August 23, 2002

Mr. David C. Farmer

Ms. Mona Abadir
Chairperson
The State Foundation on
Culture and the Arts
250 South Hotel Street, Second Floor
Honolulu, Hawaii 96813

Mr. Ronald K. Yamakawa
Interim Executive Director
The State Foundation on
Culture and the Arts
250 South Hotel Street, Second Floor
Honolulu, Hawaii 96813

Re: Withholding of Minutes of a Public Meeting

Dear Mr. Farmer, Ms. Abadir, and Mr. Yamakawa:

On March 8, 2002, Mr. Farmer requested assistance from the Office of Information Practices ("OIP") to obtain copies of minutes of meetings of the Department of Accounting and General Services, State Foundation on Culture and the Arts Commission ("SFCA Commission").[1] By copy of this letter, the OIP is advising the SFCA Commission of its obligations with regard to disclosure of minutes of meetings open to the public. Other issues concerning the SFCA Commission's responsibilities in connection with executive meetings will be addressed separately.

ISSUES PRESENTED

[1] The SFCA Commission is the policymaking and oversight commission of the State Foundation on Culture and the Arts. Haw. Rev. Stat. § 9-2 (Supp. 2001).

I. Whether, under the Uniform Information Practices Act, chapter 92F, Hawaii Revised Statutes ("UIPA"), a board[2] has the discretion to withhold from public access proposed minutes of meetings open to the public.

II. Whether, under part I of chapter 92, Hawaii Revised Statutes ("Sunshine Law"), a board may withhold from public access for more than 30 days after the date of the board meeting, minutes of meetings open to the public, when the minutes have not yet been approved by a board.

BRIEF ANSWERS

I. To a limited degree, yes. A board has discretion to withhold minutes under chapter 92F-13, Hawaii Revised Statutes. That discretion is limited to the extent that proposed minutes of open meetings reflect data subject to the process of editing to prepare minutes to be presented to the board. That discretion is also limited by the 30-day deadline of section 92-9, Hawaii Revised Statutes. Moreover, as this opinion concerns board meetings open to the public, and as boards are not entitled to deliberate or vote in private concerning amendments or corrections to minutes of open meetings, there is no exception in the UIPA that would permit withholding of minutes of open meetings from the public once those minutes are in a form ready for submittal to a board for review at a public meeting.

II. No. The Sunshine Law requires that a board make its written minutes publicly available **within 30 days** after an open meeting. Haw. Rev. Stat. § 92-9 (1993). There is no provision in the Sunshine Law for an extension of the 30-day deadline due to delays in having the minutes completed and approved by a board or commission.

FACTS

Mr. Farmer initially sought records from the SFCA Commission through an e-mail dated February 22, 2002, to Ms. Mona Abadir, then the SFCA Commission Interim Chairperson. Mr. Farmer requested:

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[2] "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. Haw. Rev. Stat. § 92-2(1) (1993).

> copies of all executive sessions [minutes] of the SFCA Commission for the calendar year 2001 to February 20, 2002 that in any way relate to my hire, evaluation, dismissal, or discipline as the executive director of the SFCA or of charges brought against me, where consideration of matters affecting my privacy were involved.

In an e-mail dated February 26, 2002, to Ms. Abadir, Mr. Farmer added to his request:

> [P]lease provide me with copies of **all** SFCA Commission meeting minutes as originally approved by the Commission from the period March 2001 through the last-approved month in 2001.

(emphasis added).

By e-mail dated March 8, 2002, Mr. Farmer first requested the OIP's assistance in connection with his record requests.

By letter dated March 20, 2002, Mr. Ronald K. Yamakawa, Interim Executive Director of the State Foundation on Culture and the Arts ("SFCA"), mailed copies of the SFCA Commission minutes of meetings open to the public dated from March 21, 2001 through September 19, 2001, to Mr. Farmer.

