

OIP Sunshine Law Basic Training Video Transcript, Part 2 (revised Nov. 2021) (1 hour, 15 minutes total) (time stamps are approximate)

Please note: This transcript tracks the closed captioned Sunshine Law Basic Training Video Part 2 and refers to the slides contained in the “all slides” handout for Part 2, which are accessed via the link to the “Basic Sunshine Law Training Video and Materials” found on OIP’s Training page at oip.hawaii.gov. Although the video is closed captioned, this transcript may be helpful to people who prefer to read the training or keep this in lieu of taking their own notes.

Slide 1: The Sunshine Law Part 2 (0:00:01)

This is part two of our Sunshine Law slideshow, continuing directly from where we left off at the end of Part 1.

Slide 2: Sunshine Law requires: (0:00:10)

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

Slide 3: Minutes (0:00:30)

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 mean to post them online? Where actually does the board post those minutes? They can be posted either at the board's own 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 its own website, because a county or State department could post these for its attached boards, for example. Or again, it could be a general State or county website.

However, if the board does have its own website then 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 required to be automatically posted, and they can be withheld from the public for so long as their publication would defeat a lawful purpose of the meeting.

Slide 4: Recorded Minutes (0:01:57)

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 with written summary or written minutes. It's not something that a member of the public can require the board to, you know, if they choose recorded, require them 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 audiovisual or just audio. It can be analog or digital, so in practice that means you might be using to record it, anything from cassette tape or microcassettes or film. Anything from that to 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 that 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 thing with written minutes, if the vote is unanimous and the written summary already reflects who is present at the time, you can just say that 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 was present and the fact that it was unanimous who voted in favor of it.

(0:04:00)

The written summary also has to include a timestamp or other reference which indicates when in the recording the board began discussion of each agenda item, and when each vote or motion was made by the board. Now there is software that you can use to create this while taking notes at the meeting. One that I'm familiar with is One Note, 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 timestamp or a link to a spot in an audio recording to their written notes. In other words, be taking written notes during the 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. Counties, you know, I don't know county by county who is using One Note and who is using something else. But you know, you can certainly look at that or other options to make it easier.

(0:05:00)

If you are in the position of trying to recreate this after the meeting -- you've taken written notes, you don't have them specifically and previously linked to spots in a recording. Probably somebody is going to end up having to listen to the recording. Fast forwarding is appropriate so that they can note the time in the recording when each topic of discussion motion or vote begins.

So having heard that, you know you're probably wondering, well, what don't you have to include in the written summary? How is this any better than keeping regular written minutes? Well, the big thing that is actually left out of the written summary requirement is the need that you have in the written regular written minutes, the need to keep the substance of all matters discussed or decided, and the requirement to give a true reflection of what was discussed in the views of the participants.

In other words, the written summary that accompanies a recording does not have to transcribe or paraphrase all the discussion that took place during the meeting. So you know, while it may take a little getting used to for boards taking this option to add that timestamp 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 can be a useful thing.

Slide 5: Written Minutes (0:06:33)

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. It's not, there's no automatic disclosure for executive session minutes. The level of detail is the same though. So, you need to have the obvious things like the date, time and place of the meeting, which members 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 that a member requests be included.

So, on the level of detail of 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, which other members seconded because that wouldn't show the views of the participants.

So, when you're reflecting the discussion that your board members are having during a meeting, you do want to, in order to show the views of the participants, you do 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 said. You know the members spoke against it because blah blah blah blah or the member spoke in favor because blah 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, [and the] general tenor of what they thought.

Now for testifiers, you should also reflect that testifiers spoke, but you don't have to go into as much detail on their views as you do for members, since the purpose of the minutes is really to reflect the board's 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 a very brief, um, because of blah blah blah, but sometimes it's a little bit obscure to tell what a person's reasoning would be. So, with the testifier really, the minimum there would be just reflect that they testified for or against, and on what subject.

I also wanted to talk about the requirement 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 in favor, say nay, nobody speaks; any abstentions, nobody speaks. You have unanimous vote in favor. Well, OK, vote for acclamation works 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 elsewhere in the minutes you've already said which members were present so you can tell from those minutes who was there and you know everyone there voted in favor. If you have a split vote, vote by acclamation doesn't work, because then you can't typically tell who was an aye and who was a nay. However, if you have a split vote, you can still vote by show of hands. That would allow you to note down whoever is taking notes for the minutes, can 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 that this is meant to encapsulate the common parliamentary procedure of saying, please let the record reflect that blah blah blah blah. Please let the minutes reflect that the chair is staring out the window right now. Please let the minutes, or I have some prepared remarks that I would, I'm going to read them now and I would like the minutes to reflect them verbatim, as something like that.

