THE SUNSHINE LAW TRANSCRIPT

Good morning, good afternoon, or good evening, and welcome to OIP's training on the Sunshine Law. The Sunshine Law is Hawaii's open meetings law; it is not the open records law. The Sunshine Law is specifically referred to the meetings law, which is found in Part 1 of Chapter 92 in the Hawaii Revised Statutes.

We are going to begin by talking about the purpose of the Sunshine Law and the policies behind the Sunshine Law as it's set out in the statute. The reason we are going to start out here is because this is really the starting point always in interpreting the law. Now when you need to interpret the law, OIP or a court hearing a complaint, would be to interpret what the law means in a couple of different situations.

First, you have the situation where you can see the language of the statute but there are questions about what the language means. Does this comma mean this clause is supposed to modify that part or not, those sorts of questions. So that's one instance, in which we return to, well what is the purpose behind the law in deciding how to interpret. The other and more typical situation is when you know what the law says but the question is how does that apply to these particular facts in this factual situation. What does the requirement of the law mean?

So again these are the situations in which we would look at the purpose, and for those of you who are using the Sunshine Law, as board members, board staff, or members of the public, it helps you to understand this as well. Understand what this law is supposed to give you a better idea of why it works the way it does and help you make the right call when Sunshine Law questions come up. So the statute says that one purpose of this law is to protect the public's right to know, and it is also intended to open up the governmental process to public scrutiny and public participation. So this is what the law is meant to do, it is meant to open the government process to the public and enhance the public's ability to know what the government is doing.

Specifically, as far as the policy, the law states, "It is the policy of this State that the formation and conduct of public policy, which includes discussions, deliberations, decisions, actions of government agencies shall be conducted as openly as possible." This, by the way, is almost identical to a policy clause in the UIPA, the open records law. So for the Sunshine Law as well as the records law the reason the law is there, what the legislature intended it to do is to open up the government policy making process to the public.

During this course we are going to go over several basic requirements of the Sunshine Law. We're going to talk about the concept that a board's discussions, decisions, deliberations, all are supposed to be generally conducted at a meeting open to the public. We are going to talk about the concept that a board meeting is open by default. It is open to the public, unless a closed meeting or executive meeting is specifically allowed. We are going to talk about the testimony requirement. Boards have to accept testimony from the public. We're going to talk about the notice requirement. Boards need to provide notice to the public, including an agenda. And

finally we are going to talk about the minutes requirement. A Sunshine Law board is required to keep written minutes of its meetings.

We are going to begin with the first of these, the concept that a board's discussions, deliberations and decisions must be conducted at a meeting. Now the Sunshine Law is applicable whenever you have members of a board talking about board business. So of course a fundamental question is what is board business. OIP has defined board business to be matters over which the board has supervision, control, jurisdiction, or advisory power, that are before the board or reasonably anticipated to come before the board in the foreseeable future.

So this is actually a little bit narrower then it could be. As a general rule, OIP or a court is required by statute to interpret the Sunshine Law broadly, to interpret provisions broadly to favor openness in public access, and to interpret the closed meeting provisions narrowly. So why is it that we are not interpreting the concept of board business very broadly to encompass anything that could conceivably be within a board's authority? Well it's because in this case the Sunshine Law actually bumps up against a couple of constitutional concerns. There's the constitutional right to freedom of assembly, the constitutional right to freedom of speech, so bearing those in mind, and balancing them against the purpose of the Sunshine Law, we have this somewhat narrower definition.

So let's break this definition, there are a couple of elements in this definition. One is that to be board business the issue has to be within the board's authority, and I want to emphasize here, that's the board's authority. In other words we're going to exclude things that are perhaps purely the Chair's prerogative, for many boards setting the agenda for instance, is the Chair's prerogative so if you're a board where it's the Chair who sets the agenda it's not something you decide on as a board.

Then a discussion limited to setting the agenda, such as, "can you please put such and such on the agenda for next month?" We can't because in next month we have too much to discuss, but it can go on for the month after. That discussion by itself would not, for most boards, be board business because we're talking about something that is purely in the Chair's prerogative. Similarly a lot of administrative matters, scheduling the meetings, travel arrangements for members who are coming from another island, things that are purely taken care of by staff, things in other words, that are not going to be something where the board as a board is going to be considering it or possibly acting, these wouldn't be within the board's authority.

And then more obviously you have things that you never might talk about where it is nowhere near their authority, issues such as "How do you think the warriors are going to do this season?" or "Do you think it's going to rain soon, my plants are dying out in my yard?" These are for most boards not going to be anything to do with what the board deals with and so are more obvious instances of issues that are not board business. And then the other thing I would point out, we're talking about specific matters. If you remember the definition, it talks about discreet matters. So we're not talking about discussions that are kind of at a very elevated philosophical

level, we're talking about specific issues that the board is dealing with. So, for instance, we're not usually talking about "What do you think about development as a general concept?" We are usually talking about "What do you think of the new proposed housing development that is coming on our agenda sometime soon?"

The other element is that to be board business, something needs to be on the current or a future or reasonably upcoming in the foreseeable future agenda. So you might have issues that were board business, the board finished dealing with it, the board took action or didn't take action, one way or the other the board doesn't anticipate it coming back, it's pau, it's off the agenda, and an issue like that would no longer be board business. Some examples of this, you might have a neighborhood board that has in the past dealt with the question of a new ball field being built at the neighborhood park and it made its recommendation and so forth. That was a year ago and now the ball field has been completed and the members are invited to the opening ceremony for the new ball field. Well, it's not board business anymore, so they can go and talk about what a great ball field it is because it's not something they reasonably expect to be on their current or near future agenda.

Looking at the off-in-the-future element, we had an opinion a couple of years ago involving the Hawaii County Council. They had gone to a briefing by a volcanologist on what Mauna Loa was doing. And they didn't notice it as a Sunshine Law meeting, so there were journalists that asked OIP's opinion on whether it that was a violation of the Sunshine Law. Now in this case the primary issue that they were hearing about, what is Mauna Loa doing, really wasn't anything within the Hawaii County Council's authority, they had no say over what the volcano was up to. There was a tangential issue that could have come within the council's authority that would be depending on what the volcano did, there was some possibility that in the future emergency funding would be needed. But that was well off in the future, it was speculative, in fact it never did end up becoming an issue or hasn't yet. At the time OIP's opinion ended up saying that even though that tangential issue was something that would be a specific issue potentially within the Council's authority the time element wasn't there, it just wasn't something that was coming on their agenda in the foreseeable future, it just was too far off and too speculative at that point. So for that time element again, something that's already happened, it's pau, that is no longer board business, something that might someday come to the board but you don't know when, it's speculative, that's probably too far off.

We're looking at specific issues within the board's authority that are either on the agenda now or you can see it coming, you know it's coming soon. You're not going to play games by saying, oh well we haven't filed that agenda yet, if you can see it coming and the board expects to consider, but at the same time, things that are so far off it's just not foreseeable at this point are going to be board business yet.

I've spent a lot of time talking about board business, that's because board business really is fundamental to determining whether you need to be concerned about the Sunshine Law in discussing it. If it is board business and the communication is between board members, then you

can't do anything at a distance that you couldn't do face to face. So that means if the Sunshine Law doesn't otherwise allow it through a permitted interaction and as board business, you can't talk about it in a caucus, you can't poll the board members on what do you think of this issue one by one, you can't do it by telephone if you can't do it face by face, you can't do it by email if you can't do it face by face, and similarly you can't do it in some written form, such as memorandums. Again, if you can't do it face by face, so you can't use other methods of communication to have a discussion that you wouldn't be able to do gathered in a room together.

However, the Sunshine Law does in fact cover some specific situations which are called permitted interactions, in which board members are specifically permitted to communicate with one another about issues that are board business. These include the ones that allow two members to communicate privately, the ones that allow a board to set up less than a quorum as an investigative task force, the ones that allows board members to set up as less than a quorum to go and represent the board to present something to another board, discuss something and negotiate issues.

Here's one again set up as less than a quorum to select officers. The full board can meet with the Governor, but it has to be the Governor, not the chief of staff, and then the full boards can also meet with the head of a department to which the board is attached to discuss minor administrative matters. Paper clip matter, we usually call it.

We're going to focus on the first two of those, because those are the most commonly used ones: the one that allows two members to privately discuss board business, and then the investigative task force. The two-member permitted interaction allows two members of a board to communicate privately about board business with some limitations, and when I say communicate privately, what that means is without having other board members present. So they could be out in public, it doesn't have to be off in a corner somewhere, it could be two board members at a meeting with lots of other non-board members, at a seminar or something like that. The important thing is that only two board members.

