Transcript of Basic Sunshine Law Video Training Part 1

1 hour, 10 minutes total (time stamps are approximate). Please note: This transcript tracks the closed captioned Sunshine Law Basic Training video Part 1 and refers to the slides contained in the "all slides" handout for Part 1, 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 tread the training or keep this in lieu of taking their own notes.

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

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. I know that you probably know this if you're watching it, but just in case, there is sometimes confusion, the Sunshine Law specifically refers to the meetings law, which is found in Part I of Chapter 92 in the Hawaii Revised Statutes. There is another law, the Uniform Information Practices Act, that provides for public access to government records. OIP also administers the UIPA, but we're not going to be talking about it during this training. There are training materials about the UIPA elsewhere on OIP's website.

Slide 2: What's the Purpose? (0:00:49)

So we're going to begin by talking about the purpose of the Sunshine Law and the policies behind the Sunshine Law as set out in the statute, and the reason we're going to start out here is because this is really the starting point, always, in interpreting the law.

Now, when do you need to interpret the law? Well, OIP or a court hearing a complaint would need 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. Is this comma, 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 would turn to, well, what is the purpose behind the Law, in deciding how to interpret. The other and more typical purpose 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 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 as members of the public, it helps you to understand it as well, to understand what this law is supposed to do, it gives you a better idea of why it works the way it does and helps you to 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 to public participation. So, this is what the law is meant to do. It is meant to open the government process up to the public and to enhance the public's ability to know what government is doing.

Slide 3: Policy (0:02:55)

Specifically, as far as the policy, the statute says that it is State policy 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 the policy clause in the UIPA, the open records law. So for the Sunshine Law, as well as the records law, the reason this law is there, what the legislature intended it to do, is to open up the government policy-making process to the public.

Slide 4: Sunshine Law requires (0:03:30)

And to begin with, we will start out with the first of these: the concept that a board's discussions, deliberations and decisions must be conducted at a meeting.

Slide 5: "Board Business" (Definition) (0:03:39)

Now the Sunshine Law applies whenever you have members of a board talking about board business. So, of course, a fundamental question is, what is board business? It's defined as specific matters within the board's authority that are either before the board or are reasonably anticipated to come before the board in the foreseeable future. Let's break this definition down a little.

Slide 6: "Board Business" (Elements) (0:04:05)

There are a couple of elements in this definition. One is that to be board business, the issue has to be something that is within the board's authority, and I want to emphasize here that that's the board's authority. So 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 that 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 fit it in next month. We have too much else to discuss, but it can go on for the month after," that sort of discussion by itself wouldn't, for most boards, be board business because it's talking about something that's purely within the chair's prerogative. Similarly, a lot of administrative matters, scheduling the meeting, travel arrangements for members 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 members might talk about that are nowhere near their authority as a board. Issues such as, "How do you think the Rainbow Warriors are going to do this season?" or "When are the trade winds coming back?" 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 that I would point out

is that we're talking about specific matters. 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, it's not usually going to cover "What do you think of development as a general concept?" It's going to cover, "What do you think of the new proposed housing development that's 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, upcoming in the reasonably foreseeable future, agenda. So you might have issues that were board business the board finished dealing with, if the board took action or didn't take action, one way or another, but the board doesn't anticipate it coming back, it's pau. It's off the agenda. 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, and that was all 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 a near future agenda.

Looking at the off in the future element, we had an opinion some years ago involving the Hawaii County Council. They had gone to a briefing by a volcanologist on what Mauna Loa was doing at that time, and they didn't notice it as a Sunshine Law meeting. So there were journalists that asked for OIP's opinion on whether 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 into the future. It was speculative. In fact, it never did end up becoming an issue, or at least not from Mauna Loa. But 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 was just too far off and too speculative at that point.

So for the time element, again, something that's already happened, is pau, well, that's 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. So for board business, we're looking at specific issues within the board's authority that are either on the agenda now or you can see it's coming, you know it's coming soon. So you're not going to play games by saying, "Oh, well, we haven't filed that agenda yet." You can see it coming. If you know it's something the board expects to consider, then it's board business. But at the same time, things that are so far off that it's just not foreseeable at this point, those aren't going to be board business yet.

