

I'm going to be talking about the changes in the Sunshine Law from Act 64, which include providing board packets for public inspection, electronic notice, and some changes to the minutes provisions. But first, I wanted to note that even though earlier this morning you've been hearing about proposed rules and you have the opportunity to comment on those, these new Sunshine Law changes are not a proposal or a draft. These were passed by the legislature and signed into law as Act 64, and the reason I'm talking about them as a future thing is just because they have a delayed effective date; they're all going into effect next year, July 1, 2018.

## New Requirement to Provide Board Packets for Public Inspection

Starting July 1 of next year, boards will be required to make their board packets for every meeting available for public inspection in the board's office at the time they are distributed to board members. This doesn't mean that a board is going to have to make confidential information available to the public, though; the public version can be a redacted version.

Some boards do board packets ahead of their meetings as a regular thing, and other boards never do. So the first question you might have is, what is a board packet? There's a definition in the new law, and basically the board packet is the documents that are compiled by the board, or more accurately by the board's staff, and distributed to the board members to look at ahead of a meeting, and usually are background information or applications or other things that are going to be discussed at that meeting. This law isn't requiring you to do a board packet – some boards don't do them, and for a board that doesn't do board packets, this new law isn't going to change anything. It applies any time a board **does** send a board packet out to its members.

The packets that are going out to the board members sometimes include stuff that would not be disclosed to the public under the Uniform Information Practices Act, whether that's stuff like personal contact information in applications or information that's going to be discussed in executive session or for some other reason. Under the new law, the board packets are being disclosed to the public only to the extent that the information in them is public under the UIPA. In other words, you're never going to have to include something in the public version of the board packet that you wouldn't disclose when you were responding to a UIPA request.

The definition of a board packet in the new law also specifically excludes the minutes of previous executive sessions that a board might be looking at before approving at the next meeting, professional license applications, or other records the board can't reasonably redact in

time. What this means is that the law potentially allows withholding more stuff from the public board packet than the board would have been able to redact from those records when it was responding to a UIPA request. It's written that way in recognition of the shorter timeframe, because whereas if you got a UIPA request for a copy of those records you'd have 10 business days just to get your notice out and then at least 5 more business days after that to actually do the redaction and so on, for getting the public version of the board packet out, you really don't have any time lag at all because you're supposed to be making it available at the same time the packet is going out to the board members. So instead of expecting the same kind of fine-grained level of redaction you'd be expected to do under the UIPA, the law allows for a more rough-and-ready approach where you're putting out everything public that you can without having to spend a ton of time on careful redaction and risk missing something due to the rush.

So for instance, if you have a long document with confidential info studded all throughout it, you can just withhold the whole thing rather than having to go through it line by line to catch everything. But if you have an equally long document that's divided into several distinct sections, and only some of those sections are confidential and others are not, you'll just withhold the confidential sections and you'll put the non-confidential sections in the board packet. If you have something fairly short, maybe just a few pages, with some confidential information scattered in, because of the short length there's time to look through it so you'll just redact the confidential info and disclose the redacted version of the pages in the public board packet. And if a document is fully public, even if it's a long document, obviously in that case you wouldn't withhold it.

OK, so you have a board packet that's going out to the members for an upcoming meeting, and you've figured out what if anything you're redacting and have made a public version of the board packet. Now what does the board have to do with it?

What the board has to do is to have the packet available for those members of the public who come looking for it, and to let people know that it's available. So first of all, the board has to have a copy available for inspection in the board's office. I realize that not all boards have their own office, but since a board is already supposed to have a copy of each meeting notice available in the board's office, presumably you're going to have the public copy of the board packet in the same place. If you don't have a specific board office, that's probably the office of the agency the board is attached to.

Second, the board has to let people know that the packet is there, and it does that by notifying the people on its mailing list – and that’s going to be both the email list and the postal list – that the packet is available to inspect in the board’s office. I would suggest specifying where the office is when you do this, for instance by giving the address and room number, to avoid complaints, since it’s not always obvious where a board’s office would be and even for the boards that do have a clear headquarters, people in the public may not know where it is.

Third, when people want to see the packet, the board has to provide “reasonably prompt access” upon request. This means you’ll want to have a copy ready for people who come by the board’s office to look at, and also be prepared ahead with a PDF copy for people who want to get it by email, as the law requires accommodating requests for an electronic copy “as soon as practicable”

Now, hard copies are treated differently from electronic copies here because the law specifically does *\*not\** require you to mail the packet out by postal mail, so that means that you’re *\*not\** going to have to do a mailing of it to everyone on the notice list, and it also means that if someone asks to get a copy by mail you can treat it like a UIPA request with the usual UIPA response timeline to get out a notice to requester and also the UIPA fees for postage and copying – there’s no requirement to mail it out free, or to mail it out immediately after getting a request. And again, this is in contrast to what the law requires when someone makes an email request for an electronic copy, which you’ll need to accommodate as soon as practicable. This is all in recognition of the difference in cost between mailing out a hard copy of the packet versus sending out a PDF via email.