So we don't interpret it to mean that a member can come back several months after a meeting and say yes, I have a 20 page addendum that I want to insist be included in the meeting minutes. I hope none of the board, 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 of 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, and 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 time deadline by which the minutes have to be prepared and available to the public.

Slide 6: Remote Meetings (0:12:15)

Before we finish up with our discussion of the Sunshine Laws requirements, we're going to move away from those five main requirements applicable to every meeting that we've been going through, and instead go over some specific types of meetings that differ from what we might think of as the standard type of meeting, the traditional everyone in one place meeting. And they might differ, either because of how and where these meetings are held, or there may be differences from the usual notice and public access requirements for special circumstances.

We're going to start with remote meetings, which are a type of meeting where instead of having the board and the public all together in person at one physical location, the way it was in the 1970s when the Sunshine Law was first passed. In this case, the meeting is actually held over the Internet, and the board and the members of the public can be logged in to participate in it from their homes, their offices, other private locations. They're not required to show up at any particular public location, and they're not required to invite other people to wherever it is that they're attending if it's a private location.

Slide 6: Remote Meetings (Platform; Location) (0:13:37)

Now the platform that is used for holding these meetings is not stated in the statute itself, but it does have to allow audio-visual interaction between members and the public. So you can see each other, you can hear each other as a general rule.

And as I mentioned, the members as well as the public can access the meeting from anywhere. This would be via the Internet for the most part. In some cases it could be via phone and we'll go through that.

And the board does need to offer at least one physical public meeting location. So even though no one is required to be at that location in particular, the board does need to accommodate those people who could be board members, could be members of the public, who don't feel comfortable or feel the inclination to set up their own connection to the online meeting because not everyone has that ability. And so those who would rather just go someplace where the meeting will be, can go to this public meeting location, which itself is going to be connected to the online meeting. And they can watch the meeting from there, they can give testimony or otherwise participate from there.

The board is also required to record the meeting, but only "when practicable." This recognizes that for most of the online meeting platforms that are out there, recording a meeting is pretty straightforward. It's often just a case of pressing a button and acknowledging, "Yes I recognize this meeting is being recorded." So the law then requires the board to do so when practicable, and to put that recording on its website--again when practicable--until such time as the meeting minutes are posted. So that means that somebody in the public who missed the meeting but still would like to watch it, has the ability to do so. They don't have to wait until it could be over a month when the meeting minutes themselves go online.

Slide 7: Remote Meetings: Notice (0:15:58)

When a board files its notice of a remote meeting, it has a few additional elements that it needs to include beyond the ones that we've discussed previously that apply to every meeting.

For one thing, the notice has to give the link that the public and the members can use to join the remote meeting. And if applicable, the notice also has to give the link or phone number that people will use to testify. So probably in most cases a board is just going to list the one link, which is what everyone is going to use to join the meeting, watch the meeting and give testimony at the meeting.

But in some cases, the board may want to separate those functions out. A board that has a lot of testimony expected and possibly disruptive testimony, depending on the controversial nature of what it's discussing, a board in that situation might want to have a little bit more control in the event of disruption occurring in the course of the testimony, or at other points in the meeting, as compared to a board holding a meeting where they're not really expecting much public interest. So in that event, the board does have the option of having two feeds: one that's going to be a view-only feed where the public can view the meeting, and a separate feed for the public's right to participate in the meeting to testify.

The notice also has to list that one physical location that, as discussed earlier, the board is required to provide for members of the public as well as members of the board or others who might want to actually go somewhere in person where someone else, namely the board, has already set up the connection to the meeting.

The board also has the option of listing additional locations. And those would also be public physical locations open to the public. The difference between those and the required physical location is that the additional locations do not have to be guaranteed to stay connected to the meeting.

We're going to discuss, little bit later, the requirement that these various elements of our remote meeting, including the main meeting hosting platform and the connection to the physical location, that these do have to stay connected, and if the connection is lost, they have to go through various steps to try and reinstate it, and they can't just continue the meeting with one of those elements missing. But for additional locations, that's not the case. So as long as the notice makes this clear, a board could provide additional locations as a courtesy because it can provide more locations that way, while still not having to guarantee that the meeting will not go on without that location in the event the location loses its connection.

In other words, this is a way for the board to accommodate more people by providing more physical locations without having to increase its risk of having to cancel the whole meeting due to technical problems.

Slide 8: Remote Meetings: Quorum (0:19:22)

As I mentioned before, the meeting platform does have to allow for audio-visual interaction between members and the public, but that doesn't mean that everyone participating has to be visible at all times. And in fact, the law requires that a quorum of members generally must be visible. The law doesn't actually specifically require nonmembers to be visible at all, so members of the public are free to be invisible, because it's only a quorum of members that are required to be visible.