Slide 7: Communication Prohibitions (0:09:33)

Now I've spent a lot of time talking about board business and 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 it's board business, you can't talk about it in a caucus. You can't poll the board members on "What do you think on 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 other form of written form, such as a memorandum, if it's something you can't discuss face by face. It comes down to, if it's something you couldn't discuss all in the same room together in person, you can't have that discussion through any other means.

Slide 8: Permitted Interactions (0:10:43)

But there are situations in which members of a board can talk about board business together, discuss, email or otherwise communicate outside of a meeting, and it's still allowed under the Sunshine Law. And these are called permitted interactions. I'm going to run down the list of them first.

There's a permitted interaction for just two members communicating. There is one that allows a board to set up a group to investigate an issue, and I will go back and talk about that one more as well as the two-member one later. A board can set up a group to present, discuss, or negotiate an issue. So, set up a group of less than a quorum of members to present an issue to perhaps another board or negotiate an issue with another group. Less than a quorum of board members can discuss board leadership. Again, less than a quorum, but that does not require being set up ahead of time.

Slide 9: Permitted Interactions (0:11:56)

A newer permitted interaction added in 2012, allows the members of a board that are at a meeting to hear public testimony or presentations when the meeting had to be canceled for lack of quorum, or possibly if it was a multi-site meeting because the connection went down. There is another, newer permitted interaction allowing less than a quorum of members to attend a meeting of some other group or board, or a presentation. Again, I will discuss that one in more detail. A board's full membership can circulate and comment on its proposed legislative testimony for a bill that the board has already adopted a position on, and that is assuming that the testimony deadline is too short for the board to hold a Sunshine Law meeting to discuss it. Now to keep the public informed, the board is going to have to post all its proposed testimony drafts and its communications about the testimony online within 48 hours.

And finally, the full membership of a board can meet to discuss board business with the Governor so long as the board business in question isn't a matter over which the board is exercising its adjudicatory function. In other words, if you are a board that hears contested cases, you can't use this to sit down with the Governor and say, "Well, here's what we're

thinking of doing in this contested case that's before us." But other than that, the full membership can sit down with the Governor to talk about anything. It does, however, have to be the Governor, not the chief of staff. The full membership can also meet with the head of the department to which the board is attached. That, however, is limited to discussion of minor administrative matters. What we sometimes call paper clip items.

Slide 10: Permitted Interactions - In Depth (0:13:58)

The ones that are most frequently used are the permitted interactions that allow two members of a board to talk about anything, and the one allowing a board to assign less than a quorum of members to investigate something. So I will be talking about those two as well as the permitted interactions allowing a board to accept public testimony when it lacks quorum and the one allowing less than a quorum of board members to attend another meeting or a presentation.

Slide 11: Permitted Interactions – 2 Members (0:14:35)

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. This 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 or at a seminar or something like that. The important thing is that it's only two board members. Now some of the restrictions are, 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. I mean, you might be saying, well, "I, I think this is the best idea ever for our community. I strongly support it" or "I think this is a terrible idea. I'm going to do everything I can to make sure it doesn't happen," and it's clear which way you're going to vote. But we interpret this "don't make or seek a commitment to vote" restriction to mean no horse trading.

So in other words, what we don't want to see is "if you will support my pet project that's on the agenda for this month, I will commit to support your pet project that is coming up next month." That's what would be making or seeking a commitment to vote. And that's what you shouldn't do when using this two-member permitted interaction. The other thing to watch out for with this one is that you can't use it serially. Serially means the 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 blah 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 full board, really. But you can't do that. So essentially, with the two-person, 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.