Some of the restrictions on the board members using this, they can talk about any board business but they can't make a commitment, and they can't seek a commitment to vote on an issue. So you may wonder, what does it mean to make, or seek a commitment to vote. Well I think if you're discussing board business it can be clear enough from your discussion which way you're planning to vote, you might be saying well that is the best idea for our community, so I'm going to support it, or you think it's a bad idea and you are going to do whatever you can for it not to happen. It's clear which way you are going to vote. But we interpret this, don't make or seek a commitment to vote restriction to mean no horse trading. In other words, what we don't want to see is, if you will support my pet project that's on the agenda this month, I will support your pet project that is coming up next month. That would be making or seeking a commitment to vote. That's what you shouldn't do when it is a two-member permitted interaction.

The other thing to watch out for with this one is that you can't use it serially. Serially means a situation where member "A" talks to member "B" about this issue, and then member "B" goes to member "C" at some later point and says, you know I was having an interesting conversation with member "A" about this and he said blah blah blah. Now at that point you never had more than two members at a time talking, but there are now three people who are essentially part of this conversation, there are three people who are now in on what was discussed. So that would be serial use and it could be more than three, it could be the whole board really. But you can't do that, so essentially, with the two-member permitted interaction, you can talk about any piece of board business but you can't horse trade, you can't make or seek a commitment to vote on an issue, and you can't use it serially to expand the communication beyond those two members.

The permitted interaction for an investigative task force or as it's sometimes called, a permitted interaction group, or a PIG, is the other one. That one that is probably the most frequently used permitted interaction. This allows a board to set up a group consisting of less than a quorum of members to investigate a specific matter. So the first thing is to make sure that the members appointed to this group are going to be less than a quorum, and you're going to have three necessary meetings to setting up this group. So at the first necessary meeting, and there can be other meetings in between by the way, I mean you might have ten meetings that go by before you finally wrap it up, but you need at least three.

So I'm going to talk about three meetings, and I'm going to mean this minimum of three necessary meetings that need to go through all the steps that are required to use this permitted interaction. So this first meeting is the one at which the members of the group are assigned, again less than a quorum, and at which the scope of the investigation is defined. It could take place at a meeting, so then the public would be aware, okay members "A" "B" "C" and "D" are now part of this group that is supposed to go out and look into whatever the issue is.

So these members, they go out, they do their work. They are not a sub-committee, they don't have to do their work through scheduled meetings, with notice and taking public testimony, and so forth. What they are essentially, it's as though the Sunshine Law's usual restrictions don't apply to the members that were assigned when they are talking about this issue. Although they do need to keep it within that group, they can't then talk with other board members who aren't part of this group about what's going on. So you've basically taken an issue that the board was considering and you've taken it off the table for the full board. You've instead handed it off. Let's say it's a nine member board, so you have four members who you've handed it off to these four members who are specifically named and they have their authority to find. Now they're going to take it and they're going to look into it in whatever way, so that could be by doing something that resembles formal meetings, it could be by telephone, by email, by face to face, by walking around, by talking to members of the public, as long as they are not talking to board members who are not a part of the group. It could be in a smoke-filled room, it could be a through a series of community meetings, however it is they want to do it. But basically they can, these members can talk about this issue while they're part of this investigative group without having concerns about "oh, we need to do it in a meeting."

So they've done their work, they're ready to come back to the board and put the issue back on the table for the board. And that's where we get to the second necessary meeting for a permitted interaction group to do its work. So at this second necessary meeting, this is where the permitted interaction group is going to present its findings and recommendations to the full board but the board is not going to deliberate on it yet. It's not going to discuss the report at this second meeting. The board is just going to receive the report and say thank you very much and we'll put it on the agenda for the next meeting, let's say.

The third, at that third necessary meeting, the full board can now take up this item again for deliberation, decision making or action. So essentially, we said the full board took it off the table, put it in the laps of these four members who went out and did their work. It's at this third meeting that it's really fully back on the table for the full board. So now the permitted interaction group no longer exists, it's done its work, it's reported, it's dissolved, but the full board has this issue back and now that the report has been received and they've waited one full meeting the full board can now begin deliberation and decision making.

It often comes up that board members considering setting up some sort of a group to deal with an issue, either the board can't decide between a sub-committee or standing committee and one of these permitted interaction groups. Or sometimes boards get confused about requirements for the different sorts and it's important to be clear about what a board is setting up and what the requirements are, because the requirements are very different for each. A standing committee or sub-committee, let's say a board's finance committee, is basically a miniature board. It is subject to the Sunshine Law the same way a full board would be. So you need a quorum of the finance committee there, you're going to notice its meeting, and post an agenda for its meeting, it's going to take public testimony, have the meetings open to the public, unless a purpose for an executive session applies. It's going to need a quorum of its committee membership in order to hold a meeting and then when it reports to the full board, assuming that the issues being reported on are properly on the full board's agenda. The full board can immediately take it up for discussion or action.

So again, standing committee, you have to follow the Sunshine Law just as though the committee was a mini board, but on the other hand it's never off the table for the full board as it is for a permitted interaction group. A permitted group, once you've got that issue properly assigned to the named members then they can go out and work on it outside the context of the usual Sunshine Law meeting process. Which gives more flexibility, but when they report back to the board they have to be very careful during the time when they're working on it to keep it outside of the rest of the members. To keep it limited to that group, and it's not going to on the table for the full board until after they report back and in fact until one meeting after the meeting in which they report, and then they can take it up. So it's a more cumbersome process, the permitted interaction group in terms of how long it takes and a permitted interaction group also is not something that is really designed to deal with very broad subject areas, like finance, but on

the other hand you have more flexibility for the permitted interaction group in how it conducts the investigation it's doing.

So why would we use the permitted interaction groups? Some examples might be if you're conducting confidential interviews, but they're either something that wouldn't fall under one of the executive session purposes or for some reason the executive session purpose isn't workable. For instance, the Board of Regents did this with former UH President Dobelle. Or another board might do it with an executive director, let's say, so you want to talk to staff, or in the UH case the faculty, about their feelings about the current boss for the evaluation and because the personnel privacy executive session purpose, we'll talk about those later. But the personal privacy one would allow the person being evaluated to say "no, I insist upon having it public," and then here maybe the staff is saying in confidence that that might be a situation where a board would rather set up a permitted interaction group to do those confidential interviews and then come back and report to the full board on here is what we found was the general faculty feelings about the current President, or in another case the staff feelings of the executive director.

Another situation use this would be for site inspections or product demonstrations. If you have something that is perhaps a confidential prototype of a product, that wouldn't be a reason to do it in executive session, and yet the board might have some reason that it wants to view it, so it could potentially set up a permitted interaction group to go out and have a look at whatever it is and then report back to the full board.

Sometimes a board wants to receive or consider information that the board considers confidential, but it isn't going to fall under one of these executive session purposes, the purposes that allow a board to have a closed meeting, and so there again that might be a reason for doing this.

A board might also do permitted interaction groups when it's not trying to keep something confidential, it's just simply a matter of logistics. This might be the situation where there's a series of community meetings being sponsored by the developer on some project and the board wants to know what's going on, what is being said at these meetings, but they couldn't go as a full board and listen to everyone talk about an issue that is board business at that time. So they might send a delegation, a permitted interaction group to go attend meetings, talk to members of the public, talk to the developers, find out what's being said and report back to the full board on how it went.

So there can be various reasons that you might do a permitted interaction group, and as long as it follows the basic requirements, as long as they follow what was on the previous slide, the three meetings structure, that is going to work.

We'll go to the next basic element that the Sunshine Law requires, which is that every meeting of a board has to be open to the public unless an executive meeting, i.e., a closed meeting, is specifically allowed. So even though what we are talking about is the concept that a meeting is

open unless it is specifically allowed to be closed. So we are going to spend the rest of this time talking about when and how meetings can be closed. Now the presumption that the meeting is open, that's actually relatively easy because if it's open then it's open, people can attend. So the question comes up when the board is allowed to close the meeting and how does it work, how does it do it?

The Sunshine Law term for a closed meeting is an executive meeting, and that would be a meeting that is closed to the public as permitted under the statute. So the way you do this is you need a two-thirds vote in favor of all the board members that are present, and by the way that also has to constitute at least a majority of the board's full membership. So if you have a 10-member board, you have a quorum of six members there, and two-thirds of those six—four—vote in favor to go into an executive meeting, you actually wouldn't have quite enough, you would need to have five, which would be half of the full membership of ten. This doesn't usually come up, so the main thing to remember is two-thirds of the board members present, a super majority to vote in favor of closing it.

Now in the public session, this vote would be in the public session, and also in the public session the board needs to announce the purpose for the closed meetings. These would be one of the eight we talk about, and then the vote on the closing of the meeting needs to be recorded and entered into the board's minutes.