This does mean that if a board has members who have trouble connecting to an online meeting-- maybe they don't have good Internet service; maybe they're not comfortable with the technology. If they have difficulty connecting and they can manage to call in, they still have that option as long as there are enough other members that are going to be visible that they have a quorum visible.

So again, boards with members that have difficulty connecting to remote meetings, they have two options. One of course is that those members can go to the public meeting location the board is required to provide as we've discussed, and the other option is that as long as the board has at least a quorum of members who are visible, it can have the additional members call in by phone or with their video off. Or you know something like that where they are connected by audio but are not actually visible.

Now for both members that can and cannot be seen, the chair of the board is required to announce who's present at the meeting and the board is required to take its votes by roll call vote

unless the vote is unanimous. So that allows for the practice that many boards may have of calling for the vote and calling first to see if there are any objections or abstentions. And if none, then it's unanimous, so you don't actually in that situation have to run through the members. But if the vote is anything other than unanimous, the board does need to call the roll so that it can accurately record and the public watching can accurately understand who voted which way.

Now, in an executive meeting, and again, that is a meeting that is closed to the public, the audible only connection is going to be allowed if the board is holding an executive session so you don't have the public viewing in that case. But during an executive meeting, the board chair or the person who is presiding over the hosting platform does need to confirm that there is no unauthorized person that is connected to the meeting, which is something that a lot of these platforms do allow the person who's hosting to do, to look and see who the connected participants are.

Slide 9: Remote Meeting: Dropped Connection (0:22:48)

I referred earlier to the board being obligated to keep the connection up between the elements of a remote meeting and if it loses the connection, to take steps to restore it. We're going to spend some time now going through that idea in more detail. Specifically, what is it that the board has to keep connected to have the remote meeting and what is the board supposed to do if that connection drops?

If there is a dropped connection, the board first of all has to recess immediately when the connection is gone. It has to recess to try to restore the connection and this applies to the connection to the hosting platform itself. If your hosting platform goes down, that of course is a problem. If there is a separate public broadcast, if the board is doing the thing of having the hosting platform for the board members and then having a separate public feed and a separate public call in number or space for people to provide testimony, then all of those elements do need to stay connected.

During the COVID pandemic, you may recall there was an incident in the news, earlier on in the pandemic where a board was having a meeting and it had a separate one-way feed for the public to watch that I believe was on YouTube. Well, the YouTube feed for the public apparently went down and the board kept meeting because they didn't realize it because they were all on the hosting platform. Now since that was during the pandemic and it was under emergency orders, the Sunshine Law proper wasn't in effect there.

But be aware that if something like that were to happen in a remote meeting held under the Sunshine Law proper, now that the Sunshine Law proper allows for remote meetings, that would be a violation. Because, again, the public broadcast, if it's separate, does also need to remain connected to the meeting.

As I mentioned before, you do have to have a quorum of members visible. So if the lost connection is on the part of an individual board member, say, who disappears from the meeting, if that breaks quorum, then that's going to require restoring the connection.

If it doesn't break quorum, if you still have a quorum of members visible, the board is not actually required to recess to get that board member back online, although of course it also could choose to do so if it wished.

The board needs to keep that connection going to the physical site that it is required to provide for members in the public.

We discussed earlier also that the board could provide additional sites that are not guaranteed to remain connected. So consistent with that, if the board's notice listed not just the required physical site open to the public, but also listed additional sites. And if the notice also made clear that these additional sites were not guaranteed to remain connected, that in the event of a connection problem it was possible the meeting would go on without those sites. In that case, if the connection is dropped to one of those sites, the board would in fact not be required to recess to try to restore the connection to that site. It could continue with the meeting while it attempted the restoration.

Slide 10: Remote Meetings: Restore Connection (0:26:30)

When a board has to recess its meeting to try to restore the connection, it has a 30-minute time limit to get that connection restored. Now, if it's unable to restore the audio-video connection, but it is able to restore an audio connection, it can actually continue with just that audio connection, so it can continue as an audio-only remote meeting. But there are certain conditions, including that speakers have to announce who they are before they speak, and if there are visual aids, those need to be available to all participants in the meeting. And if they can't be made available in that way, the board can't act on anything involving those video aids at that meeting.

The board does need to notify the public how to rejoin a meeting that has been recessed in is restarting, or if it's going to continue the meeting to a later time in place, how that meeting is going to be continued. And OIP's tip would be to do this in the meeting notice itself. If you say in the meeting notice, if the meeting has a connection problem, first try the link given and if that's not working, try this alternate link. That might be one way to notify people how to rejoin. The meeting notice could also say something like if we lose connection at the meeting, the meeting will be continued the next day at the same time using this other link. Something like that. Ultimately, if it's been 30 minutes, the board hasn't been able to restore at least that audio connection, and the board hasn't already given the public notice as to how the meeting is going to be continued, at that point the board does just have to terminate the meeting.