Two days later, by letter dated March 22, 2002, Mr. Yamakawa advised Mr. Farmer that his request for executive session minutes had been reviewed and that these minutes were being withheld pursuant to section 92-9(b), Hawaii Revised Statutes, "which stipulates that release of the minutes is not imminent because matters discussed have not been resolved and therefore public disclosure may defeat the lawful purpose of the executive meeting."[3]

[3] By letter dated May 22, 2002, the SFCA Commission advised the OIP that it will withhold minutes of executive meetings, and by letter dated April 5, 2002, the SFCA Commission advised the OIP that, in some instances, minutes of executive meetings were not taken. These matters, as well as other issues of the SFCA Commission's compliance with the UIPA and the Sunshine Law, will be addressed separately.

Thus, as Mr. Farmer received SFCA Commission meeting minutes that were "approved by the Commission," as he requested in his February 26, 2002 record request, his request as to records of open meetings has been responded to by virtue of Mr. Yamakawa's response of March 20, 2002.

Although the issue of public access to minutes of meetings open to the public, but not approved by a board, is apparently not raised by Mr. Farmer's February 26, 2002 request, the issue was presented to the OIP by another matter before the OIP. By letter dated April 5, 2002, in response to a request by the OIP for all the SFCA Commission minutes from January 2, 2001 to May 28, 2002, in that other matter, the SFCA Commission forwarded to the OIP, for *in camera*[4] review, minutes stamped "draft" for the five SFCA Commission meetings of October 17, 2001, November 28, 2001, December 19, 2001, January 16, 2002, and February 20, 2002. In its April 5, 2002 letter, the SFCA Commission said that it was enclosing "[d]raft minutes for meetings that do not have approved minutes" and that "the minutes have not been distributed to the public pending closure to the matters discussed."

DISCUSSION

I. INTRODUCTION

A. UIPA

The UIPA provides that all government records are open to public inspection and copying unless access is restricted or closed by law. Haw. Rev. Stat. § 92F-11(a) (1993). When the UIPA was enacted in 1988, two provisions mandating disclosure of minutes, without exception, were included:

> **§92F-12 Disclosure required.** Any other law to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours:

[4] The term "*in camera* inspection" is defined as: "[a] trial judge's private consideration of evidence." *Black's Law Dictionary* 763 (7th Ed. 1999). The OIP makes *in camera* inspection of documents in situations like this one, where there is a dispute between a record requester and an agency as to whether certain records are public. Haw. Rev. Stat. § 92F-42(5) (Supp. 2001). After the OIP makes its determination, the records are returned to the agency, even if the OIP deems them public. The agency has the ultimate responsibility to disclose those documents if they are found to be public.

> . . .
>
> (7) **Minutes of all agency meetings required by law to be public**;
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> . . .
>
> (16) **Information contained in** or compiled from a transcript, **minutes**, report, or summary **of a proceeding open to the public**.

Haw. Rev. Stat. § 92F-12(7), (16) (Supp. 2001) (emphasis added).

B. Sunshine Law

The Sunshine Law governs the proceedings of boards of the State or its political subdivisions. Haw. Rev. Stat. § 92-1, et seq. (1993). In 1998, the Legislature added a new section to the Sunshine Law, granting the OIP authority to administer part I of chapter 92, Hawaii Revised Statutes. Haw. Rev. Stat. § 92-1.5 (Supp. 2001). The Legislature also amended section 92F-42, Hawaii Revised Statutes, and required that the Director of the OIP:

> (18) [s]hall take action to oversee compliance with part I of chapter 92 by all state and county boards, including:
>
> (A) Receiving and resolving complaints;
>
> (B) Advising all government boards and the public about compliance with chapter 92; and
>
> (C) Reporting each year to the legislature on all complaints received pursuant to section 92-1.5.

Haw. Rev. Stat. § 92F-42(18) (Supp. 2001).

The Sunshine Law was first enacted in 1975. The policy and intent of the Sunshine Law is set out in its first section:

> **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.

Haw. Rev. Stat. § 92-1 (1993).