Now that you’ve heard about these new requirements for making board packets public and what that means for a board, you are probably wondering when it is that your board has to start doing this – when does a board legally have to make board packets available?

The new board packet section of the Sunshine Law becomes a legal requirement for all boards starting July 1, 2018. But I wouldn’t recommend that you wait until then to start doing it - it’s a good idea for boards to start following these new board packet requirements before they actually become legally mandatory next summer. Starting early will allow you to work out any technical or procedural kinks you might run into while it’s still only a good practice rather than a legal mandate, so that you don’t have to worry about possible complaints to OIP or even someone going to court to try to void a board action over a slip-up with the board packets. If you start now, your board can be ready and running by the time the actual legal requirement

goes into effect. And there's no harm to starting early other than the additional administrative effort; you're certainly not going to be in violation of the Sunshine Law or the Uniform Information Practices Act through voluntarily making a public board packet available earlier than the date it becomes a legal requirement.

We have a few practical tips for boards as they start working on this new requirement. First, I would suggest you keep the new board packet requirement in mind when you're pulling together the packet for an upcoming board meeting; in other words, as the various reports or documents come in and you start to put it all together think about what will and won't be included in the public packet so you don't have to go through it an extra time. And then as each board packet item comes in, prepare the public version of that document at the same time as you're adding it in to the full packet, so you have the public version of the packet all ready to go already when the full packet goes out to the board members. And finally, when you're preparing the public version of each document as it comes in, make sure that includes scanning it if necessary so that you have a PDF version of the public packet ready to go at the same time the full packet is ready for distribution to members.

## Electronic Notice Is Replacing Paper Filing as the Official Way to Notice a Meeting

Effective July 1, 2018, Sunshine Law meeting notices will switch to electronic filing, meaning they must be posted on state and county electronic calendars as the official notice of the meeting. For those of you responsible for getting the notice and agenda filed and sent out, you'll probably have several questions about this, starting with the mechanics of how you do this.

So to begin with, how do you post a notice online? You'll post it via the state or county's online calendar system, depending on whether it's a state or county board that's filing the notice. For state boards, this is the same state online calendar system that's up and running currently and that state boards have already been posting meeting notices to per executive order, even though the Sunshine Law itself hasn't required it before now. For county boards, each county has its own calendar system and part of the reason for the delayed effective date for this law is to give the counties time to get those calendars updated as needed to make online posting easier for the boards, before the law actually goes into effect.

The law doesn't include technical requirements for how the online posting has to work – for example, posting via filling information into an online form, versus just uploading a PDF copy of the notice and agenda – but boards or the IT people assisting them will want to consider the issue of accessibility under the ADA in setting up the system. In other words, although the Sunshine Law itself doesn't regulate accessibility, other laws do address this area so you're not going to want to be putting up just an image-only PDF as your only online posting of the notice and agenda because that could open you up to ADA-type complaints. Again, the counties do have time before this law goes into effect to update their systems if needed.

Now that you're going to be filing electronically, you may wonder, do you have to still file a paper copy with the Lieutenant Governor's or County Clerk's office? Or does the electronic filing replace the paper one? The answer is both yes and no: yes, you do still need to get a copy of the notice and agenda to the LG or Clerk, and it doesn't specifically have to be a paper copy, but it's going to be up to the LG or Clerk to determine how they prefer to get these. But the no part is that no, the paper version is not going to be the official copy of the notice and agenda any more once this law goes into effect. In other words, if you mess something up when you're sending the copy of the notice and agenda over to the LG or Clerk, you're not going to have to cancel your meeting over it. So why even have the requirement to send a copy over to the LG or Clerk? Well, the primary reason is so that those people who are accustomed to going by the LG's or the Clerk's to browse through all the notices and want to continue doing that, can still do that even though they're now browsing through courtesy copies rather than the official filing. And the LG or Clerk is still going to be responsible for posting the notices in a central location as they do now, such as the Capitol basement or a county building. But the law allows for this to be done in different ways, so it could be either all the paper copies pinned to a bulletin board as has been the more traditional practice, or being forward-looking, it could also be done by an electronic monitor that cycles through the notices or something else in the electronic line.