Slide 11: Multi-site Meetings (Locations) (0:28:27)

We're going to move on to multisite meetings. And unlike a remote meeting, which is a meeting that's being held over the Internet and you have members in the public attending from all over the place, often in private locations, a multisite meeting is a regular in-person meeting, but it is one that is being held across multiple public meeting sites rather than in one single location as with the traditional in person meeting. Now please bear in mind that a multi-site meeting is not a primary meeting site plus satellite locations as far as the law is concerned. Every official meeting site is considered equal in terms of the legal requirements. And there's no minimum technical standard for how to connect these meeting sites. This is in a way similar to the question that sometimes comes up of what size meeting room a board has to use.

For both of them, it's not something that the statute itself defines, so it's a question of what is reasonable given that it's supposed to be open to the public. You want to use something that's going to be adequate to allow the expected number of attendees at all locations to follow the meeting from wherever it is that they're attending. So, if you're talking about having a major board expecting a large crowd at each of these sites, then in that case you probably do want to be looking at some sort of a video, conference room or dedicated facility. But in another case where one of the sites is going to be fairly light in expected attendance, you know, it might actually work to do just a speakerphone, or even something like a cell phone speakerphone. Again, it's a question of being able to accommodate the expected attendance at each of these meeting sites.

(00:30:40)

Now the law requires audio interaction at all of these public meeting locations. So notice that's a difference from the remote meetings. If it's a multi-site meeting where each of these sites is already a public meeting location and you don't have people necessarily attending, certainly not members generally attending from private locations. In that case, the law is written to allow for just audio interaction, although obviously audio-video interaction is good too.

The notice has to list every location where nondisabled board members will be, because again this is an in-person meeting being held across multiple meeting sites. So for a multi-site meeting board members do not generally have the option of attending from home or other private locations. It is a little different if they are disabled members. The law has a special provision for that.

The notice can also list "additional" meeting locations and it's the same idea as with the "additional locations" we talked about in the remote meetings, but it's a little bit different in that for these additional locations you can't have board members attend from there because they are not the official public meeting locations. But like the additional locations discussed in the remote meetings, you can lose the connection between an additional location and the rest of the meeting and still continue the meeting. So an additional meeting for both multi-site meetings and remote meetings, an additional location is a location that's being provided as a courtesy because the board is trying to increase access by offering more sites, but the board is not guaranteeing that these additional locations will stay connected to the meeting and if the connection is lost, the meeting won't continue without them. The board is not making that guarantee for an additional location.

Now the public can attend at any of these listed locations. The public can of course attend at the official meeting sites, but the public can also attend at these additional locations.

Slide 12: Multi-site Meetings: Restore Connection (0:33:07)

As with the remote meetings, if you lose your connection between the sites at a multi-site meeting, the board has to recess the meeting to restore that connection. Because multi-site meetings require only an audio interaction, that means that if you had an audio-video interaction, you lose a video, but you still have the audio you're not required to recess. But if you can't maintain at least that audio connection between all the meeting sites--and that's all the official

locations, not including the additional locations--then you do need to recess to try to restore that connection.

And also, as with remote meetings, the board has 30 minutes to restore the connection. If it's unable to restore the connection, then the meeting has to terminate. However, it can continue at another time if the board gave notice of that prospect and when it would be continued so. Also, as with remote meetings, we would recommend that boards provide for this in their notice, if it's a concern. Something like, if the connection is lost and cannot be restored, the meeting will continue the next day or two days later, at the same locations at such and such a time.

Slide 13: Limited Meetings (34:30)

The next type of special meeting we're going to talk about is a limited meeting. And this is a meeting that is not necessarily closed to the public, but it can't be made accessible to the public in the same way as a regular public meeting and that's because of where it's being held. It's being held at a dangerous location, or it's being held at a location that's not necessarily dangerous, but for one reason or another, public attendance is impracticable. So I emphasize again that this is not something like an executive session where it's being closed to the public to discuss confidential information. This is something where the board cannot guarantee the same level of public access that would normally be required for a public meeting, and therefore it's able to hold this limited meeting. But it's actually supposed to take steps to give the public what access it can. And we will discuss those.

So what is a dangerous location? A dangerous location, the classic example would be Kahoolawe because that was the origin of this statute. A board that wanted to tour Kahoolawe and couldn't because it really couldn't invite the public and thus this was put into place to allow for going to locations where the board doesn't want to invite the public because of the dangers of the location. But the board is not actually trying to hold an executive session closed to the public. It's just that they can't invite the public for that reason.

