutenant governor or the appropriate county clerk's office, and in the board's office; and

(4) Persons requesting notification on a regular basis are contacted by mail or telephone as soon as practicable.

(b) If an unanticipated event requires a board to take action on a matter over which it has supervision, control, jurisdiction, or advisory power, within less time than is provided for in section 92-7 to notice and convene a meeting of the board, the board may hold an emergency meeting to deliberate and decide whether and how to act in response to the unanticipated event; provided that:

(1) The board states in writing the reasons for its finding that an unanticipated event has occurred and that an emergency meeting is necessary and the attorney general concurs that the conditions necessary for an emergency meeting under this subsection exist;

(2) Two-thirds of all members to which the board is entitled agree that the conditions necessary for an emergency meeting under this subsection exist;

(3) The finding that an unanticipated event has occurred and that an emergency meeting is necessary and the agenda for the emergency meeting under this subsection are filed with the office of the lieutenant governor or the appropriate county clerk's office, and in the board's office;

(4) Persons requesting notification on a regular basis are contacted by mail or telephone as soon as practicable; and

(5) The board limits its action to only that action which must be taken on or before the date that a meeting would have been held, had the board noticed the meeting pursuant to section 92-7.

(c) For purposes of this part, an "unanticipated event" means:

(1) An event which members of the board did not have sufficient advance knowledge of or reasonably could not have known about from information published by the media or information generally available in the community;

(2) A deadline established by a legislative body, a court, or a federal, state, or county agency beyond the control of a board; or

(3) A consequence of an event for which reasonably informed and knowledgeable board members could not have taken all necessary action. [L 1975, c 166, pt of §1; am L 1996, c 267, §4]

§92-9 Minutes.

(a) The board shall keep written minutes of all meetings. Unless otherwise required by law, neither a full transcript nor a recording of the meeting is required, but the written minutes shall give a true reflection of the matters discussed at the meeting and the views of the participants. The minutes shall include, but need not be limited to:

(1) The date, time and place of the meeting;

(2) The members of the board recorded as either present or absent;

(3) The substance of all matters proposed, discussed, or decided; and a record, by individual member, of any votes taken; and

(4) Any other information that any member of the board requests be included or reflected in the minutes.

(b) The minutes shall be public records and shall be available within thirty days after the meeting, except where such disclosure would be inconsistent with section 92-5; provided that minutes of executive meetings may be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer.

(c) All or any part of a meeting, of a board may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction, except when a meeting is closed pursuant to section 92-4; provided the recording does not actively interfere with the conduct of the meeting. [L 1975, c 166, pt of §1]

§92-10 Legislative branch; applicability. Notwithstanding any provisions contained in this chapter to the contrary, open meeting requirements, and provisions regarding enforcement, penalties and sanctions, as they are to relate to the state legislature or to any of its members shall be such as shall be from time to time prescribed by the respective rules and procedures of the senate and the house of representatives, which rules and procedures shall take precedence over this part. Similarly, provisions relating to notice, agenda and minutes of meetings, and such other requirements as may be necessary, shall also be

governed by the respective rules and procedures of the senate and the house of representatives. [L 1975, c 166, pt of §1]

§92-11 Voidability. Any final action taken in violation of sections 92-3 and 92-7 may be voidable upon proof of violation. A suit to void any final action shall be commenced within ninety days of the action. [L 1975, c 166, pt of §1; am L 2005, c 84, §2]

§92-12 Enforcement.

(a) The attorney general and the prosecuting attorney shall enforce this part.

(b) The circuit courts of the State shall have jurisdiction to enforce the provisions of this part by injunction or other appropriate remedy.

(c) Any person may commence a suit in the circuit court of the circuit in which a prohibited act occurs for the purpose of requiring compliance with or preventing violations of this part or to determine the applicability of this part to discussions or decisions of the public body. The court may order payment of reasonable attorney's fees and costs to the prevailing party in a suit brought under this section.

(d) Opinions and rulings of the office of information practices shall be admissible in an action brought under this part and shall be considered as precedent unless found to be palpably erroneous.