As I mentioned, there are eight purposes listed in the statute under which a board can close a meeting. One thing would be to consider a vocational or professional license. Personnel matters is another one, and we'll talk about that a little bit more. To discuss the authority of a person who is designated to negotiate labor issues or land purchase. To discuss legal matters with the board's attorney, we'll talk about that a little more. To investigate criminal misconduct, to discuss sensitive matters relating to public safety, to talk about receipt of private donations, that's really specifically for the UH Regents that want to be able to accept anonymous donations. And then to discuss issues that are made confidential by law or court order.

So we're going to break out these two more specific ones that are most frequently used for purposes of executive sessions. That would be personnel matters and discussion of legal matters with the board's attorney.

The personnel executive session purpose applies when a board is discussing hire, fire, discipline, or dismissal of an officer or employee and individual privacy is concerned. It would provide though, that the individual's privacy is concerned, the individual has the right to waive that privacy and push it out into the open. So personnel matters as a purpose wouldn't allow a board to hold a closed meeting for more general personnel discussions that don't concern individual privacy. For instance, we need to hire staff for our office. We are going to discuss how many positions we need and what the duties of these positions would be. Or we're forecasting our personnel needs for next quarter, or next year. So those wouldn't allow a closed meeting. What would allow a closed meeting would be something like, we are going to hear about a complaint

about an employee, we're going to discuss that complaint. Or we're hiring people and we're going to be interviewing the applicants, or we're a board that has an executive director and we are doing an evaluation of our executive director and we want to do it in closed session. Any of those would be ones where individual privacy is concerned so it could properly be done in closed meeting.

I want to emphasize again that the individual whose privacy is concerned, that's who this executive session purpose is supposed to protect. You know most of these executive session purposes are intended to protect the board's interest in one way or another. But this personnel one is really only meant to protect the individual whose privacy is affected, and therefore that individual has the option to say, "No, I want it opened," and if that person says "I waive my privacy, I want it open," as the board you can't override that and say no we're going to continue in executive session under the personnel matters purpose.

Now it might be that for part of your discussion, there's another purpose for an executive session that would apply, in which case yes, perhaps you could be in executive session under that purpose for that portion of it with personnel matters purpose. It might be discussion with the board's attorney. You talked about how the executive director's performance has been, but you want to discuss what's our liability if we fire our executive director? So there might be some portion of a personnel discussion that might fall under a couple of purposes and the person concerned couldn't waive, say the board's attorney-client privilege. But the person could certainly waive their own individual privacy, and again in that sense the personnel matters executive session purpose, ultimately it's that individual that can waive it. It's not the board's decision in that case.

The other one I have highlighted is that discussion of legal matters with the board's attorney. It would apply in the scenario I just mentioned where it's discussion relating to a personnel matter, but it's certainly not limited to discussion of personnel issues. Really it would be any issue dealing with the board's powers, duties, authority, liabilities, where the board is discussing it with the board's attorney, seeking legal counsel from the board's attorney. The only real limited use there is that the attorney does in fact have to be present, this would not apply, where for instance when the board says, well we received a letter from our attorney, who is not at the meeting, but we want to go into executive session to discuss the attorney's advice. That wouldn't qualify, if the attorney is there, then yes they could go into executive session.

We're also going to discuss a couple of specialized types of meetings which are not closed meetings, not executive meetings but are a little bit different from the standard public normal public meeting. So the first of them I'm going to talk about is limited meetings. Now a limited meeting, again, is not a meeting that is specifically being closed to the public to try to keep something or other confidential. Rather a limited meeting is a meeting that the board cannot practicably have it fully opened to the public as a normal meeting has to be. Either it's being held at what is actually a dangerous location, or simply because it is at a location where public attendance is impracticable.

A dangerous location might be something like Kahoolawe. That was actually the original reason for this provision. It originally was limited to the dangerous location and it was to allow a board to do its site visit to Kahoolawe, but it has since been expanded to include locations where public attendance is impracticable. So that could be a board going to Coconut Island, let's say, and they have arranged for so many boats but they have a limited number of boats and they're not going to be able to accommodate every member of the public.

Or a board is going to go look at a facility on private land or go look at undeveloped private land, and the landowner wants a waiver and you can't require people to sign a liability waiver just to attend a public meeting, so it's impracticable to provide for a normal public attendance.

Or a board is going to a spot where they have to hike up a trail for a half a mile to get there. Again, you can't expect people to do that for a normal public meeting. Or the board is going behind the scenes at the airport, behind security, and anybody who attends has to be cleared. Again, you can't usually require people to go through the airport security to attend a public meeting. Now with some of these public attendance impracticable situations you'll notice that public attendance is not impossible. It's not like the Kahoolawe one, where you probably don't want to be bringing members of the public along.

In some of these cases you can accommodate some people, you can't accommodate everyone who might want to attend, and so I emphasize again that because a limited meeting is not supposed to be a closed meeting, there's nothing wrong with having some members of the public attend to the extent the board can. This should be done on a first come first served basis, if you have only five boats, for instance, that will accommodate the board members plus ten other people, it should be the first ten people, other than staff, let's say. It should be the first ten people who show up ready to go, rather than telling people that "Oh no, you can't come because we're saving it for some of our friends that are coming along." So do it fairly. If you can only let so many people in, there's nothing inherently wrong with saying "Well, we can take a few members of the public with us; we're going to take the first however many that show up." Again you're not waiving any kind confidentiality. It isn't supposed to be confidential, and in fact this provision is really set up to try to give the public access as best you can to what goes on at the limited meeting.

One final note on the location, the board needs to be holding the meeting at this location that is dangerous or where public attendance is impracticable for a good reason. In other words, the board can't be saying, "Well, we're going to hold it on a military base where people have to show I.D. to get in just because they had a convenient meeting room with air conditioning and it's better than the one we have." It would need to be because there's something there that we need to see. So the board has to be going to this location in the first place because there is some reason it has that it needs to see something at the location, not just because it's a convenient meeting spot.

So you have your dangerous location or your impracticable location and your board wants to meet there, how do you do it? Well, you need OIP's concurrence that this is the situation where there is dangerous location or a location where public attendance is impracticable and the board needs to go look at it and meet there. We usually do that on the attorney of the day turnaround basis. In other words, you should get your answer within a working day and we have a form for that on our website.

You need a two-thirds vote of board members at the time you're setting up this meeting in favor of setting up the limited meeting. You need to video the limited meeting and show the video the next time at the next regular meeting of the board. The videoing requirement can be waived but we're going to waive it, for instance if you're putting the videographer in danger or it's obviously impractical to video in that situation. For instance, you're going from site to site by bus, you probably don't need to video the inside of the bus as you're traveling to the next site; that is, assuming that the board members aren't talking about it as they're going. Or it's a situation where you're going half a mile up a trail; we're not going to say the videographer has to be going to be hanging out at the cliff base with one hand and videoing with the other. But for the most part you are supposed to be taking video of this limited meeting in order that it can be shown to the public at the next regular meeting, and so that's not going to be waived unless it's just clearly not practical.

The other thing is that this limited meeting is one where decisions cannot be made. The board can discuss, it is a meeting, the whole purpose for the board members going out to whatever this site is that they need to see, they're going to be talking about it, so discussion is fine, but any decision that the board might want to make having to with the limited meeting has to be made at the next regular meeting.

The other miscellaneous type of meeting I'm going to talk about is videoconference meetings. A videoconference meeting is basically a normal meeting that is taking place in more than one place. So a long distance meeting. A board can hold a long distance meeting, a meeting with multiple locations, but by statute it needs to have audio and visual interaction at all locations. So that's why these are videoconference, not teleconference meetings.

When the board files its notice, it needs to provide notice of each location that a board member will be attending from, and then the public can attend from any of those locations. So this really isn't set up to have a main site in Honolulu and a couple of satellite sites on other islands, the way this statute is set up if you're having a videoconference meeting every location that you set up is a valid location, every location is available for public attendance.

Every location is supposed to be noticed and then you need to maintain your connection to every location. If you lose the audio interaction between any locations the meeting is going to have to end if you can't get it back within 15 minutes. So you need audio and video to start the meetings. If you lose the video part way through the meeting, you can continue, but if you lose the audio the meeting has to end, and that's true even if you still have quorum without the

location that you lost. Again, all meeting sites really are considered equal the way this statute is written.

The question that always comes up with videoconference meetings is what is the technical standard? What kind of facility do you need to have to have videoconference meetings? There aren't any minimum technical standards by the statute, so you could do it by Skype, you could do it using a laptop that has a laptop camera and a little laptop microphone. You do, however, have to notice it as a public location. So, if you have your member who says I want to attend from my home office on Maui, that's fine as long as they're willing to notice that as a meeting location and invite in anyone from the public who's going to attend.