You may also be wondering what effect, if any, the new electronic filing might have on the current requirement to keep a mailing list and send notices and agendas out to people on that list. As far as postal mailings go, the new law doesn't really change anything because the postal mailing list is still going to be a part of what's required; people who ask to receive board notices by postal mail will still be entitled to receive board notices by postal mail. But with the new provisions, now the email mailing lists that many boards have been running as a convenience or courtesy are going to be legally enforceable just like the postal list already is. In

other words, if you send out the email notices late and someone complains you'll have to cancel the meeting, just like currently can happen when the mailed notices are postmarked late and someone complains about the late mailing. I want to emphasize this change, because I know a lot of boards have been running an unofficial email list for years and are used to thinking of the email list as the no-harm-no-foul list, where if you sent the email 4 days ahead instead of 6 days ahead it wasn't a big deal. So it's important to realize that the email list is now going to have a firm deadline just like the postal list.

A person can choose whether to be on the postal mailing list or on the email list, and the board needs to accommodate that either way.

As a practical tip to avoid making clerical errors when entering a requester's email address, and possibly getting complaints about missed notices, we would suggest that if possible, boards have a process that allows requesters to automatically sign up themselves for emailed notices, including input their own email addresses into the system without the need for someone on the board's staff to retype it into an email list or another system. That way, you're less likely to have transcription errors in email addresses, and if there is a mistake in a person's email address it would be due to the requester having entered it into the system wrong, rather than being the board's fault, so the board wouldn't be looking at potentially having to cancel a meeting after the email notice didn't get through to the requester.

The new provisions do specify how it's handled if someone questions the online posting date of the notice and agenda was filed: the electronic calendar records when an agenda was posted and a printout of the time and date of posting will show when the filing took place

So, when should a board start following these new requirements and filing its notices and agendas electronically? Electronic filing becomes a legal requirement for all boards on July 1, 2018, so all boards definitely need to be filing electronically from that date onward. And in fact, state boards are already supposed to be posting on the state's electronic calendar per executive memorandum, as I mentioned earlier. But it's a good idea for boards to start doing the electronic filing before it's legally mandated. As with board packets, getting an early start on electronic filing allows boards, and the relevant IT folks, the time to work out any technical or procedural kinks when it's still just for practice, so they can be ready and running when the actual legal requirement starts. And also like with board packets, there's no harm to starting early; assuming you're still filing your paper copy with the LG or the Clerk, you're not going to be

doing anything that would violate the current version of the Sunshine Law by also filing notice electronically as the new standards will require.

## Meeting minutes may be kept in recorded form, and must be posted online

Two significant parts of the new Sunshine Law act affect meeting minutes. First of all, all meeting minutes are going to have to be posted online once these new provisions go into effect. Second, boards are going to have a new option, if they wish to use it, in how they do their meeting minutes, as they'll now have the option to either do written minutes the same way that they've always done them, or if they prefer, to instead do an audio or video recording of the meeting accompanied by a written summary.

So let's start with the new requirement that's going to apply to all boards to post their meeting minutes online. Online where, you may ask? Where are these minutes supposed to be posted? The law allows for posting them either on the board's own website, or on a general state or county website, so there's some flexibility there. The new provisions aren't going to require the board to have its own website; a county or state department could post the meeting minutes for its attached boards on the general departmental website, for instance. But if a board does have its own website that it wants to use, that can certainly be the place where it's posting the minutes online. And if a county wants to have a part of the general county website where all the meeting notices and meeting notices are found without regard to which department a board might be attached to, that would also be ok under the new provisions.

You may also be wondering how long a board is going to have to get its meeting minutes online. Under the new provisions, a board has up to 40 days after a meeting to have the minutes of that meeting posted online. Now you can compare that 40 days to the soon-to-be-former deadline of 30 days after the meeting, which is what it's been under the current law, to have minutes 'available to the public.' As you will notice, the new time period starting July 1 is 10 days longer. That's in recognition of the difference between simply having minutes "available" for people to request, and actually posting minutes online, and the additional time that's going to be needed between when the minutes have been fully prepared and when they are actually posted online. Many boards can't just upload a document as soon as it's written but instead have to go through an IT office or other web administrator to make changes to their websites, so turnaround can take a few days. And boards will want to run an accessibility

checker on the completed minutes to make sure they're posted in ADA-accessible format, to avoid possible complaints, and that too will take a little time. But the 10 days longer for preparation and uploading doesn't necessarily mean that it will take longer for members of the public to get the minutes. The previous deadline was to have minutes "available," rather than to affirmatively post or send them out, so in the past members of the public had had to request the minutes after the 30-day mark and then wait for the board to provide them. Because there won't be any waiting time to get minutes once they're posted online, having them available online 40 days out from each meeting may actually be faster, in addition to easier, for the public than requesting them 30 days after each meeting and then waiting to receive a copy.