(e) The proceedings for review shall not stay the enforcement of any agency decisions; but the reviewing court may order a stay if the following criteria have been met:

(1) There is likelihood that the party bringing the action will prevail on the merits;

(2) Irreparable damage will result if a stay is not ordered;

(3) No irreparable damage to the public will result from the stay order; and

(4) Public interest will be served by the stay order. [L 1975, c 166, pt of §1; am L 1985, c 278, §5; am L 2012, c 176, §3]

§92-13 Penalties. Any person who wilfully violates any provisions of this part shall be guilty of a misdemeanor, and upon conviction, may be summarily removed from the board unless otherwise provided by law. [L 1975, c 166, pt of §1]

Section 26-35, Hawaii Revised Statutes:
Administrative Supervision of Boards and Commissions

§26-35 Administrative supervision of boards and commissions. (a) Whenever any board or commission is established or placed within or transferred to a principal department for administrative purposes or subject to the administrative control or supervision of the head of the department, the following provisions shall apply except as otherwise specifically provided by this chapter:

(1) The head of the department shall represent the board or commission in communications with the governor and with the legislature.

(2) The financial requirements from state funds of the board or commission shall be submitted through the head of the department and included in the budget for the department.

(3) All rules and regulations adopted by the board or commission shall be subject to the approval of the governor.

(4) The employment, appointment, promotion, transfer, demotion, discharge, and job descriptions of all officers and employees of or under the jurisdiction of the board or commission shall be determined by the board or commission subject to the approval of the head of the department and to applicable personnel laws.

(5) All purchases of supplies, equipment, or furniture by the board or commission shall be subject to the approval of the head of the department.

(6) The head of the department shall have the power to allocate the space or spaces available to the department and which are to be occupied by the board or commission.

(7) Any quasi-judicial functions of the board or commission shall not be subject to the approval, review, or control of the head of the department.

(8) Except as set forth hereinabove, the head of the department shall not have the power to supervise or control the board or commission in the exercise of its functions, duties, and powers.

(b) Every board or commission established or placed within a principal department for administrative purposes or subject to the administrative control or supervision of the head of the department shall be considered an arm of the State and shall enjoy the same sovereign immunity available to the State. [L Sp 1959 2d, c 1, §6; am L 1965, c 96, §140; Supp, §14A-4; HRS §26-35; am L 2004, c 16, §1]

Sunshine Law Opinion Letters

Summaries and Index (Nos. 90-35 through 11-01, as of June 30, 2012)

The full text of OIP's opinions are available on-line at ***hawaii.gov/oip/opinions****.*

01-01 Application of Sunshine Law to Vision Teams

OIP concluded that the neighborhood Vision Teams, created by the Mayor for the City and County of Honolulu, are "boards" covered by the Sunshine Law, and as such, must provide public notice and keep minutes of their meetings. However, given the peculiar nature of membership in a Vision Team, participants are Vision Team "members" only when they are actually attending a Vision Team meeting. For this reason, outside of the Vision Team meetings, Vision Team members are not required to restrict their interactions or otherwise act as board members.

The second half of this opinion was superseded in 2008 by section 92-82, HRS, which created a permitted interaction for neighborhood boards only. The statute now authorizes a neighborhood board to (1) attend meetings of another entity at which matters relating to the neighborhood board's official board business will be discussed and (2) participate in the discussion of these matters relating to neighborhood board business. The conditions allowing neighborhood board members to attend information meetings or presentations are explained on page 16 of this Guide in the section relating to "permitted interactions."

01-06 Public's Right to Testify on Agenda Items at Every Meeting; Continued Meetings

The Liquor Commission held separate meetings on March 19, 1998 and April 9, 1998. OIP found that the Liquor Commission, at its April 9 meeting, violated the Sunshine Law by prohibiting public testimony on the agenda item listed as "Decision-making on Proposed Rules of the Liquor Commission (Continued from March 19, 1998)."

Even when the public has had an opportunity to testify on an agenda item at a previous meeting, section 92-3 of the Sunshine Law requires a board to afford interested members of the public an opportunity to present oral or written testimony on any agenda item at every meeting.

OIP found no conflict between sections 91-3 and 92-3, HRS. Section 91-3, which requires a public hearing as part of the rulemaking process, does not prohibit an agency from accepting public testimony on the date the agency announces its decision as to proposed rule revisions. Thus, it is possible for a board to follow both sections 91-3 and 92-3 without violating either.

A board may make its decision on proposed rule revisions at a later date than the public hearing without hearing further public testimony, however, by continuing the previously noticed public hearing or meeting to a reasonable date and time, as provided by section 92-7(d), HRS.