Similarly, public attendance being impracticable could be something that's a little hazardous to the public, like a board is touring undeveloped land and the land owner wants people to sign a waiver. And of course you can't normally ask people to sign a liability waiver to attend a public meeting. And the board might in fact be concerned. Maybe the land owner doesn't want the public on the land at all due to the undeveloped nature. It could be something that's difficult to get to. One of the boards that has reason to be looking at a hiking trail is going to a spot half a mile up the trail or a board is going along the coast to a number of historic locations. It could be something like the board is going behind security at the airport, and of course you can't normally ask people to show ID and go through security to attend a public meeting.

Now I do want to point out that the board needs to be holding the meeting in this dangerous or impracticable location for a reason. It can't just be something like, well, they had a good meeting room. It has to be something where the board needs to go to this location in pursuit of its duties.

So to hold a limited meeting aboard needs first of all to get OIP's concurrence that the limited meeting is necessary. The board needs to have a 2/3 vote of its membership in favor of holding the limited meeting and it needs to have set out the reasons why the limited meeting is necessary.

The board is required to videotape a limited meeting. Again, these are supposed to be as accessible to the public as the board can make them. It's just that it's not practicable to open them fully in the way the board normally would. So the video is meant to be the way that the public can see what was going on at the meeting. Now the law does allow the board to request a waiver of the video requirement that would be done in the course of seeking OIP's concurrence. The board can request that waiver.

OIP will grant the waiver when there is a good reason for it and that could be something like danger to the person filming. For instance, if you are on that hiking trail, we don't expect the person holding the camera to be holding onto the cliff edge with one hand and filming with the other. It could be that they're all in their separate cars going along the coast, and so they're not going to be able to readily film because they're all in separate cars while they're traveling, although in that case they shouldn't be talking about board business while they're traveling either. It could also be something like they are filming the interior of someone's home, someone's private residence and there is a privacy concern. In a case like that, OIP might waive the video, but stipulate that there needs to be an audio recording so that the public can still get the board's discussion there.

But generally speaking, if it's going to be dangerous, yes, we might be willing to give a partial waiver, but we're usually not going to give a full waiver. It would be a case of, turn that camera back on when you're stopped and looking at the site and discussing. But no, we're not going to require you to risk a fall because you're focused on your filming instead of looking where you're walking.

Having recorded this video, the board is then required to show it at the next public meeting of the board. And the board can't make decisions at this meeting. It can discuss what it's looking at. That is the purpose of this. The fact that the board needs to go and look at this site in pursuit of some board business it's trying to do. But the board shouldn't be making decisions at the limited meeting.

And in terms of the idea that this is not necessarily closed to the public, I do want to note that there may be situations--probably not when it's a dangerous location, but where it's an impracticable location--there may be situations where the board can accommodate some members of the public. Like on that hiking trail, the board may say if you're there in time to join us as we set off, you are welcome to join us. Obviously that's going to exclude some people. There are people who are not physically able to go up that hiking trail with the board. But for those who are able to, the board could welcome them. You might have a situation where the board is going to do a field trip to Coconut Island and they've arranged for boats and they have some extra seats beyond what they need for board members and staff. And they're going to offer those to the public. In a situation like that, the board should be careful to do it on a first come first serve basis so it should be equitable. It shouldn't be a case of, well, we've saved some of these for our friends. It should be a case of we have 10 slots available. If you are one of the first ten people that shows up to claim them, you are welcome to have a seat in the boat and join us on this limited meeting.

(Guest Meetings for County Councils) (0:42:05)

Now there is one specialized type of limited meeting that's a little bit different. It applies to county councils specifically. It's the guest meeting form of limited meeting. And this is where a county council can notice a special type of limited meeting to attend an event set up by some other group to which they've invited the council, and this would be getting at things like perhaps candidate forums or open meetings on some community issue where the council members have been invited, they want to be able to go and participate and talk to people. They're not in control, so they're not able to create an agenda and thus they are not required to file an agenda. But there are a number of other limitations on this type of meeting in order to make sure the public interest is served. I'm not going to go into more detail because that one is seldom used, but if you are a county council and would like to hold one of these, please contact OIP if you would like further assistance.

Slide 14: Emergency Meetings (0:43:10)

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 rock, potential rockfall 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, or welfare. You just need something that the board needs to respond to in less than six calendar days that it couldn't have anticipated before. And this could include things like court deadlines or administratively set deadlines. Perhaps if you're in administrative process, contested case process.