The Legislature implemented the public policy that "discussions, deliberations, decisions, and actions of government agencies - shall be conducted as openly as possible"[5] by requiring that:

> [e]very 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 section 92-4 and 92-5 . . .

Haw. Rev. Stat. § 92-3 (1993). In keeping with the policy of "[o]pening up the governmental processes to public scrutiny and participation,"[6] the Legislature also required that:

> [t]he 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

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[5] Haw. Rev. Stat. § 92-1 (1993).

[6] Id.

> minutes of executive meetings may be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer.

Haw. Rev. Stat. § 92-9(b) (1993).

C. Minutes – Recording, Editing, and Approval

This opinion will set out how the UIPA and the Sunshine Law, together, limit a board's discretion to withhold minutes of meetings open to the public.

Customarily, at a meeting of a board, an individual is assigned to record the minutes of a meeting. The written record taken at the meeting by such an individual will be referred to in this opinion as "Notes." Sometimes, an audiotape recording is made of the meeting. Sometimes a full transcript is made of the meeting, usually based on an audiotape recording. Such audiotape recordings or transcripts will be referred to in this opinion as "Tapes/Transcripts." Commonly, an employee or employees of an agency, or a board member or members assigned by the board, will edit the Notes or review the Tapes/Transcripts and prepare a record of the meeting for the board members to review. The resulting document will be referred to in this opinion as the "Draft Minutes." Subsequently, the board approves Draft Minutes, which become part of the official record of the board ("Approved Minutes"). There is no requirement in the Sunshine Law that minutes be approved. However, as is explained below, if a board does wish to approve open meeting minutes, approval must take place at a meeting open to the public.[7]

II. APPROVAL OF MINUTES OF OPEN MEETINGS MUST TAKE PLACE AT A MEETING OPEN TO THE PUBLIC

Section 92-9(b), Hawaii Revised Statutes, provides that **minutes shall be public records and shall be available within 30 days after the meeting**. Section 92-3, Hawaii Revised Statutes, provides that **every meeting of all boards shall be open to the public** – the only exceptions are those permitted by the State Constitution or the Sunshine Law. In view of this forthright language, the OIP, *sua sponte*, raises the question of

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[7] Approval of minutes of executive meetings will be addressed separately.

whether a board must make minutes that have not been formally approved by a board available as public records, within 30 days of the date of the meeting to which such minutes pertain.

The Sunshine Law is explicit that meetings "closed to the public be limited to matters exempted by section 92-5." Haw. Rev. Stat. § 92-4 (1993). Thus, the Sunshine Law does not allow boards to deliberate in executive meeting unless the deliberations relate to one of the eight purposes set out in section 92-5, Hawaii Revised Statutes. The OIP notes that approval of minutes is not listed in section 92-5, Hawaii Revised Statutes, as a purpose for which a board is authorized to hold a meeting closed to the public.[8] The

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[8] **§ 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.

OIP also notes that approval of minutes is not listed in section 92-2.5, Hawaii Revised Statutes, as a permitted interaction, or an activity which a board is authorized to conduct outside of a meeting open to the public.[9] The OIP therefore opines that if a board wishes to approve minutes, the Sunshine Law requires that such approval take place at a meeting open to the public.

Public availability of Notes, Tapes/Transcripts, Draft Minutes and Approved Minutes of open meetings is determined not only by reference to the Sunshine Law's requirement that minutes be available within 30 days. Haw. Rev. Stat. § 92-9(b) (1993). The UIPA's mandatory disclosure section also directs a board's authority up to the 30th day after the meeting.

III. PUBLIC AVAILABILITY OF MINUTES WITHIN THE 30-DAY PERIOD AFTER THE MEETING

A. Tapes/Transcripts

As previously discussed, audiotape recordings and transcripts are sometimes made by a board's recorder at meetings open to the public. Meetings open to the public "may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction." Haw. Rev. Stat. § 92-9(c) (1993). Thus, boards or their staff, as well as any member of the public in attendance at a board meeting open to the public, can record open meetings. The OIP concludes that no exceptions to disclosure can be applied to these recordings because all information contained in Tapes/Transcripts is public record, by virtue of the fact that the taping or

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> (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.