02-02 Restrictions on Testimony by Rule

The City Council had a rule that precluded individuals from testifying orally if they failed to register by a prescribed time. The OIP found that oral testimony must be allowed even if a person wishing to testify did not sign up. The Sunshine Law requires that boards shall afford all interested persons an opportunity to present oral testimony on any agenda item and that boards may provide for reasonable administration of oral testimony by rule. Haw. Rev. Stat. §92-3. A rule that limits

testimony to those who sign up by a certain time, however, is not reasonable because it would preclude oral testimony by all latecomers as well as those who are not familiar with Council rules.

OIP noted that the Council may, by rule, place time restrictions on testimony, as long as the rule meets the reasonableness requirement under the Sunshine Law as well as requirements of the Freedom of Speech and Equal Protection Clauses of the United States Constitution.

02-06 Minutes of Public Meeting

Audiotape recordings and full transcripts made by boards of meetings open to the public are public records.

Notes taken by an individual assigned to record the minutes of a meeting may be withheld during the editorial process. But if minutes have not been approved by 30 days after the date of the meeting, then notes or "draft" minutes must be made available to the public.

OIP noted that there is no requirement in the Sunshine Law that a board approve minutes, and therefore boards do not have the discretion to withhold minutes from the public based on whether or not the minutes have been approved by a board.

OIP therefore encouraged boards that wish to formally approve minutes to do so within 30 days of the date of the meeting, to ensure that the public has access to minutes that have been reviewed for accuracy and completeness. OIP also suggested that the board stamp or mark the minutes "DRAFT" when disclosing unapproved minutes, to put the public on notice that the minutes may be corrected or amended at a later date.

02-09 Actions on Bills and Resolutions Without Notice

Boards may not discuss or act upon any item, including a proposed bill or resolution, that is not specifically listed on the meeting agenda. The Sunshine Law requires that notices and agendas be posted six days prior to meeting dates and that such agendas list, among other things, all items to be considered at the meeting. Haw. Rev. Stat. §92-7(a) (Supp. 2001).

OIP acknowledged that there may be unforeseen circumstances in which a discussion at a meeting results in the decision to draft a bill or resolution to address an agenda item. OIP found that if a sufficient nexus exists between what was noticed and what resulted from the discussion, there would be no violation of the Sunshine Law. However, this nexus should be reflected in the meeting minutes, and voting on such a bill or resolution should take place at a future meeting that is properly noticed.

02-11 Meetings of Councilmembers Who Have Not Yet Officially Taken Office to Discuss Selection of Officers

Board members are not subject to the Sunshine Law prior to officially taking office when they meet to discuss the selection of officers. After election, the Sunshine Law only permits discussion concerning officer selection between two or more members of a board, but less than the number of members that would constitute a quorum for the board.

03-06 Electronic Transmission of Testimony

E-mail use is widespread and has become an acceptable method of communication for governmental agencies. Boards must accept testimony submitted by e-mail in the same manner as other forms of written testimony and reasonably ensure distribution to board members.

03-07 Voting in Executive Meetings

Boards subject to the Sunshine Law may vote in executive meetings. Votes taken in executive meetings need not be disclosed to the public because the Sunshine Law allows minutes of executive meetings to be withheld so long as their publication would defeat the lawful purpose of the executive meeting. Once disclosure of votes taken in executive meetings would not defeat the lawful purpose of holding the executive meeting, the votes should be disclosed.

03-08 UIPA, Not Sunshine Law, Governs Disclosure of Records Relating to Agenda Items

The Sunshine Law does not require that records relating to items on an agenda be available to the public at the time the notice and the agenda are filed. The disclosure and availability of government records are governed by the Uniform Information Practices Act (the "UIPA"). *See* Part II, chapter 92F, HRS.

03-12 Attendance at Executive Meetings by Parties Other Than Council or Board Members

When a board requires the assistance of non-board members to accomplish the purpose of convening an executive meeting, the Sunshine Law authorizes the board to summon the non-board members to participate in the closed board meeting. Non-board members should remain at the meeting only so long as their presence is essential to the agenda item being considered in the executive meeting.

More than one of a board's attorneys may attend an executive meeting to advise the board concerning the board's powers, duties, privileges, immunities, and liabilities.

03-13 Views of Non-Board Members Included in Minutes

OIP found that minutes of a Land Use Commission ("LUC") meeting were sufficient despite a complaint by a member of the public that points enumerated in her presentation to the LUC were not individually listed in the minutes.