By the way, since we've been getting questions on this, I wanted to specifically address how you handle the situation where your minutes are still in draft form at the deadline. This isn't changing from how you handle it under the current law: the Sunshine Law doesn't require a board to approve its minutes, so although many boards do like to approve their minutes as a routine thing, the minutes are complete under the Sunshine Law without that. So if the board hasn't approved them by the time you need to make them public, you can mark them "DRAFT," but you'll still need to post them by the deadline. And you can still replace that version with the approved version later on when it's available.

Turning to the other new minutes provision, the one allowing boards to keep minutes in recorded form, some of you are no doubt wondering if your board is going to be required to record its meetings once this law goes into effect. The answer to that is no. Recorded format minutes are an option, not a requirement. Boards can keep on doing written minutes the same way as before, and will not be required to record their meetings, or keep a copy of any recording they might make, or post a copy of such a recording online. Even if a board does make a temporary recording to use in creating written minutes, as long as the board is keeping and posting its written minutes it will be in compliance with the minutes requirement and it's not going to be under any obligation to keep those temporary recordings or to post them online. And just as is true now, a board doesn't have to record its meetings at all to comply with the minutes requirement; it can use detailed written notes taken during a meeting to create its written minutes.

But let's say you do want to use the recorded minutes option once it's available. Are there limitations as to what kind of recording you can use as recorded minutes? The law allows for analog or digital recording, which means anything from tape or film to digital voice recorder or cell phone camera or digital camcorder recording would do. But remember, you've got to post



this recording online, so if you've recorded it on magnetic tape, say, you're still going to have to get it into a digital format to post it online. For that reason, I would suggest that making a digital recording in the first place is probably your easiest bet if you want to do your minutes in recorded format.

With recorded format minutes, you have to include and post both the recording itself, and a written summary to go along with it. So what do you need to include in the written summary? The law requires you to include the time, date, and place of meeting; the members who are present or absent, and when they arrived or left; for all motions or votes, the vote for and against by member. (And on this one remember, if it's unanimous and the written summary already reflects who's present at the time, you can just say unanimous in favor, no abstentions, rather than listing all the members as voting aye.) And finally, the summary has to have a time stamp or other reference indicating when in the recording the board began its discussion of each agenda item and when in the recording motions and votes were made by the board. There is software you can use to create these time stamps at the same time as you're taking notes at the meeting. For instance, OneNote, which is part of the Microsoft Office package that the state agencies are using, allows someone to easily add a time stamp or a link to a spot in an audio recording to their written notes. For the state boards, ETS can train you on how to do this. But if you haven't entered your time stamps while you were recording and you're left trying to recreate that after the meeting, someone's probably going to have to listen to the entire recording and note at what point in the recording each topic of discussion or motion or vote begins to get the time stamps for the written summary.

So I'm sure some of you are thinking, what \*don't\* you have to include in the written summary – how is this better than regular written minutes? Well, the big thing that's left out of the written summary requirements is the requirement you have for written minutes to include the substance of all matters discussed or decided and the requirement to give a true reflection of what was discussed and the views of the participants. In other words, the summary doesn't have to transcribe or paraphrase all the discussion that took place during the meeting, which can be a time-consuming process. If you choose to use recorded format minutes, you will have to get used to adding that time stamp to index when each part of the discussion begins, but you won't have to try to write up what everyone said throughout the meeting

When should a board start following these new provisions for minutes? As far as posting the minutes online goes, online posting becomes a legal requirement for all boards on July 1, 2018, but it's a good idea for boards to start doing this before then. You'll have time to work out

the technical or procedural kinks so you can be ready and running when the legal requirement starts, and there's no harm to starting early as you're not going to violating anything by posting your public meeting minutes online before it's actually legally required.

But for the question of when a board should start doing its minutes in recorded format, if it prefers that format, I have a different answer. For this change to the law, boards should \*not\* start doing it early, at least, not unless the board is also keeping regular written minutes. That's because until July 1, 2018, the Sunshine Law requires that board minutes be in written format as they've always been. The option to \*not\* keep written minutes with all the currently required information, and instead have minutes consisting of a recording accompanied by a written summary, doesn't become legal until next July 1. So if your board wants to do recorded minutes, you can start looking now at how to record the meetings, and practice adding the time stamps, but you need to keep doing written minutes until next July 1 in order to stay in compliance with the current provisions of the Sunshine Law.

I'm happy to take questions on all these changes to the Sunshine Law that are going into effect next July, and if I don't have time to answer your question at this presentation, you are welcome to send it to OIP at [oiip@hawaii.gov](mailto:oiip@hawaii.gov), or call us at 586-1400. Thank you for your attention and for your interest in the changes to the Sunshine Law.