Haw. Rev. Stat. § 92-5 (Supp. 2001).

[9] To summarize, permitted interactions include the gathering of information so long as no commitment to vote is made or sought, investigations so long as decisionmaking occurs at the board meeting, and negotiations of a board's position so long as the position is adopted at a board meeting, as well as communications among board members as to selection of officers, and communications with the governor and the head of the department to which a board is administratively assigned as to certain other administrative matters. Haw. Rev. Stat. 92-2.5 (Supp. 2001).

transcription took place in a meeting required by law to be open to the public. The OIP therefore opines that Tapes/Transcripts are public records at all times, subject to the UIPA's mandatory disclosure requirements under section 92F-12(a)(16), Hawaii Revised Statutes.

B. Notes and the Deliberative Process Privilege

When maintained, Notes are government records, and are subject to the UIPA as they are "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993). The UIPA presumes that all government records are public records:

> **92F-11. Affirmative agency disclosure responsibilities.**
>
> (a) All government records are open to public inspection unless access is restricted or closed by law.
>
> (b) Except as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours.

Haw. Rev. Stat. § 92F-11(a)(b) (1993).

Should an agency wish to withhold Notes from public disclosure, it may do so only within the exceptions set forth in section 92F-13, Hawaii Revised Statutes. Of the five exceptions to the general rule of disclosure, Notes could conceivably fall into the exception contained in section 92F-13(3), Hawaii Revised Statutes. This exception does not require the disclosure of "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (1993). The OIP has previously opined that this exception permits the withholding of draft documents covered by the "deliberative process privilege." OIP Op. Ltrs. No. 00-01 (Apr. 12, 2000); No. 95-12 (May 8, 1995); No. 93-19 (Oct. 21, 1993). The test for the deliberative process privilege is set out in the OIP Opinion Letter Number 95-12:

> In order to qualify for protection under the "deliberative process privilege," the information must be both "deliberative" and "predecisional." To be "deliberative," the government record

> must reflect the "give and take" of the agency's consultative process. . . . To be "predecisional," a government record must be "received by the decisionmaker on the subject of the decision prior to the time the decision is made."

OIP Op. Ltr. No. 95-12 at 8-9 (May 8, 1995) (citations omitted).

The Sunshine Law does not have extensive requirements for minutes. Besides certain routine information, the "written minutes shall give a true reflection of the matters discussed at the meeting and the view of the participants" and shall include "[t]he substance of all matters proposed, discussed, or decided. . ." Haw. Rev. Stat. § 92-9(a) (1993). [10] Generally the preparation of minutes involves making a determination as to whether certain data should be made a part of the minutes. To the extent that editorial or policy judgments are made to include or exclude material so as to conform to the minimum requirements of the Sunshine Law or other lawful requirements, or to requirements imposed by a board, a board may invoke the deliberative process privilege on behalf of the individual preparing the minutes.

Thus, the OIP opines that when less than 30 days have elapsed since the date of a meeting of a board, a board has the discretion, pursuant to the deliberative process privilege, to withhold Notes from disclosure to the public.

C. Draft Minutes - Factual Data

After Draft Minutes are prepared, they are no longer subject to any editorial or policy judgments because the data in the minutes reflects the

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[10] That required routine information is:

> "(1) The date, time and place of the meeting;
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> (2) The members of the board recorded as either present or absent;
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> (3) . . . a record, by individual member, of any votes taken."