The Sunshine Law requires that boards keep written minutes of all meetings which "give a true reflection of the matters discussed at the meeting and the views of the participants." Haw. Rev. Stat. §92-9 (1993). With this statutory mandate in mind, and given the Sunshine Law's policy of protecting the public's right to know, OIP found that the primary purpose for keeping minutes is to reflect the actions taken by the decision-makers (board members) so that the public can scrutinize their actions.

Thus, OIP concluded that the Sunshine Law requires that minutes reflect the views of non-board members who participate in meetings, but that it is sufficient for the minutes to describe those views in very general terms.

03-17 Attorneys' Presence Allowed When Required to Accomplish the Essential Purposes of an Executive Meeting

A board may consult with its attorney in an executive meeting convened for any of the eight purposes listed in HRS section 92-5(a), and not only when the meeting concerns the board's "powers, duties, privileges, immunities, and liabilities," so long as the consultation is necessary to achieve the authorized purpose of the executive meeting. A board may also summon attorneys to executive meetings, so long as the board ensures that it is not meeting with its attorneys in order to circumvent the spirit or requirements of the Sunshine Law by having a meeting to which only a portion of the public is invited.

03-20 Oversight Committee for the First Circuit Family Court

A member of the public asked OIP for an opinion on the Judiciary's denial of his request for records relating to the Oversight Committee for the First Circuit Family Court ("Oversight Committee"). The Oversight Committee meetings were closed.

The Judiciary is not required to hold open meetings. Haw. Rev. Stat. §92-6. Thus, minutes of the Oversight Committee meetings were not required to be made available as minutes of a meeting open to the public. *See* Haw. Rev. Stat. §92F-12(a)(7).

03-22 Attorney's Presence Required for Board to Convene Executive Meeting Under 92-5(a)(4)

The Department of Land and Natural Resources State Historic Preservation Division Oahu Island Burial Council convened an executive meeting on March 12, 2003 under section 92-5(a)(4), HRS, which allows a board subject to the Sunshine Law to have executive meetings to consult with the board's attorney on the board's powers, duties, privileges, immunities, and liabilities. The meeting was improper because no board attorney was present.

04-01 Discussion of Official Business Outside of a Duly Noticed Meeting; E-Mail Voting

A state legislator asked OIP to investigate the Landfill Selection Committee's (the "Committee") compliance with the Sunshine Law. The Committee is an advisory board established by the City and County of Honolulu (the "City") to assist in the selection of Oahu's future landfills. According to the City, the Committee is subject to the Sunshine Law. The legislator alleged that, outside of a properly noticed meeting, a committee member individually solicited and obtained signatures of other

committee members on documents related to the decision making function of the Committee.

The general rule is that discussion among board members outside of a duly noticed meeting, concerning matters over which the board has supervision, control, jurisdiction, or advisory power and that are before or are reasonably expected to come before the board ("Official Business"), violates the Sunshine Law. However, there is no violation if the discussion is authorized as a permitted interaction under the Sunshine Law, such as where only two members meet to gather information. *See* Haw. Rev. Stat. §92-2.5.

In this case, OIP found that the committee member's actions did not constitute a permitted interaction because (1) the committee member did not solely gather information but sought a commitment to vote and (2) the serial communications violated, if not the rule, the spirit of the Sunshine Law.

OIP further found that a vote taken via e-mail on Official Business violated the Sunshine Law. Section 92-5(b), HRS, states that electronic communications cannot be used to circumvent the spirit or requirements of the Sunshine law or to make a decision upon Official Business. OIP noted, however, that the use of e-mail for routine, administrative matters, such as scheduling purposes, is permissible under the Sunshine Law.

04-04 Voting on Board Business by Poll Not Allowed

The Hawaii Civil Rights Commission (the "HCRC") asked OIP whether it could poll the Commissioners relating to the agency's legislative testimony. OIP advised the HCRC that the Sunshine Law requires that all decisionmaking take place in meetings open to the public, unless the Sunshine Law authorizes an executive meeting. Where the purpose of calls or e-mails to board members is to receive their position, i.e., their vote, on proposed legislation involving the HCRC's

powers, the voting is in effect a decision concerning official Commission business.