Now with any meeting you have, even with a meeting that is all in one place, you have a question of whether you planned reasonably for the number of people attending. For instance, if the City Council is holding a meeting on some controversial issue and they expect hundreds of testifiers, it wouldn't be reasonable for them to notice it for a room that only holds ten people. Likewise, if you are doing a videoconference meeting and you're expecting large public turnout, then maybe in that situation a laptop running Skype isn't going to be sufficient, just because it's not going to accommodate the members of the public that you reasonably expect to attend. But on the other hand, if you're one of these boards that nobody ever comes to your meetings, maybe if you're lucky you get a testifier every now and then, but you can tell the public doesn't even know you exist and you have somebody wanting to attend from their business trip to Denver but they want to call in on Skype, and they want to notice it for a Starbucks that they looked up somewhere in Denver. That seems like it should be adequate given your expected level of public attendance, which is probably zero.

So again there is no minimum technical standard set up for what equipment you need for this videoconference meeting. Just bear in mind that you are going to be a public location if you're a member attending from a distance, so be prepared to have members of the public attend, and if you're a board that members of the public are reasonably expected to be interested in attending make sure that whatever equipment you are using is adequate to what seems like the likely attendance.

Moving on now to the next Sunshine Law requirement that we're going to talk about, we're going to move to the testimony requirement. Sunshine Law boards have to accept testimony. The board is required to accept testimony from any interested persons, and that would include both written and/or oral testimony at the meetings. Now this would be on any agenda item. I emphasize agenda item because a board is not required to accept testimony on issues that are not on the agenda. You are not required to have a general soapbox period or an open forum on whatever issues that people want to talk about. Rather, your obligation is to hear the testimony on anything that is on the agenda. The agenda item would be interpreted reasonably broadly, but it still is going to extend beyond the reasonable boundaries of the agenda item itself. A board can if it wants to hold an open forum, it's just not a Sunshine Law requirement.

Boards are able to set reasonable limits on testimony by rule. This would typically be time limits that would be set by rule. OIP interprets that to mean simply an adoption by the board of a form of policy, a policy that's reflected in writing. We don't interpret the Sunshine Law to require Chapter 91 rule making for setting time limits. But if you do choose to adopt a policy of time

limits, the one thing we would expect is that they should be applied fairly. In other words, you're not going to, on a single item, you're not going to spend the time with some testifiers and hold up others strictly to their time limit. For the members of the public who are just up there to speak their piece, they should have the opportunity to speak their piece, you're not going to waive it for some and waive it for all members of the public.

PART 2

Boards are also required to provide notice of meetings, including an agenda, and we're going to move to that. So a board's filed notice has to be written, it has to specify the date, time, and place, and it needs to include an agenda of all the matters the board will consider at that meeting; also, where the board anticipates having some portion of the agenda in executive session. The agenda also needs to reflect that and the anticipated purpose of that executive session and the statutory basis.

The meeting notice is required to be posted on the state or the county's online calendar, depending of course, on whether it is a state or a county board. It is also required to be kept available at the board's office, for members of the public to review. A copy is required to be provided to either the Lt. Governor or the county clerk, depending again on whether it's a state or county board, and the board is required to keep a proof that they provided it to the Lt. Governor or clerk. It's also required to be posted at the meeting site when feasible. So note here that the one's that absolutely if you don't do it, you're going to have to cancel your meeting, are the posting of the online calendar and at the board's office. Because there is a statutory provision that says that providing it to the Lt Governor or the clerk, while this is required, and would be a violation to not do it, the statute specifically says, the board is not going to have to cancel the meting if there is an error in that, whether it's on the board's or the Lt. Governor or clerk's end. And then of course the meeting site requirement is when feasible rather than absolute. So again, make certain that you get it timely posted on the state or county online calendar and available at the board's office because if you don't, you could have to cancel your meeting.

Now the timing for this, this is required to be done by six calendar days prior to the meeting. A calendar day is a full day. It's not six times 24 hours. It's basically you look at a calendar, you can put your finger on today's date and count forward six days and that is the first day that you could be posting a meeting for if you're filing today. In other words, if it is the first of the month, count forward six days, you can file a notice of meeting for the 7th or later. You can't file one for the 6th of the month or earlier because that's not enough calendar days between. And so it's not six times 24 hours. If you are filing at 4 PM and you're filing for a 9 AM meeting, that's still okay as long as it's six calendar days ahead. The difference between today's date and the date of the meeting is at least six days.

You are also required to mail or email a copy of the notice and agenda to anyone who has requested to receive copies of the board's notice and agenda. And the postal mail or email, that's at the option of the person who is doing the requesting. So while as a board you might prefer for instance to do this by email, if somebody says "I want to be on your list and receive it by postal mail," you can't then say "No, we only do email." You do have to allow them to get it whichever way they would prefer.

The agenda, of course, is probably the most difficult part of the filing of the notice and the preparation of the notice. A board's agenda has to include all items that the board intends to consider at its meeting, and the level of detail of the agenda has to be sufficient to inform the public of the matters the board intends to consider well enough so that the public can decide whether to participate in the meeting.

So, you should be thinking of this as something that is aimed not at board staff or at regular attendees, people who are frequently at the meeting or following the board. You should rather be thinking of this as something that is intended for the general public. You can assume maybe that the reader watches the news or reads the newspaper from time to time, or that the reader is in the local area and has that familiarity with local issues, but don't assume that this is somebody that already knows what's before your board, or what your board is dealing with or what your usual topics are. You should be able to show this agenda to somebody who isn't part of your staff or part of your regulars and they should be able to understand what you are going to consider. So, show it to your spouse or your neighbor, and they should be able to say "Oh, you're talking about such and such." Or if they look at it and say, "I don't know what you guys are going to talk about," maybe you better add a little more detail or perhaps explain some of the terms or some of the jargon a little better.

So, we're going to show some bad examples from past agendas, and then a good example as well. These are old ones the boards in question are even better at this point. But, you can see the highlighted, which is the "rules revisions." What rules are being revised, what are the revisions going to do, what do the rules deal with? We can't tell any of that.

"Other" is obviously not informing us of anything. A board really needs to have on its agenda all the issues it's expecting to consider. It can't leave itself room to talk about additional things, by having catchalls like "other."

"New business," new business and old business, or unfinished business, if they appear on an agenda it should only be as a category with specific topics underneath. In other words, if you want to organize your agenda by beginning with your old business and then moving to new business, that's fine, but you can't just say "new business," you do need to have specific items underneath the "new business" category.

Now I know that sometimes there are boards who do like to organize their agenda by "old business" and "new business" and if there isn't any new business they may say new business and leave it blank. And if the board doesn't then go on to discuss anything under that heading at the meeting, it's not a violation as such, but I would recommend that if you are going to do that, if you always want to list new business on your agenda, but you are not going to discuss anything under that, perhaps you just note under it "none" or "none at this meeting" or something like that, so we don't have people calling OIP saying "their agenda just says new business, can you call them and tell them they can't discuss anything under that?" It makes it a little bit clearer.

Now here are a couple of examples of open session or open forum or soapbox period: "community concerns" and "beneficiary comments," and this is a board that likes to do the thing of having comments on topics that are not on the agenda from the constituents that it serves as a way of being open to people's concerns. And again, that's fine. There is nothing in the Sunshine Law that says you can't do that. However, a board that does this should be aware that this doesn't entitle the board members to then discuss issues that are raised under beneficiary comments. So if somebody raises under beneficiary comments some issue that is not already reflected on the agenda, then the board members are really just going to have to say thank you for your input, we will consider this for a future agenda, or possibly they can add it to the agenda by two-thirds vote, which we will talk about in a moment. But generally speaking if it's not on the agenda and somebody else brings it up, you can allow a member of the public to bring it up but you can't then discuss it as a board.

Unfinished business, as we've mentioned before is not a topic. You can use it as a category, but it should then be followed by the actual topics that you're going to discuss under that, and likewise for new business.

Now we're going to see a before-and-after set. At one point the UH Regents listed their "Gift, Grants and Contracts" simply as "Gift, Grants and Contracts," and the problem, of course, is if you're listing gifts, grants and contracts without detail is that it really doesn't tell you anything if you are an interested member of the public thinking about whether you should go to the meeting. You don't know what they might be receiving, whether they're granting money, whether they're receiving grants, whether they're entering into any contracts, you don't know whether you're interested or not. If you wanted to testify you wouldn't know what to testify about.

Now since that time they've changed their method of agendizing "Gifts, Grants and Contracts," as you can see from this sample. They've changed to, really, at an excellent level of detail, and this goes well beyond the minimum that would be required by law, by the way. It is very informative, it's a good example, you can see that looking at this you have lots of information and you can tell very well whether you're interested, either based on the topic of the research that is receiving a grant, or based on the person who is doing the research, or on which school it's going to, on the amount of money, the source of the award. There's just a wealth of information there. This is really a good example of how you can list these things in a way that gives the public a lot of information and clearly allows people to both decide whether they're interested and give intelligent testimony on the subject matter.