It can also include legislative deadlines. So, a board actually can use emergency meetings to deal with legislative issues that come up. There is a hearing in two days and we need to decide what our testimony is going to be. It's not something I think that gets used a lot in that way. It's probably just because it's, it is, kind of a lot of hoops to jump through to have the meeting, but it would qualify, that would qualify as an unanticipated event.

I'm not going to run through all of the hoops that you need to jump through 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.

But the short run down is that you need 2/3 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? Well, 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 that we need an emergency meeting? Yes, we do. And you need to get Ag, Attorney General, 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.

Slide 15: A Meeting in the Life of the Shrimp Board (0:46:05)

So now we're going to 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're not familiar with it, is OIP's entirely fictional board that we use to help out in training. It works out better that way than if we were to try to use the real boards for this. So if you haven't already, you probably want to print out the two sample agendas that are available on OIP's websites.

These shrimp board agendas, one of them is a one page one and that's the one I think it's labeled something like bad agenda. That's the before for example, and the other one is a two page one. The one page one, I think it's 20 items. The two page one has, I think, 17 items. The two-page one is the "after." So as we go through this we are going to talk a bit about that agenda.

Slide 16: Meet the Shrimp Board (0:47:05)

The Shrimp Board is a 5-member board chaired by Giovanni Brine and 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 leading up to their seventh meeting of the [year].

Slide 17: 20 days out (0:47:29)

So 20 days out, 20 days before this meeting, the annual shrimp parade is coming up, it's 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 shrimp mobile in the parade. They were going to ride in the shrimp mobile 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. And 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.

Slide 18: 13-14 days out: E-mail (0:48:17)

Then 13 or 14 days before the meeting, we have an exchange of emails. 14 days out Goby Maguire emailed to the Chair Gio Brine to ask that the shortage of aquarium shrimp be 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. And 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. And then the other members all replied all also with their thoughts on this issue.

So let's unpack this a little bit. The first thing that happened was a request to include something on the agenda, and you notice I have the little caution hand there. That's because the request to include 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're on a board where it's the chair who sets the agenda then, the simple decision--is something on the agenda or is it not--is 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. Because again, it's something that's purely 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 OK.

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

And likewise, of course the Tiger Shrimp's reply to everyone. All the other board members jumping in. This all furthered the discussion of board business. And so for board members, you know, it's useful to remember that "reply all" is really not your friend when you're on a Sunshine Law board. .

Now, 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 a violation. But I know the situation does come up where board members say, well, you know I have this 50-page article on the aquarium shrimp market, the National Aquarium Shrimp Market Today, that would be useful for the other board members to read before the meeting, and they're not going to want to sit down and read it all during the meeting. So how can I send it out to them so they can take a look at it?

We actually have a recommended procedure. This isn't the only possible way you can do it without violating. It's not something where we're saying follow this or you're going to be in violation. This is more intended as 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 the US Today, we have a process where it goes to one person, preferably a staffer. If you have staff, perhaps the chair's secretary. All to one person who's going to collect all of these it.

Make sure that it's limited to purely factual material. Don't be including opinions, editorials because it can be, that is a little bit too obvious--a case of well, this is actually my opinion here, that this is what I think, this reflects my thoughts. But if you give one person, maybe the chair's secretary the factual information, news articles or white papers, that sort of thing about an item, and let that person compile it and then give it to all the board members at one time before the meeting so that you don't have a back and forth.

Because even with purely factual material, and even with news articles you know it's actually quite possible to conduct a pretty good argument with just news articles. My husband and I do this from time to time. You know, 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, could be considered a discussion. So again, if you want to provide these lengthy factual things so board members can read them before a meeting are recommended, our recommended process is: Submit them all not to the other board members, preferably to 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 the chance to look at this and limit it to factual material.

And then the thumbs down at the bottom is the communication about the merits of the agenda item of. That's something where it's discussion. Discussion of something that's expected to be on the agenda, so that's not something that's allowed under the Sunshine Law.

Slide 19: 10 Days Out: Teleconference meeting? (0:54:21)

Ten days out from the next meeting, one of the Shrimp Board's Neighbor Island members, S. Scampi, is tired of having to fly into Honolulu for the monthly meeting and would like to know if she can just attend by 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 in audio meeting or a audiovisual meeting is possible, it can't just be a member of board members calling in from home or wherever is convenient. If you want to do a multi-site meeting connected either by audio or audiovisual, you need to notice all the public locations where 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. You just need something that's going to be; there's no technical standards set in the law. You just need something that's going to be reasonable given the amount of people that you're 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, then you know the board could reserve a smaller meeting room and possibly have just a conference phone or something like that. Or you know something like a laptop with a speaker and a webcam even would do. In a pinch perhaps even 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 from.

