

Quick Review: Sunshine Law Requirements for Board Packets (August 2022)

The Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes (HRS), requires a board with a board packet for its upcoming meeting to make the board packet available to the public before the meeting, with limited exceptions. HRS § 92-7.5. A board packet consists of the documents that are compiled by the board or its staff and distributed to board members before a public meeting for use at that meeting. This could include reports, applications, and documentation relating to items the board will consider at the meeting, as well as written public testimony and draft minutes being circulated to board members. Not all boards create and distribute board packets, and the requirements relating to board packets only apply to those boards that actually distribute board packets.

What's Included in Public Board Packet

While the general rule is that a board packet must be made available to the public, the public disclosure requirement only applies to documents that would be disclosable under the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA). In other words, non-public information within board packets can be redacted. In addition, the law allows a board to potentially withhold more records in creating the public version of the board packet than could have been withheld in response to a formal UIPA record request. Specifically, the public version of a board packet is not required to include executive meeting minutes, license applications, and other records for which the board cannot reasonably complete its redaction of nonpublic information in the time available before the meeting.

In this way, the board packet provision recognizes the challenge facing a board that must both put together a board packet and create a public version of it in the short time before a meeting, when the board packet may include materials from third parties that the board has not previously reviewed, or materials with public information and nonpublic information mixed together. For example, if a board packet includes a long document with confidential information embedded throughout it, which would make redaction unreasonable or overly time-consuming in the days before the board meeting, the board could leave the entire record out of the public board packet. On the other hand, if a similarly long document has several distinct sections, only some of which are confidential, it may be relatively straightforward for the board to separate them and include only the non-confidential sections in the public board packet. If a document includes some confidential information but is only a few pages long, the confidential information can readily be redacted before the record is included in the public board packet. If a document of any length is fully public, it should be included in an unredacted form in the public board packet.

Making the Board Packet Available to the Public

Any board packet prepared for a meeting must be made available for public inspection in the board's office **at the time it is distributed to board members, but no later than 48 hours before the meeting**. If materials the board members need to review aren't available to the board in time to meet that deadline, such as written public testimony submitted for the upcoming meeting (much of which is likely to come in less than 48 hours before the meeting), late submissions from applicants or other third parties, or a report not scheduled for public release until the meeting date, the board cannot circulate those materials to members in the last 48 hours before to the meeting without violating the Sunshine Law. Thus, boards should plan to provide such last-minute materials to the board's members at the meeting itself, rather than before the meeting when they will be considered a board packet. The Sunshine Law does not specifically address a board's obligation to make materials distributed to members during a meeting available to the public, but OIP recommends that boards plan on having copies available for the public or be otherwise prepared to provide public access to any non-confidential materials being distributed to board members during the meeting itself.

A board is not required to automatically mail or email its board packet to people on its notification list, but it must notify them that the board packet is available for inspection in the board's office and must provide "reasonably prompt" access to the packet to any person upon request. The board must accommodate requests for electronic access to the board packet as soon as practicable, which it can do by emailing the packet to requesters or by posting the packet on its website or in a file-sharing site and letting the public know where it can be found.

Keep in mind that the UIPA has separate and different requirements from the Sunshine Law, and the new board packet disclosure requirement does not replace the existing right of a member of the public to request a board packet under the UIPA. Either before or after the board meeting, if a UIPA request is made for a copy of the board packet, the board will have ten business days to respond, so the board's UIPA response deadline typically will not be until after the meeting has taken place. This gives the board more time to carefully examine and redact any confidential information from the board packet. Also unlike the Sunshine Law's access requirement, the UIPA would require the board to mail a board packet if so requested, but the board could also charge the search, review, and segregation fees and copying and postage costs allowed for UIPA requests. Thus, for most members of the public, free access to the public version of the board packet prior to the meeting as provided for in the Sunshine Law will be preferable to waiting two weeks or more to receive what may be a slightly less redacted version for which review and segregation fees will be assessed under the UIPA.

Practice tips

- When compiling a board packet, prepare the public version at the same time. As each document comes in, determine whether it must be included in the public packet and prepare a redacted version if necessary.
- Have a copy of the public board packet available in the board's office by the time the packet goes out to board members (and at least 48 hours before the meeting). If the public board packet is available for public inspection only in electronic format, have equipment available for the public to be able to view the packet.
- Have a PDF version of the public packet ready to be emailed or faxed upon request, or if the board prefers, available to download from the board's website or a file-sharing service.
- Materials, such as testimony, that are received after the board packets are prepared for distribution may be provided to the board at the meeting itself. While not required by law to do so, the board should try to make publicly available at the meeting a physical or electronic copy of the late materials, with appropriate redactions, if any.
- Remember that a member of the public can still make a UIPA request for the full packet, which may require more extensive review and segregation work than was done for the public packet prepared for the Sunshine Law meeting, and would be subject to the time limits, procedures, and fees for UIPA record requests.
- Consider requirements of the Americans with Disability Act (ADA) in preparing electronic materials. The board's attorney or the state Disability and Communications Access Board can provide further ADA information. OIP does not administer the ADA.