I mentioned a couple of minutes ago that there is some possibility of amending the agenda at the meeting. To do so you need a two-thirds vote of all members to which the board is entitled. This is different from the two-thirds vote that we talked about under executive sessions. That one I sometimes refer to as a super majority. Two-thirds vote is a super majority, that one was two-thirds members present at the meeting. This one is two-thirds of all members to which the board is entitled. So, it would include membership slots that are not currently filled, it would include people who are not at the meeting. If you have a board, for instance, that statutorily has ten members, only seven of the slots are filled and six people show up for the meeting, you have

quorum, but you don't have enough people to amend the agenda because you have two-thirds of nine, you don't have two-thirds of ten. You don't even have enough votes even if all six of them vote in favor; you are not going to have enough votes to actually amend the agenda. So, if you are a board that just barely meets quorum, you might as well forget about ever adding something to the agenda at the meeting because you are simply not going to have the vote. However, if you are a board that does tend to have at least two-thirds of its membership present at a meeting, then you could potentially vote to add something to the agenda. There's a further requirement that you can't add an item to the agenda if it is of reasonably major importance, and will affect a significant number of people. In other words, it's only the minor things that can be added at the meetings. You can't amend the agenda at the meeting to add a big item. These are obviously subjective, what is reasonably major importance, what is a significant number of people. They're going to be subjective, they're going to vary some by the boards if you have something that is one of the C&C neighborhood boards or one of the similar boards that other counties have where it's really focused on a specific locality. In that case, its reasonably major importance is going to mean how important it is to that locality. Significant number of people is going to be measured by the number of people that the board serves. So, if you have the Mililani Neighborhood Board then you're talking about something that of importance in Mililani that will affect a significant number of people in Mililani. If you have a statewide board, such as the Board of Education, then reasonably major importance is going to be measured in terms of their issues statewide. And a significant number of people is going to be measured in terms of their constituency, which is going to be much broader.

As far as a rule of thumb for your board, if you're thinking of adding an item, picture if you can who is going to be ticked off when they find out that you discussed this item, possibly took action at a meeting and they didn't even know about it. If you can't imagine anyone, if your reaction is nobody is going to be ticked off, no one even cares about this, then it's probably suitable to add. If you can immediately picture which individuals are going to be be ticked off, perhaps it's not suitable for adding to the agenda with a two-thirds vote.

Now we're going to talk about the board packet requirement. This is something that's related to notice and agenda but isn't actually filed as part of notice and agenda. And it's not something that's going to apply to every board or to every meeting. It's only going to apply when a board actually has put together a board packet that is prepared for an upcoming meeting. So, to begin with let's talk about what a board packet is. A board packet is documents that are compiled by a board and distributed to the board's members before the meeting for use at that meeting. A board packet as defined in the statute only includes those documents that are actually public under 92-F, the Uniform Information Practices Act to begin with. So, in other words you're never going to have to include in the public version of a board packet anything that you wouldn't have to disclose in response to a UIPA request. And, the definition of a board packet also does not include anything that the board can't reasonably redact in time given that it's a very short turnaround for a board from when a board packet is ready to go to when it has to be making it available. It needs to make it available at the same time it goes out to the members as we'll discuss so, it's not like the UIPA where you have your 10 business days to respond initially and then additional time potentially to do your redaction. So, the law again, potentially allows withholding more stuff from the public board packet than could be withheld in response to a UIPA request in recognition of the shorter time frame. And, the law specifically says that

executive session minutes, license applications, these are records that a board couldn't reasonably redact in time so those aren't considered part of a board packet. And it would apply to other instances such as if you have a long document with confidential information studded all the way through it, that's something you couldn't reasonably redact in time so, that part of what went out, you could just withhold the whole thing because it wouldn't fall within the definition of board packet which needs to be shared with the public. On the other hand, you might have a long document with several distinct sections and only some of those sections are confidential. In that case it would be relatively easy to just take out the distinct sections that are confidential and leave in the other sections. So, you would simply include the non-confidential sections in the public version of the board packet. If you have just a few pages and there is confidential information through out those, you can get that redaction done so reasonably thinking you would just redact the confidential information and disclose the redacted pages as part of the public board packet. And then finally, this should go without saying, but if a document is fully public even if it's a very long document if it's fully public obviously you're not going to need time to redact it and so therefore it would be considered part of the public board packet. You wouldn't withhold it from that packet board packet.

Let's assume that your board does have a board packet for it's upcoming meeting and you have a public version ready to go out to the public. What do you need to do with it? Well, first of all you have to have it available for inspection in the board's office So, that would be for anyone who comes into the office, you have to have the public version ready to go. Second, you need to notify your email and postal mail mailing lists that there is a board packet available in the office. You'll notice this doesn't say you have to attach it. You just have to notify the mailing lists that it is available. You have to provide reasonably prompt access upon request, which means if somebody then responds and asks you to send out a copy of it or email a copy of it, you need to be reasonably prompt in responding to that. And, you also need to accommodate electronic requests quickly. Now there is no automatic requirement to mail or email the board packet out to everyone on the mailing list. So, notice that the actual requirement here is to have it available ready to go, to let people know for the mailing list that it's there and available. And then to accommodate requests, especially electronic requests quickly, because you already have it there available. So if you want to, if you feel it would make things easier for your board, you certainly could. Especially with your email list do something proactive like either attaching it to the list or including the link to where people can download it from online. That would save you time since if you're going to get responses to that list or to that email saying it's available and you get responses coming in and saying, "I'd like a copy," and you're sending out these individual emails with the link, it would be better to include it with the email originally. But again, the requirement is actually to notify the email and postal mail list that it's there and available and in fact to have it available in the board's office and ready to turn around quickly when anybody requests a copy of it.

OIP has a few practical tips for boards that have a board packet and trying to put together a public board packet. First of all, we would recommend that you keep the requirement to distribute or make available a public version of a board packet in mind when you're actually compiling a board packet. In other words, as things come in leading up to the meeting and as for board staff, as you're putting it all together, think as you go about what will and what won't will be included in the public packet so that it's not something that you end up having to do all at once all at the last minute. In fact, you will already have kind of thought through the what can go

in and must go into the public version of the board packet versus what things would be too difficult to redact and therefore maybe you're going to withhold them. And then the second thing we would recommend is that you actually go ahead and prepare the public version at the same time that each board packet item comes in. So not just to have it in mind as you go through but you know, actually go ahead and do the work. Especially if you have things that are trickling in over a period of perhaps a couple weeks leading up to a meeting. Much easier if you go ahead and as each thing comes in, you prepare the public version of that thing rather than wait until the full packet is otherwise ready to go out. And then the last recommendation we have is that you have a pdf version of the public packet ready to go at the same time that you are sending it out to the board. The law doesn't actually say anything about a pdf. It says to have a copy available in the board's office. But, given that you are likely to be letting people know by email about the existence of a board packet, given that you are likely to be getting requests by email, and the law does say to turn those around as soon as practicable, it would be easier if you just go ahead and again, as you're going put things together such that you will have a pdf of the public packet ready to go at the same time that you are sending it out to the board members and making a copy available in the board's office.

This is another kind of miscellaneous meeting type. I'm going to talk briefly about emergency meetings. An emergency meeting is basically a regular meeting that is conducted on short notice. An emergency meeting can be held where you either have an imminent peril to public health, safety, and welfare, or there is an unanticipated event. So imminent peril that would be the obvious situation, there was one recently that BLNR held because of the potential rock fall over Niu Valley, and that was one where there was an imminent peril, and for that reason they needed to respond to the situation, take action to respond in less than six calendar days.

The unanticipated event possibility that you don't need peril to public health, safety and welfare, you just need something that the board needs to respond to in less than six calendar days, it couldn't have anticipated before. And this could include things like court deadlines, or an administratively set deadline, perhaps if you're in administrative process, it can also include legislative deadline. A board actually can use emergency meetings to deal with legislative issues that come up, there's a hearing in two days, and we need to decide what our testimony is going to be. It's not something that's used a lot in that way, it's probably just because it is a lot of hoops to jump through to have the meeting. But it would qualify. It would qualify for an unanticipated event.

I'm not going to run through all the hoops that you would have to jump through in order to hold an emergency meeting. When one of these situations comes up, feel free to give OIP a call, or your deputy AG or Corporation Counsel. The short rundown is that you need two-thirds concurrence of board members. How do you get that if you don't have a meeting scheduled because you need to hold an emergency meeting? In order to avoid interpreting the statute to create an impossibility, we interpret that to be the one situation where you can do it by phone, find out do you agree to hold an emergency meeting, yes we do. You also need to get the Attorney General's concurrence to hold an emergency meeting. And basically make an effort to get the word out to people on your list and the public as best you can within that short period of time. But again, it's something that doesn't come up that often. When it does please feel free to call OIP and we can help walk you through it.