Therefore, OIP opined that the HCRC staff cannot poll individual Commissioners outside of a properly noticed meeting for the purpose of determining and/or approving the HCRC's legislative testimony. That does not mean that staff cannot gather information from Commissioners to assist staff in drafting testimony, so long as staff ensures that there is no facilitation of deliberation through staff's discussion with multiple Commissioners. OIP also suggested alternatives to assist the HCRC in consulting with Commissioners without violating the Sunshine Law.

04-09 Anonymous Testimony; Liability for Disclosure of Testimony Containing Potentially Defamatory Statements

OIP was asked for an opinion on receipt of anonymous testimony and disclosure of testimony containing potentially defamatory statements provided to boards.

OIP opined that boards must accept anonymous testimony. Because the Sunshine Law requires that "all interested persons" be given the opportunity to provide written and oral testimony on agenda items and the policy underlying the Sunshine Law requires liberal construction in favor of openness, it is not appropriate to condition submission of testimony on whether a potential testifier identifies himself or herself.

OIP also opined that an agency or agency employee is immune from liability under section 92F-16 of the UIPA for disclosing testimony that may contain defamatory statements because the UIPA requires agencies to disclose public testimony upon request. OIP noted, however, that section 92F-16, HRS, has never been tested in court.

04-10 Barred Employee's Right to Testify

Even though a county charter bars county employees from appearing before boards, if a county employee does appear before a board seeking to testify, the board must hear his or her testimony. OIP noted that the charter provisions themselves do not violate the Sunshine Law.

04-14 Adjudicatory Functions

A staff briefing of the Board of Land and Natural Resources regarding pending contested cases is part of the Board's "adjudicatory functions," which are not subject to the Sunshine Law.

The Board could not meet in executive session to receive sensitive information about an alleged violator's personal problems offered as a defense or mitigating factor for the alleged violation because OIP found that the privacy provision of the State Constitution did not require the Board to keep such information confidential.

04-19 Sunshine Law Compliance

OIP was asked whether the University of Hawaii Institutional Animal Care & Use Committee (the "UH IACUC") must conduct its meetings in compliance with the provisions of the Sunshine Law. OIP opined that the Sunshine Law does not apply to an agency, board, commission, authority, or committee created by or pursuant to federal law. OIP found that the UH IACUC was created pursuant to federal law and therefore is not subject to the provisions of the Sunshine Law.

05-01 Task Force

Because the Downtown Homeless Task Force did not meet two of the five elements of the Sunshine Law's definition of a "board," OIP concluded that the Task Force is not a board subject to the Sunshine Law. OIP found that the Task Force does not "take official actions" because it does not create recommendations that are to be acted upon by the City. OIP also found that the Task Force was not "required to conduct meetings" because the group does not need a quorum to reach a decision.

05-02 Public Testimony

A board may permit the public to speak at its meetings on matters that are not on the agenda, but is not required to do so. If the board elects to hear such public statements and the statements concern "board business," the board must be careful not to respond to or discuss those matters because they are not on the agenda.

05-04 Executive Session

The Kauai County Council asked whether it could meet in executive session to interview the Mayor's appointees to county boards and commissions. OIP concluded that the Council could not do so because the interviews did not fall within any of the exemptions to the Sunshine Law's open meeting requirements.

OIP found that neither the county charter provision that appeared to allow closed meetings for this purpose nor the UIPA are "state laws" requiring confidentiality and, therefore, the exemption allowing an executive meeting to consider information that must be kept confidential pursuant to state or federal law or court order did not apply. OIP further found that an uncompensated board or commission member is not a "hire" under the exemption allowing for closed meetings to consider the hire of an officer or employee.

05-07 Board Requirements

Boards (except the Land Use Commission) are not subject to the Sunshine Law when exercising their adjudicatory functions. Boards must follow the Sunshine Law at public hearings on proposed agency rules in addition to the requirements under section 91-3, HRS.

If a board fails to give proper notice of an agenda item required under a statute or ordinance other than the Sunshine Law, the board can avoid violating that other law by cancelling its meeting or cancelling the individual agenda item without discussion.

05-09 Charter School Boards

Charter school boards are "boards" as defined by the Sunshine Law and, therefore, must comply with the Sunshine Law's requirements. (Subsequent to this opinion, section 302B-9, HRS, was enacted, which exempts charter school boards from the Sunshine Law.)