The only exception would be if S. Scampi is permanently or temporarily disabled and as a result of that, it's impractical 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 a meeting room for this, and Scampi doesn't in fact want to open up her home to the public. So they decided that she will fly in again for this month and next month they'll look at setting up meeting rooms, either audio only or audio-visual for all their neighbor island members.

Slide 20: 8 days out: Agenda (0:56:48)

Eight days out from the meeting now the Shrimp Board files its agenda at the Lieutenant Governor's site and if you look at the little agenda on your screen, this is the one that's the version one or I think it's called bad agenda or something like that. This is the "before."

Slide 21: 7 days out: Agenda ok? (0:57:07)

So then seven days out, chair Brine calls OIP with a question about something on the agenda, sends OIP a copy. And after the conversation, Chair Brine realizes that there are some problems with that agenda, but it's seven days out. There's still time, so he cancels the meeting and sends a notice of cancellation on that first agenda and the board goes ahead and does a revised version.

Slide 22: 6 days out: New Agenda (0:57:32)

So now we're six days out from the meeting and the Shrimp Board files a new notice of meeting and 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 of the differences between version one and version two, and you can look over it to see. But in short, what version two has done for the most items, is simply increase the detail. So for instance, the approval of meeting minutes. Now we can see of which meeting--meeting of April 1st, 2005--is the Minutes being approved. Shrimp Administrators Report, which in the first one didn't have any breakouts, 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 one, 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 applications or the rule amendments or the proposed legislation, those in the initial one were just kind of placeholders. Aquaculture license applications, if any. Now we have it as a category, and then there's a listing of this specific applications they're considering: Prawn with the Wind Shrimp Pond, South Point; `Opae in the Sky Hydroponic Farm, Maunaloa; and so forth. And likewise, for the rule amendments and proposed legislation. They were just headings without details before; now they're headings that has things under it so that a member of the public can look and see, "Oh, 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 an executive session. Revocation of coconut-crust shrimp pupu license for Pilau Bar and Grill, for instance, there's no obvious connection to one of the executive session purposes.

Approval to retain special counsel in the Heinz Cocktail Sauce v. Board case. That's one where it's anticipated that that is going to be a financial discussion. However, if it turns out that the board ends up bringing up legal issues in connection with it, you know, well explain to me why this case is so complicated? Why is it that you can't handle it? Maybe it'll turn out to be one

where they end up needing to, without anticipating it, vote at the meeting to go into executive session if it turns out that there's advice from counsel, that's going to be a part of it. But approval to retain special counsel, since what the board is expecting is that this is mostly going to be focused on where is the money coming from. Do we want to spend the money? That one is noticed at least for this purpose as a public session item.

There is something that stayed in executive session. The interview for the Secretary/Fry Cook II candidates. 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 comes later.

Gifts, grants and contracts. Again, it's more detail added, broken out.

Correspondence from Kahoolawe County Council. We have instead of just correspondence, we now can see who it's from and what the topic is.

And the open forum that now has a caveat, and this is really more to warn the public than 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 that their issue is going to be addressed right then and there by the board. Because the board is not going to be; the open forum doesn't give you information about what's going to be talked about, obviously. So this caveat is to let the public know these items will be considered for the next meeting. They're not going to be addressed right now as soon as they are brought up.

Slide 23: 5 days out: News Stories (1:02:13)

Five days out from the meeting up, S. Scampi emails all the board members a news story about Vietnamese shrimp farmers. And then Prawn Travolta emails or replies with a reply to all with an editorial from buyamericanshrimp.org website opposing Vietnamese shrimp. And then Chair Brine emails the members his position statement, previously published position statement, on the shrimp imports. OK, 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 was to have one person, preferably a staffer, perhaps the chair's secretary, be in charge of receiving this, limited to factual materials.

So the news story about Vietnamese shrimp farmers would qualify. The editorial from by American shrimp.org would be an opinion statement, an editorial. Chair Brine's position statement would likewise 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 or to the Executive Director to compile, and then whatever the members submitted goes into the board packet, which is distributed 5 days before the meeting, let's say, all at once.

Slide 24: 4 days out (1:03:42)

So then 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 amended agenda for the upcoming meeting and so he asks, can he file an amended agenda with this included. And the answer is going to be no, you can't. There's no such thing as an amended agenda under the

Sunshine Law's notice and agenda provision. He could potentially take a vote at the meeting by that super duper majority, 2/3 of all members to which the board is entitled.

If this was a minor item, and it probably was a minor item, the 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. But there there's no such thing as filing an amended agenda. You file your agenda. If you still have time more than six calendar days or 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.