We're now going to move to the final one of the Sunshine Law requirements that we are covering in this slideshow and that is the requirement that a board must provide written or recorded format minutes of every meeting and post them online.

The Sunshine Law gives the board the option of keeping either written minutes or minutes in a recorded format accompanied by a written summary. And either way those minutes have to be posted online within 40 calendar days. Now what does it meant to post it online? Where does the board actually post those minutes? They can be posted either at the board's website or on a general state or county website. This is something where the statute allows for some options. So in other words it is not a Sunshine Law requirement for each board to have it's own website because a county or state department could post these for its attached board or again it could be for a general state or county website. However, if the board does have its own website than that is an obvious place where it could be posting its minutes online. Please note that this is for public minutes when we're talking about the requirement to post them online within 40 calendar days. Executive meeting minutes which a board is still required to keep can however be withheld from the public. They're not certainly automatically required to be posted. And they can be withheld from the public for so long as their publication would defeat a lawful purpose of the meeting.

Let's start with the option to keep recorded minutes with a written summary. And by the way, when I say option I mean the board's option. The board gets to choose either recorded minutes for the written summary or written minutes. It's not something that a member of the public can require the board to choose written or vice versa. So, if your board has chosen to keep recorded minutes with a written summary, first of all you have to include a recording of the full meeting. That can be audio visual or just audio. It can be analog or digital. So in practice that means you might be using to record it anything from cassette tapes or micro cassettes or film or digital voice recorder or a cell phone camera or a digital camcorder. Remember however, you do have to post this recording online. So although the law allows you to make an analog recording, it's probably going to be easier if you just make a digital recording in the first place because otherwise you're going to have to convert that analog recording to digital form so you can post it online. Now as far as the written summary, that has to include first of all the date, time and place of the meeting. The members who are present or absent and when they arrived or left. For all motions or votes, you need to record the vote, for or against by member and remember as is the same with written minutes, if the vote is unanimous and the written summary already reflects who is present at the time, you can just say it was a unanimous vote in favor with no abstentions rather than listing all the members as voting "aye" because anybody reading the minutes would be able to tell from who is present and the fact that it was unanimous who voted in favor of it. The written summary also has to include a time stamp or other reference which indicates when in the recording the board began discussions of each agenda item and when each vote or motion was made by the board. Now there is software you can use to create this while taking notes in the meeting. One that I'm familiar with is OneNote which is part of the Microsoft Office package that the state agencies are generally using. And that one I know allows someone to readily add a time stamp or a link to a spot in an audio recording to their written notes. In other words they take written words in a meeting and then click a button to add a link to the simultaneous recording. And this is something that I know that the state ETS can train on. I don't know county by county who is using OneNote and who is using something

else. But you can certainly look at that or other options to make it easier. If you are in the position of trying to recreate this after the meeting, you've taken your written notes and don't have them specifically and previously linked to spots in a recording, probably someone is going to have to end up listening to the recording, fast forward as appropriate so they can note the time in the recording when each topic of discussion, motion or vote begins. So, having heard that you're probably wondering "Well what don't you have to include in the written summary?" How is this any better than keeping regular minutes? The big thing that is left out of the written summary requirement is the need to keep substance of all matters discussed or decided and the requirement to give a true reflection of what was discussed in the view of the participants. In other words the written summary that accompanies a recording does not have to transcribe or paraphrase all that discussion that took place during the meeting. So while it may take a little getting used to for boards taking this option to add that time stamp to index when each part of the discussion begins or when a vote or motion is taken, it does mean that a board doing recorded format minutes is not going to have to try to write up what everyone said, transcribe or paraphrase throughout the meeting which for a longer meeting cam be a useful thing.

So a board has to keep written minutes of its meetings, and those minutes need to be a true reflection of matters discussed at the meeting and the views of the participants. This applies to all meetings, by the way. It applies to executive sessions as well as public meetings. But the level of automatic disclosure is different, there's no automatic disclosure for executive session minutes. The level of detail is the same though.

So you need to the obvious things, like the date, time, and place of the meeting, which member were there, which members were absent. You need to include the substance of all matters proposed, discussed or decided, and the views of the participants. You need to record, by member the votes taken, and include any other information a member requests to be included. So, on the level of detail, a true reflection of matters discussed and views of participants' substance of matters proposed, discussed, or decided. This is going to mean something more than, topic was raised, discussion was had, so and so made a motion, others members seconded it, because that wouldn't show the views of the participants. So, when you're reflecting your discussion of your board members having during a meeting you do want, in order to show the views of the participants, you want to at least be able to tell if a board member spoke, you want those minutes to reflect that that board member spoke. It doesn't need to be a transcript, it doesn't need to be verbatim, but you should be able to say this member spoke on this issue and at least a little brief summary of what they've said. The member spoke against it and blah blah blah or the member spoke in favor because blah blah blah. You don't have to go on verbatim again, but we should at least be able to tell reviewing those minutes that this member spoke for or against general tenor of what they thought.

Now for testifiers you should also reflect that testifiers spoke. You don't need to go into as much detail on their views as you do from members, since the purpose of the minutes is really to reflect the boards' discussion and decision making process. So, for a testifier it's adequate at a minimum to say "so and so testified for or against." Again, better if you can have it very brief, but sometimes it's a little bit obscure with a testifier's reasoning. So, with a testifier, really the minimum there would just reflect that they testified for or against and on what subject.

I also wanted to talk about the requirements that you record by member who voted for or against what. I get the question sometimes, “Does this require that we do a roll call vote for every vote?” Well, it doesn’t require a roll call vote, but it does require that the vote be taken in a way such that you can tell who voted which way on it. So a vote by acclamation is not going to work unless it’s unanimous, if all in favor say “aye,”—“aye,” all not in favor say “nay,” nobody speaks, any extensions, nobody speaks, you have unanimous vote in favor. Well okay, vote for acclamation worked because you can tell that everyone present voted in favor. And in fact, even if the minutes just say it was unanimous and don’t list all the members that still works, because you’ve already said in the minutes which members were present. So you can tell from those minutes who you know was present and everyone there voted in favor. If you have a split vote, vote by acclamation doesn’t work because you can’t tell who was an “aye” and who was a “nay.” However, the split vote you can still vote by show of hands, that would allow you to note down who voted which way, and then of course a roll call vote would work as well for that.

That last requirement, other information that a member requests be included, we interpret to apply to requests that are made at the meeting. In other words, we believe this is meant to encapsulate the common parliamentary procedure saying please let the record reflect that blah blah blah, please let the minutes reflect that the Chair is staring out the window right now, or I have some prepared remarks, I’m going to read them right now, and I would like the minutes to reflect them verbatim. So we don’t interpret it to mean that a member can come back several months after a meeting and say, “I have a 20-page addendum that I want to insist be included in the meeting minutes.” I hope none of the boards, none of you listening have had that situation come up. Sadly, some boards are more dysfunctional than others and so we have had instances where we’ve heard similar requests being made. So again, to be clear, OIP interprets that requirement to apply to information that a member requests be included during the course of the meeting. Really, whoever it is taking notes for the minutes should by the end of the meeting have all the information that’s needed to prepare the minutes. Because there is a timed deadline by which the minutes have to be prepared and available to the public.

So now we’re going take some of these concepts that we’ve learned and we will apply them to a meeting of the Shrimp Board. The Shrimp Board, in case you don’t know it, is OIP’s entirely fictional board that we use to help out in training. It works out better that way. Then we don’t have to use any real boards for this. If you haven’t already you probably want to print out the two sample agendas that are available on OIP’s website, the Shrimp Board agendas. One of them is a one-page one, and that’s the one that’s labeled “bad agenda” that’s the “before” example, and the other one is a two-page one. The one-page one has 20 items and the two-page one has 17 items, the two-page one is the “after,” so as we go through this, we’re going to talk about that agenda.

The Shrimp Board is a five-member board chaired by Giovanni Brine, and the members are Goby Maguire, Tiger Shrimp, Prawn Travolta and S. Scampi, and we’re going to follow them chronologically through some things that they’re dealing with prior to and up to their seventh meeting of the year. So 20 days out, 20 days before this meeting the annual shrimp parade is going to be held prior to the meeting. So S. Scampi gave OIP a call to ask whether the board members could ride all together in the Shrimpmobile in the parade. They were going to ride in

the Shrimpmobile with the annual Opae queen. Now as long as they're not talking about issues, specific issues that are on their agenda or coming on their agenda in the foreseeable future, this isn't going to be board business. Since what they're really planning to do is make small talk with the Opae queen and wave at the people on the sidelines during the parade, it's not board business. So they can go ahead they can ride in the annual shrimp parade and it's not going to be a problem.