Additionally, minutes shall include:

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

Haw. Rev. Stat. § 92-9(a) (1993).

events that took place in full view of the public at the open meeting, prepared in conformance with requirements imposed by law and by a board. Thus, Draft Minutes of meetings open to the public contain only factual data, information already known to the public by virtue of the open meeting. The two-part deliberative process privilege test set forth above requires that a document be both predecisional and deliberative. "A 'predecisional' document is one 'prepared to assist an agency decisionmaker in arriving at his decision.'" Maricopa Audubon Society v. United States Forest Service, 108 F.3d 1089, 1093 (9th Cir. 1997) (citations omitted). It is without question that Draft Minutes are not predecisional documents because they essentially consist of the preparer's summary of events that have already taken place in public. Draft Minutes are merely a record of editorial decisions already made and reflect objective data, not deliberative material. As the OIP has previously stated, "[p]urely factual material is often not protected under the deliberative process privilege, because it does not ordinarily implicate the decision-making process." OIP Op. Ltrs. No. 00-01 at 6 (Apr. 12, 2000); No. 90-8 at 6 (Feb. 12, 1990); No. 89-9 at 10 (Nov. 20. 1989). Although Draft Minutes are subject to correction or amendment at meetings open to the public, that function is essentially ministerial in nature, in that it does not involve anything other than ensuring that the actions already taken at preceding open meetings are accurately stated in the minutes.

Therefore, the OIP opines that, once the individual preparing the minutes has put them into a form ready for submission to a board, those minutes are government records required to be disclosed pursuant to the UIPA.

The OIP's conclusion is supported by the opinions of five state open government agencies. The Florida Attorney General opined that once the clerk has prepared the minutes in final form, the minutes are not mere precursors to public records and therefore constitute public records subject to disclosure, even though not sent to council members or officially adopted. AGO 91-26, Advisory Legal Opinion, Florida Attorney General, April 18, 1991. The Office of Public Access Counselor, State of Indiana, has opined that draft minutes are disclosable public records, and that the exception for deliberative material is not applicable as draft minutes are merely summaries of information received. PAC Opinion 98-8, December 16, 1998. The New York State Department of State, Committee on Open Government has opined that "draft minutes should be disclosed, on request, **as soon as they exist** . . . [m]inutes of a meeting open to the public do not involve 'internal government consultations or deliberations;' on the contrary,

information contained in those records has effectively been disclosed to the public already." OML-AO-3284, March 27, 2001 (emphasis added). The Minnesota Commissioner of Administration has stated: "The Commissioner is not aware of any Minnesota statute or federal law that classifies preliminary notes of a meeting as anything other than public data. These notes fall within the presumption . . . that all government data are presumed to be public." Advisory Opinion 00-030, August 1, 2000. And, the Freedom of Information Commission of the State of Connecticut has opined that a board-adopted policy that minutes not be released until board approval violated Connecticut's statute providing that minutes are to be available within seven days of the meeting to which they pertain. FIC 95-110, February 14, 1996.

D. Approved Minutes – Disclosure Under the UIPA

As stated above, there is no requirement in the Sunshine Law that a board approve minutes, nor does a board have any discretion to withhold minutes once those minutes are in a form ready for submission to a board. For these reasons, the OIP is of the opinion that, under the UIPA, no board or commission may withhold minutes from the public because the minutes have not yet been approved.

IV. PUBLIC DISCLOSURE OF MINUTES 30 DAYS AFTER THE MEETING – SUNSHINE LAW

As set forth above, the SFCA Commission presented copies of minutes to the OIP. Those minutes that were stamped "draft," were received April 5, 2002, and pertained to minutes of meetings held on October 17, 2001, November 28, 2001, December 19, 2001, January 16, 2002, and February 20, 2002. The OIP therefore finds that more than 30 days have elapsed since the dates of those five meetings. As also set forth above, the SFCA Commission advised that the reason for nondisclosure is that the minutes are pending final approval by the SFCA Commission. The OIP therefore finds that the SFCA Commission has withheld minutes of meetings open to public past 30 days from the date to which such meetings pertain.

The plain language of section 92-9(b), Hawaii Revised Statutes, provides that minutes of meetings open to the public are to be made available to the public within 30 days of the meeting to which they pertain.[11] The

[11] The only exception to the 30-day requirement is if the minutes pertain to executive meetings. Haw. Rev. Stat. § 92-9(b) (Supp. 2001).