05-11 Closed Buildings and Public Meetings

A member of the public asked (1) whether the building in which the Kauai County Council was meeting in executive session could be closed to the public and (2) whether the Council could commence a meeting more than seven hours after the time stated on the notice for the meeting. OIP concluded that closing the building during the executive meeting did not violate the Sunshine Law. OIP found that any deviation from the time stated in a notice must be reasonable or the notice will be rendered insufficient. OIP found a seven-hour delay to be unreasonable.

05-15 Serial Interactions

A council member may not use the two-member "permitted interaction"—which allows two members to discuss "board business" with each other outside of an open meeting as long as no commitment to vote is made or sought—to discuss council business with another council member, and then use the same permitted interaction to discuss the same council business with other council members through a series of private one-on-one discussions. No permitted interaction may be used to circumvent the spirit or requirements of the Sunshine Law.

06-01 Public's Right to Testify

A board may choose to take public testimony on all agenda items at the beginning of a meeting, but must allow a person to testify on as many of the agenda items as the person wishes. The public's right to present oral testimony does not give a person testifying the right to question board members during that testimony.

06-02 Investigative Task Force

The Board of Directors of the Natural Energy Laboratory of Hawaii Authority ("NELHA") formed a Finance Investigative Committee, as a "permitted interaction," to investigate the charges to be used in negotiating the land rental rates with NELHA's tenants. After the Committee reported back to the Board on the matter it was originally authorized to investigate, it ceased to be an investigative task force. At that point, the Committee's meetings were required to be open to the public unless another permitted interaction or exception applied.

06-05 Agenda Item Amendments

An agenda item may not be amended to add an item if it is of reasonably major importance and action on the item will affect a significant number of persons. OIP found that the Hawaii County Council could not amend its agenda to add an item relating to the settlement of a lawsuit because that lawsuit could potentially have had widespread legal effect and created substantial county liability, and where consideration of matters related to the lawsuit could realistically affect the settlement of the litigation.

06-06 Notice Filings

A board may file its meeting notice up to midnight on the sixth calendar day prior to the meeting for which the notice is being filed. A board may file its notice after normal business hours on the sixth day prior to the meeting if the office receiving the filing, i.e., the Lieutenant Governor's office for state boards or the County Clerk's office for county boards, will accept filings after their respective offices' normal business hours.

07-02 Agenda Language

OIP found that the use of standard language in an agenda regarding possible reconsideration of actions on agenda items did not provide sufficient notice to allow a county council at the noticed meeting to discuss and deliberate on the merits of a motion to reconsider a bill passed at a previous meeting.

07-03 Oral Testimony

The City Council is not required to accept oral testimony on an agenda item that is cancelled before any consideration of the item. However, once the Council begins consideration of the item, it must accept oral testimony even if it then decides to defer the item to a subsequent meeting or indefinitely.

07-06 Agenda Items

A board may take action on an agenda item without indicating on its agenda that a decision would be made or the nature of the decision. The Maui County Salary Commission's agenda was found to provide sufficient notice of the subject matter of an agenda item to allow its approval of an issue arising directly under the item listed.

07-10 Agenda Item Scope

A board can require that testimony be related to an agenda item, but it must interpret the item broadly for that purpose. The board may not restrict the public from testifying on issues within the general subject matter of the agenda item. The scope of an agenda item is determined by the language used to describe the item on the agenda, not by what the board intended the item to cover.

08-01 Council Member Participation at Committee Meetings Not Assigned to Committee

When a board forms a committee, the committee and its members must independently comply with the Sunshine Law's open meeting requirements apart from the parent board. When non-members attend and participate in a committee meeting, the combined attendance of committee members and non-members must be viewed as a discussion by them as members of the parent board—e.g., the Council—of parent board business, which may not occur outside of a properly noticed Council meeting. Therefore, non-members should not attend a Council committee meeting because the resulting discussion of Council business among the various Council members, consisting of both committee members and non-members, constitutes a meeting of the Council that does not conform to the requirements of the Sunshine Law.

08-02 Boards Created by Resolution

Although a task panel created by a county or state resolution generally does not fall within the definition of "board" under the Sunshine Law, it would contravene the Sunshine Law's policy and intent to allow a subordinate group created by a Council to meet in private to act on Council business that should be determined at an open Council meeting. Thus, a panel or other body created by a Sunshine Law board is subject to the Sunshine Law where circumstances show that, by delegation of authority from that board, the panel is in fact acting in place of that board on a matter that is the official business of the board. These circumstances must be reviewed on a case-by-case basis.

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