Then 13 or 14 days before the meeting we have an exchange of email. Fourteen days out, Goby Maguire emailed to the Chair, Joe Brine, to ask that the shortage of aquarium shrimp as an issue be placed on the agenda. But member Maguire also included an argument about why it's such a problem, why this needs to be on the agenda, and he also copied all the board members on that email. So then one of the other board members who was copied on it, Tiger Shrimp, responded to Goby Maguire with an email reply to all, arguing that there are plenty of aquarium shrimp out there, they're just hiding. Then the other members all replied also with their thoughts on this issue.

So the first thing that happened was a request to include something on the agenda, and you notice I have these little caution hands there, that's because the request includes something on an agenda by itself is usually not going to be a violation. For most boards it's the chair's prerogative to set the agenda, so if you are a board where it's the chair who sets the agenda then the simple decision is something on the agenda or is it not. It's not going to be board business, because it's not something the board decides, it's something the chair decides. So the simple request can you put aquarium shrimp shortage on the agenda for the next meeting isn't a discussion of board business. Again, it's something that's the chair's prerogative, so that request wouldn't have been a discussion of board business. So even the fact that it was copied to everybody on the board, if it was just limited to that request that would have been okay.

But the reason I have the caution hand is because it can be something to use caution with, because it can be easy to slide into a discussion of board business that does get into the actual underlying issue, which is what happened in the example. The initial email also included an argument about why the shortage of aquarium shrimp was a problem and that the board needs to deal with. So that second part then was a discussion of something that is a specific issue that they reasonably anticipated coming on the agenda, since he was asking to have it placed on the agenda. Emailing that portion to all the board members was a discussion of board business that didn't fall under a permitted interaction, so it would have been a violation.

Likewise, of course, the Tiger Shrimp reply to everyone, all the other board members furthered the discussion of board business. For board members it's useful to remember that "reply all" is really not your friend when you're on a Sunshine Law board. You sometimes have emails that are attaching factual material about an item, and that one also I have a caution hand up because it's another thing where it's just too easy to slide into another violation.

But another situation does comes up where board members say, "Well, I have this 50-page article on The National Aquarium Shrimp Market today that I think will be useful for the other board members to read before the meeting," and they're not going to have time during the meeting to read it, so how can I send it out to them so they can take a look at it. We have

actually a recommended procedure this isn't the only possible way you can do it without violating, it's not saying follow this or you're going to have a violation. This is more of a safe harbor. If you do it this way, you're going to avoid pitfalls, you're going to be safe. So our recommended procedure would be, if you have something like that 50-page study of Aquarium Shrimp in USA Today, have a process where it goes to one person, preferably staff, if you have staff, the Chair's secretary, all to one person who's going to collect all of these. Make sure that it's limited to purely factual material. Don't be including opinions, editorials, because it can be too obvious in a case of well this is my opinion here, this is what I think, it reflects my thought. But if you give one person, maybe the Chair's secretary, the factual information, news articles about an item, let that person compile it and give it to all board members at one time before the meeting. So you don't have a back and forth, because even with purely factual material, even with news article, you know essentially it's quite possible to conduct a pretty good argument with just news articles. My husband and I do this from time to time, I'll email something from Salon and he'll email something from the Drudge report. So we want to avoid that back-and-forth which could be considered a discussion.

So again if you want to provide these lengthy reports where board members can review them before a meeting, our recommended process is submit them all, not to all the board members, preferably one person who's a member of staff, let that person compile them, pass it out to all the board members at one time before the meeting so you don't have a back and forth, and that way they have a chance to look at it, and make sure you limit it to factual material. The one down at the bottom is about the communication about merits of an agenda item that's something where its discussion of something that's expected to be on the agenda, so that's not something that's allowed under the Sunshine Law.

Ten days out from the next meeting, one of the shrimp board's neighbor island members, F. Scampi is tired of having to fly into Honolulu for the monthly meeting and would like to know if she can just attend from calling in from home, so attend by phone. So the board checks in with OIP on that and learns that while either a telephone meeting, an audio meeting or a audio visual meeting is possible, it can't just be a board member calling in from home or wherever is convenient. If you want to do a multi-site meeting, connected by either audio or audio visual you need to notice all the public locations that board members are going to be attending from. Now as far as what kind of equipment is needed, these don't necessarily have to be audio visual conference rooms. There's no technical standard set in the law. You just need something that's going to be reasonable given the amount of people that you are expecting based on past attendance and the issues on the agenda and so forth. So if S. Scampi doesn't expect a lot of people to be showing up for this than the board could reserve a smaller meeting room and possibly just have a conference phone or a laptop with a speaker and a webcam even would do. In a pinch even perhaps a cell phone if you're really not expecting anybody or perhaps no more than one person to show up. But it does need to be a public meeting site. So if S. Scampi wants to call in from home, then S. Scampi's home is going to need to be listed on the notice as a meeting site the public can attend. The only exception would be if S. Scampi is permanently or temporarily disabled and as a result of that, it's impracticable for her to attend the meeting. But that's not the case here and in this case the board finds that they're a little late to be reserving the meeting room for this and S. Scampi doesn't in fact want to open up her home to the public so they decide that she'll fly in again for this month and next month they'll look at setting up

meeting rooms, either audio only or audio visual for their neighbor island members.

Eight days out from the meeting the Shrimp Board files the agenda at the Lt. Governor's site and if you look at the little agenda on your screen, this is the version 1, which is called bad agenda or something like that, this is the before. So seven days out, chair Brine calls with a question about something on the agenda, he sends OIP a copy, and after the conversation Chair Brine realizes that there are some problems with that agenda. But its seven days out, there's still time, so he cancels the meeting, sends a notice of cancellation on that first agenda, and the board goes ahead and does a revised version.

So now we're six days out from the meeting and the Shrimp Board files a new notice of meeting and an agenda with the agenda problems fixed. I'm not going to go into huge detail about this, OIP has its agenda guidance, which has some discussion on the differences between version 1 and version 2 and you can look over it to see, but in short what version 2 has done for the most items is simply increased the detail. So, for instance, the approval of meeting minutes, now we can see which meeting of April 1, 2005. The shrimp administrator's report in the first one didn't have any breakout, now we can see what it's going to be about—illegal prawn fighting, staff recruitment, projected shrimp economic activity in 2015, and we can also see that strategic planning has been included. If you look at version 1, the bad agenda, strategic planning was actually shown as an executive session, strategic planning with the shrimp administrator, but because there wasn't a purpose for holding that in executive session that one is now included in the shrimp administrator's report for the open meeting.

Similarly with the aquaculture license application, or the rule amendments or the purposed legislation, in the initial one they were kind of place holders. Aquaculture license, if any, now we have it as a category and then there's a listing of the specific applications they're considering; Prawn with the Wind Shrimp Pond, south Point; Opae in the Sky Hydroponic Farm, Mauna Loa, and so forth. And likewise for the rule amendments and proposed legislation, they were just headings without details before. Now they are headings with things under it, that way a member of the public can now know that's what the board is going to be talking about.

On the executive sessions there are some things that have moved to public session instead of being reflected as an executive session where it's not obvious what the purpose would be for holding them in executive session. Revocation of coconut-crusted shrimp pupu license for Pilau Bar & Grille, for instance, there is no obvious connection for one of the executive session purposes. Approval to retain special counsel in the Heinz Cocktail Sauce board's case, that one is anticipated that this is going to be a financial discussion. However, if the board ends up bringing up legal issues in connection with it, such as "explain to me why is this case so complicated, why is it you can't handle it," maybe it will turn out to be one on where they end up meeting, without anticipating it, to vote to go into executive session if it turns out there is advice from counsel that's going to be a part of it. But approval to retain special counsel, what the board is expecting this to be focused on where is the money coming from, do we want to spend the money, that one is noticed as at least for this purpose as a public session item.

There's one that stayed in executive session, the interview for the secretary/Fry Cook II candidate and you can notice the phrasing there where the subject comes first and then the

anticipated executive session and the purpose for the executive session come later. Gifts grants and contracts, again there is more detail added, it's broken out. Correspondence from Kahoolawe County Council, we have instead of just correspondence we can see who it's from and what the topic is about. The open forum that now has a caveat, and this is really more to warn the public if anything else, the open forum is one of those soapbox periods where people can talk about whatever, and this is just to make sure people don't come expecting their issue to be addressed right then and there by the board. Open forum doesn't give you information of what's going to be talked about obviously. This caveat is to let the public know those items will be considered for the next meeting, they're not going to be addressed right now.