SFCA Commission has withheld from disclosure to the public, minutes of meetings open to the public, stating in a letter to the OIP dated April 5, 2002, that it was enclosing "[d]raft minutes for meetings that do not have approved minutes" and that "the minutes have not been distributed to the public pending closure to the matters discussed."

Sections 92F-12(a)(7), (16) and 92-9(b), Hawaii Revised Statutes, all mandate disclosure of minutes of meetings of government agencies. However, section 92F-13(3), Hawaii Revised Statutes, allows a government agency to withhold records under the deliberative process privilege. The inquiry is thus whether a board is able to invoke the deliberative process privilege contained in section 92F-13(3), Hawaii Revised Statutes, to authorize it to withhold minutes beyond the mandatory 30-day limit imposed by section 92-9(b), Hawaii Revised Statutes.

The OIP is guided in its statutory construction of the Sunshine Law and the UIPA by the Hawaii Revised Statutes, which, when addressing the issue of two statutes upon the same subject, state:

> [l]aws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another.

Haw. Rev. Stat. § 1-16 (1993). And, if two statutes, when read together, produce an ambiguous result, the Hawaii Revised Statutes state:

> **§ 1-15 Construction of ambiguous context**. Where the words of a law are ambiguous:
>
> . . .
>
> (2) The reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning.

Haw. Rev. Stat. § 1-15 (1993). The Hawaii Supreme Court has stated:

> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language of the statute itself.

> And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

Nelson v. University of Hawaii, 97 Haw. 376, 393, 38 P.3d 95, 112 (2001) (citations omitted).

Two sections concerning mandatory disclosure of minutes are contained in the UIPA, and the third section is contained in the Sunshine Law. Unquestionably the three sections are *in pari materia* inasmuch as they relate to the availability of minutes. The provision concerning minutes in the Sunshine Law may appear to conflict with the deliberative process privilege permitting withholding under the UIPA. Upon close examination, however, the two statutes can both be given effect, without negating either.

As discussed above, the policy behind each statute is clear. It is the intent of the Sunshine Law to "protect the people's right to know." Haw. Rev. Stat. § 92F-1 (1993). It is the intent of the UIPA to "[p]romote the public interest in disclosure." Haw. Rev. Stat. § 92F-1 (1993). Certainly, these two policies are not mutually exclusive.

When the Legislature considered the UIPA for adoption, it was guided by testimony submitted to and analyzed by the Governor's Committee on Public Records and Privacy ("Governor's Committee"). The legislative history of the UIPA recognizes the importance of the work done by the Governor's Committee.[12] According to the Report of the Governor's Committee on Public Records and Privacy, Vol. I, 154-55, (1987):

> [T]here were two issues raised which while they concern open meetings, also present records questions . . .
>
> The first issue concerned the minutes of meetings. These are clearly public . . .
>
> . . .
>
> The second issue . . . involves the requirement that there be transcripts of public hearings.

[12] S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess. Haw. S.J. 1093, 1095 (1988).

Id. (emphasis in original).

The Governor's Committee concluded:

> The existing minutes format should provide the crucial information in a useful form . . .

Id.

As can be seen from the above, the Governor's Committee recognized the overlap of the Sunshine Law and the UIPA's provisions concerning minutes. The two polices are not mutually exclusive, but are in fact both designed to remove any doubt as to the importance the Legislature places on "open government." The Sunshine Law requires liberal construction of provisions requiring open meetings, and strict construction of the exceptions to open meetings requirements. Haw. Rev. Stat. § 92-1 (1993). The UIPA requires that it be applied and construed to promote the public interest in disclosure and to enhance governmental accountability. Haw. Rev. Stat. § 92F-1 (1993).