Slide 25: 3 days out: Investigation (1:04:56)

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 doesn't want her competitors to see it, but she wants to show the board. And a privately held shrimp wholesaler wants to give the board some confidential information about its business structure without the public listening in. Neither of these would qualify for an executive session, but at the last meeting that shrimp board set up an investigation so Prawn Travolta and Tiger Shrimp have been spending half their days on day 3, T minus three, snorkeling around with the slurp gun and the other half they're meeting with the shrimp wholesaler looking at the figures, so they're going to report back at the meeting.

Slide 26: 2 days out (1:05:50)

Two days before the meeting, members Shrimp and Maguire ran into each other at the hallway at the Capitol. And they start talking about the ongoing slime problems in the reflecting pool. And pretty soon that gets them back to their old argument over whether or not there is a shortage of aquarium shrimp and what, if anything, the Shrimp Board needs to do about it.

And they went at it, hammer and tongs. But they weren't saying, well, will you promise to vote my way or I promise to vote your way. So that was OK. That was fine because that two-person permitted interaction allows two board members to talk about board business without limitation, just as long as they don't make or seek a commitment to vote. So that fell under permitted interaction and was fine under the Sunshine.

Slide 27: 1 day out: Testimony (1:06:44)

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 sent by email. They also sometimes get emails that are about agenda items that aren't necessarily anonymous, but it has been sent to only one board member and Chair Brine was wondering whether they have to treat those as testimony.

And they would they. 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 it's clearly about

the agenda item, but it's only gone to one board member, that should be distributed to other board members. It should be considered as testimony.

You could try to prevent this situation 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 email testimony to so and so or please submit testimony and such in such a way, you're probably going to get testimony sent in all kinds of ways just because people don't know. If you do make it clear this is how we want to receive testimony, then most people are going to try and send it that way because they want to make sure that their testimony does get considered.

But in any event, if you still have somebody emailing the chair regarding agenda item number 7 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, and he looks a little bit strange. He wears a shrimp costume, so although he doesn't actually disrupt the meetings, the Shrimp Board would kind of like to use sign-up sheets for people who testify in person and only accept written testimony if the person is willing to identify themselves and include a name and an address.

But that that is not going to be workable as a requirement. A board can use sign-up sheets. It can request people to sign up, but it can't require it. And again, it's that any person standard--a person doesn't have to. It doesn't matter who the person is to attend a meeting, so you can't require them to sign up, identify themselves, give their name and address. You can ask that; most people will be happy to sign in; but you cannot ultimately require it.

So having learned that they can't exclude the anonymous testimony, the Shrimp Board then had a new plan: We'll hear all the public testimony at one time, and we're 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.

So timing of testimony is within 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 hearing all the 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 it if it has 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 if they said I want to testify on all four items and I'm taking my full 5 minutes on each. So you're not going to cut down, you're not going to say, well, we have a 4-item agenda or a 20-item agenda and you have 5 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 of testimony on we're going to do our four manini things first and have testimony on those all at once. And then we're going to

take all the testimony of item 5, which we expect is going to be very controversial and then move to consider it.

Again. Flexibility. The board has a lot of flexibility on the timing, except that it has to hear the testimony for an agenda item before it actually begins considering that agenda.

Slide 28: At the meeting: Items raised in Open Forum (1:11:12)

So now 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 just tells her, “Well, the board will consider including 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 this is? The public has to be protected from bad tasting salt and pepper shrimp.” But the board can't, even though she really wants it discussed 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, we will consider that for next meeting's agenda. Or possibly add it to the agenda on 2/3 vote of all board members if it's not of reasonably major importance or affecting a significant number of people. And I'm not going to go out on a limb here and say the importance of bad tasting salt and pepper shrimp for the Shrimp Board's constituency.

Slide 29: After the meeting: Retreat (1:12:30)

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 decided 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'll do team building exercises. They'll 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 special wine pairings. And after all the wine they're going to try and establish some common ground on the more divisive issues that are before them.

And they want to call this retreat in 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 meal 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.

But 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, we're going to be able to discuss them better if we don't have an audience. That may be true, but there's not an executive session purpose for that.

So the parts where they're not talking about shrimp issues, don't have to be 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 this retreat without the actual discussion of the shrimp related issues, however.

Slide 30: Screenshot of OIP's Home Page (1:14:16)

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. You may be there already. You may be watching this on our website. But if you're not, our website is at oip.hawaii.gov. And we have copies of the laws that we administer, the Sunshine Law and the UIPA; our rules under the UIPA; our opinions under both laws; forms, guidance, training materials for agencies, boards, and the general public; and other useful material.

Slide 31: Need Help? (1:14:55)

And we do have our Attorney of the Day service. Every day, one of the staff attorneys is assigned as Attorney of the Day (AOD) to answer general questions, provide guidance, quick guidance, that sort of thing. And you can reach the AOD either 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.