Five days out from the meeting S. Scampi emails all the board members a news story about Vietnamese shrimp farmers and Prawn Travolta emails a reply, and it's a "reply all" with an editorial from Buy American Shrimp.org website opposing Vietnamese shrimp. And then Chair Brine emails the members his position statement, previously published position statement on the shrimp imports. Okay, this is an example of what we are trying to avoid when I mentioned our recommended process for if you want to provide factual material and give board members a chance to read it before the meeting. Our recommended process again is to have one person, preferably a staffer or the chair's secretary, be in charge of receiving this. Limit it to factual material. So the news story about the Vietnamese Shrimp Farmers would qualify. The editorial Buy American Shrimp.org would be an opinion statement, an editorial. The Chair Brine's position statement would be opinion, rather than factual material. So those wouldn't qualify.

But a news story, for instance, under this process could have been given to the chair's secretary to compile, and then whatever the member submitted would be distributed five days before the meeting. So four days out, based on this discussion, Chair Brine decides they need to consider it at the meeting. He wants to add board position on Vietnamese Shrimp to the agenda for the upcoming meeting. So he asks can he file an amended agenda with this included, and the answer is going to be "no." There is no such thing as an amended agenda under the Sunshine Law "Notice and Agenda" provision. They could potentially take a vote at the meeting, by that super duper majority, two-thirds of all the members to which the board is entitled. If this was a minor item, and it probably was a minor item, a state board's position on Vietnamese shrimp imports is probably going to qualify to be added, since the state board isn't going to have much impact on the issue in any case.

There's no such thing as filing an amended agenda. You file your agenda, if you still have time, more than six or more calendar days before the meeting, you could perhaps cancel the filed agenda and file a new one. But here it's only four days out, so it's less than the filing deadline. So he can't file an amended agenda. Now three days out, two of the board's members are carrying out an investigation; they've been set up as an investigative task force at the last meeting. The inventor of a shrimp catching slurp gun wants to do a confidential demonstration. It's still going to be patented, so she wants to keep it from her competitors, but she wants to show it to the board. And a private shrimp wholesaler wants to give the board some confidential information about its business structure without the public listening in. Neither of these would qualify as an executive session, but at the last meeting the Shrimp Board set up an investigation,

so Prawn Travolta and Tiger Shrimp have been spending half their day on day three snorkeling around with a slurp gun, and the other half of their day meeting with the shrimp wholesaler looking at figures. So they're going to report back at the meeting.

Two days before the meeting, two members, Shrimp and Maguire, ran into each other in the hallway of the Capitol and they started talking about the ongoing slime problems in the reflecting pool, and pretty soon that gets them back to their old argument of whether there is a shortage of aquarium shrimp and what if anything the Shrimp Board needs to do about it. They weren't saying you promised to vote my way or your way, so that was okay, that was fine, because that two-person permitted interaction allows two board members to talk about board business without limitations just as long as they don't make or seek a commitment to vote. So that's falls under a permitted interaction and was fine under the Sunshine Law.

One day before the meeting, Chair Brine called OIP with a question about testimony. The Shrimp Board gets a lot of public testimony, and sometimes they get anonymous testimony that's sent by email. They also sometimes get emails that are about agenda items that aren't necessarily anonymous but it has only been sent to one board member, and Chair Brine was wondering whether they have to treat this as testimony, and they would. Anonymous testimony, a board does need to accept anonymous testimony because it's any person, it doesn't matter who is testifying, so you can't require people to identify themselves.

In that situation where something is sent about an agenda item and is clearly about the agenda item, but it has only gone to one board member, that should be distributed to the other board members. It should be considered as testimony. You could try to prevent this situation from happening, by making it clear to the public how it is that you're supposed to submit testimony, because if you look at the agenda and there's nothing there saying "please send testimony to so and so" or "please submit testimony in such and such a way," you're probably going to get testimony in all sorts of ways, simply because people don't know. If you do make it clear that this is the way we want to take testimony then most people are going to try to send it that way because they want to be sure that their testimony gets considered. But in any event if you still have somebody emailing the Chair regarding agenda item seven blah, blah, blah, go ahead and distribute it to the others as testimony anyway.

Now the board also has problems with an individual who doesn't want to be identified. He looks a little bit strange, he wears a shrimp costume. So although he doesn't actually disrupt the meetings, the Shrimp Board would like to use signup sheets for people who testify in person, and only accept written testimony if the person is going to identify themselves, then include a name and an address. That is not going to be workable as a requirement. A board can use signup sheets, it can request people to sign up, but it can't require it. And again it's that any-person standard, it doesn't matter who the person is to attend a meeting. So you can't require them to sign up, identify themselves, and give a name and address. You can ask that, most people will be happy to sign in, but you can't ultimately require it.

So having learned that they cannot exclude the anonymous testimony, the Shrimp Board then had a new plan. We will have all the public testimony at one time and we are going to do it immediately before adjourning the meeting, so that board members can leave if they need to go somewhere else, if they have other appointments. The timing of testimony is in the board's control to a limited extent. Testimony does need to be taken on each agenda item before the board actually considers that agenda item. So generally, hearing all this public testimony right before the end of the meeting, after the items have been considered, doesn't work.

They could, however, hear all the public testimony at the beginning of the meeting. A board that does that, if you have time limits. If you have a time limit, say, of five minutes per item, and you have four agenda items, then a person might have as long as 20 minutes to testify on all four items, and I'm taking my full five minutes on each. So you're not going to cut down, you're not going to say, well we have a four-item agenda, or 20-item agenda, and you have five minutes to get through it all, but you can do it all at the beginning if you prefer to. Or you can call the testimony as it comes up before each item. Or you could do some sort of a hybrid, accept testimony on our four manini items first and take testimony, and then we're going to take all the testimony on item five, because we expect the testimony to be very controversial, and then you can consider it. Again, flexibility, a board has a lot of flexibility on the timing, except that it has to hear the testimony for an agenda item before it actually can consider it.

We get to the meeting itself, and at that open forum a lady showed up to complain. Remember, the board had an open forum for items not on the agenda. So a lady shows up to complain about the salt and pepper shrimp at the legendary Fat Fat Dragon restaurant. "You should shut them down" she says, and Chair Brine says the board will consider that issue on next meeting's agenda. But this is not good enough. The lady is getting mad. "Don't you care about this, don't you see how urgent, the public has to be protected from bad tasting salt and pepper shrimp." But the Board can't, even though she really wants to discuss now and she's not happy that they're not discussing it now, they can't simply start talking about it because it's not on the current agenda.

So their choice really is either don't discuss the substance of it, just say as Chair Brine did, the board will consider it for the next meeting's agenda, or possibly add it to the agenda on two-thirds vote of all board members, if it's not of reasonably major importance or affecting a significant number of people. I'm not going to go out on a limb here and say the importance of bad tasting salt and pepper shrimp for the Board's constituency.

So after the meeting, after all this infighting over the International Shrimp Trade war, the wrangle over the Shrimp Board's staff, the members of the Board decide to have a retreat before their next public meeting. They need to re-establish trust; they need to re-establish cooperation between the board members. So they're going to have a retreat at a resort hotel; they're going to do team building exercises; they're going to do that thing where you fall and somebody is supposed to catch you; and they're going to do various ice breakers, where they have to go around a circle and say an animal that starts with the letter of their names. And then they're

going to have a five-course shrimp themed meal, with wines matched by Chuck Furuya, and after all the wine then they're going to try and establish they're common ground on some of the more divisive issues that are before the board.

And they want to call this retreat an executive session. Of course the problem here is the part where they're not discussing shrimp issues, the part where they're eating the shrimp-themed meals and doing the trust exercise and so forth. That doesn't need to be a meeting at all, because they're not discussing board business. The part where they are discussing board business, this needs to be public. They don't have an executive session purpose for holding it out of the public eye. There's not an executive session purpose for, "these are contentious issues and we're going to be able to discuss them better if we don't have an audience." It may be true, but there's not an executive purpose for that.

So the parts where they're not talking about shrimp issues, don't have to have a meeting at all. The parts where they are, have to be public. So it's not going to work as planned. They could do it without the actual discussion of shrimp related issues, however.

And that brings us to the end of our training on the Sunshine Law. Thank you very much for your time and your interest in the Sunshine Law. I just want to point out that we have a website, if you're not already on it at oip.hawaii.gov. We have copies of the laws we administer, the Sunshine Law and the UIPA. Our website also has our rules under the UIPA; our opinions on both the Sunshine Law and the UIPA laws; forms, guidance, training materials for agencies, boards, agencies and the general public; and other useful material. And we do have our attorney of the day (AOD) service. Every day one of the staff attorneys is assigned as attorney of the day to answer general questions and provide quick guidance, and you can reach the AOD by phone at 808-586-1400 or by email at oip@hawaii.gov. And our website again is oip.hawaii.gov. Thank you again for your interest in the Sunshine Law.