Section 92-9, Hawaii Revised Statutes, by its plain language, requires that a board keep written minutes of all meetings. Those minutes "**shall** be public records and **shall** be available **within thirty days** after" an open meeting. Haw. Rev. Stat. § 92-9 (1993) (emphasis added). The Intermediate Court of Appeals of Hawaii has recently construed the word "shall" as "imparting a compulsory meaning to a statute." Voellmy v. Broderick, 91 Haw. 125, 130, 980 P.2d 999, 1004 (App. 1999). The obligations imposed by the word "shall" are "mandatory." Id.

Moreover, the Sunshine Law does not require that minutes be board-approved before being made publicly available, nor does it contain any provision for delaying the 30-day deadline due to problems in having the minutes completed and approved by a board or commission.

Therefore, the OIP opines that the UIPA and the Sunshine Law must be interpreted so as to require that, whether or not a board has formally approved minutes, or whether or not Notes have been edited in such a form that they are Draft Minutes, minutes, in some form, must be made available to the public. Thus, if no minutes have been formally adopted by a board, Notes or Draft Minutes must be made available on the 30th day after the meeting.

This conclusion is supported by the decision of the Superior Court of New Jersey, Law Division, Monmouth County, in Matawan Regional Teachers Association v. Matawan-Aberdeen Regional Board of Education, 212 N.J. Super. 328, 514 A.2d 1361 (1986) ("Matawan"). The New Jersey law, as is the case with Hawaii's Sunshine Law, asserts a legislative policy "favoring public involvement in almost every aspect of government." Id. at 330. As stated by the Matawan court:

> [m]aking minutes promptly available implements the act's overall purpose in three (3) ways:
>
> 1. Enabling those attending a meeting to know what occurred at prior meetings. This is particularly important if successive meetings deal with related issues . . .
>
> 2. Providing all persons with the opportunity to take action prior to the next meeting of the public body.
>
> 3. Informing persons, who might be aggrieved by actions of the public body and enabling them to take appropriate and timely steps to appeal or otherwise respond.

Id. at 331, 1362.

The Hawaii Legislature has established as the State's policy, that 30 days is sufficient time to complete minutes. Haw. Rev. Stat. § 92-9(b) (1993). The fact that preparation of minutes presents difficulties of logistics for a board is not a legally acceptable basis to withhold public access to minutes. Section 92-9, Hawaii Revised Statutes is explicit: "[t]he board **shall** keep written minutes of all meetings . . . [t]he minutes **shall** be public records and **shall** be available within thirty days after the meeting." Haw. Rev. Stat. § 92-9(a)(b) (1993) (emphasis added).

The OIP therefore opines that the SFCA does not have discretion to invoke the UIPA's deliberative process privilege to withhold minutes of board meetings past the 30 days prescribed by the Sunshine Law, even when a board has not formally approved the minutes.

CONCLUSION

I. CONCLUSION

Based on the above discussion, the OIP concludes that:

- Tapes/Transcripts of meetings open to the public are public records. The UIPA mandates that Tapes/Transcripts must be made publicly available at all times;

- Notes can be withheld, at the discretion of a board, until prepared for submission to the board, but only within 30 days after the meeting;

- Draft Minutes are public records and must be made publicly available, even if less than 30 days have elapsed from the date of the meeting;

- Approved Minutes are public records and must be made publicly available, whether 30 days have elapsed or not, upon approval; and

- Should a board elect to formally approve minutes of meetings open to the public, and should such approval not take place by 30 days after the date of the meeting, minutes, in some form, must be made available to the public.

II. RECOMMENDATIONS

The OIP encourages those boards who wish to formally approve minutes to have such approval accomplished within 30 days of the date of the meeting to which such minutes pertain. To do so ensures that the public has access to minutes that have been reviewed for accuracy and completeness. The OIP suggests that, when a board does disclose Notes or Draft Minutes, that the board identify them as such. By stamping or marking minutes

"draft," the public knows what took place at the meeting, and is on notice that the Notes or Draft Minutes may be corrected or amended at a later date.

Very truly yours,

Susan R. Kern
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

SRK:jetf