Slide 12: Permitted Interactions – Investigations (0:17:22)

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 is probably among the most frequently used permitted interactions. 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, there can be other meetings in between, by the way. I mean, you might have 10 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 you 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, and this would take place at a meeting, so the public would then 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 subcommittee. They don't have to do their work through scheduled meetings with notice and taking public testimony and so forth. What they are essentially is, it's as though the Sunshine Law's usual restrictions don't apply to the members that were assigned when they're 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 to these, let's say it's a nine member board and you have four members, so you've handed it off to these four members who are specifically named, and they have their authority defined, and so now they're going to take it, and they're going to look into it in whatever way best suits them. 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 with other people, members of the public, just as long as they're not talking to board members who aren't part of the group. It could be in a smoke filled room. It could be through a series of community meetings. However it is that 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 to be concerned about "oh, we need to do it at 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 its recommendations to the full board. But the board is not going to deliberate on it yet, is 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, third. At that third necessary meeting then 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 the 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 subcommittee or standing committee, and one of these permitted interaction groups, or sometimes boards get confused about the 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 subcommittee, let's say a board's finance committee, is basically a miniature board. It is subject to the Sunshine Law, the same way the full board would be. So you need a quorum of the Finance Committee there. It's going to notice its meetings and post an agenda for its meetings. It's going to take public testimony, have those meetings open to the public unless an executive session purpose applies, it's going to need to have quorum of its committee membership to hold the 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 that committee was a mini board, but on the other hand, it's never off the table for the full board the same way it is with a permitted interaction group.

A permitted interaction 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 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 be on the table for the full, for the full board until after they report back. And in fact, until one meeting after the meeting at 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.

Slide 13: Permitted Interactions – Investigations – Examples (0:24:24)

So when would you use the permitted interaction group? Some examples might be if you're conducting confidential interviews, but they're, 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, if you have, if the board has, they, the Board of Regents did this with former president, UH President Dobelle, or another board might do it with its executive director. Let's say you want to talk to staff or in the UH case to 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 on having it public, and then hear maybe what the staff was saying in confidence, 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's feelings about the executive director.

Another situation you might do 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 you might, 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 the board wants to receive or consider information that the board considers confidential but does not fall under one of the executive session purposes so as to allow the board to actually have a meeting closed to the public to consider this information. And that's another situation in which the investigation permitted interaction might allow the less than a quorum of board members to consider this information in a more confidential way.

And be aware that this permitted interaction is not limited to a situation where the information the board is looking into it wants to keep confidential. Sometimes it's done in a very public sense. A board might be going out and wanting to set up a group to go out and talk to just members of the general public about an issue that it's considering. For instance, what is community sentiment about putting in a dog park area in this public park. We'll go out and talk to park users. This permitted interaction has also been used in the past for board members to set up a group to go to a meeting of another board or to a community meeting, for instance, or sometimes a conference, and certainly a board can continue to use this permitted interaction for that purpose. But the legislature in 2012 did add a new permitted interaction that is more specific to less than a quorum of board members' attendance at a conference or meeting of another board or community group, and I will be discussing that one in just a moment.

But to sum up, for the investigation permitted interaction, really there can be all kinds of different reasons why a board wants to set up less than a quorum of its members as a group to look into something. And it's not so important what the reason is; as long as the board has followed that three-step process outlined previously, and that's in the statute, then it should be fine.

Slide 14: Permitted Interactions – No Quorum (0:28:23)

Turning to the permitted interaction for a board to, the members of a board who are there to hear testimony or presentations where a meeting has been cancelled. This applies in the situation where the board had noticed a meeting and that meeting had to be cancelled, either because it did not have quorum or in some cases there may actually have been quorum, but if the meeting was across multiple sites, doing an audio conference meeting, and the audio connection between the sites was lost and couldn't be recovered. Either way, this is a situation where there was a noticed meeting, there were members of the public who have showed up to testify or give presentations and the meeting had to be canceled as a matter of law because of either lack of quorum or a lost audio connection. And what the members who are present can do is going to be limited. They can hear the testimony or presentations by members of the public who showed up to speak to items that were on the canceled agenda. And as part of doing that, you know, they can ask clarifying questions, but they can't go on, the members who are present can't go on to deliberate or -- well, they wouldn't have quorum to decide, but they can't seek to decide or deliberate these issues. They can just hear the testimony, and all deliberation and decision making has to wait until the next meeting that is actually a meeting of the board.

The members who are present at this cancelled meeting are required to keep a written record of the testimony or presentations that they heard, and this is required to be to the same level of detail as would be required for a board's minutes of an actual meeting, which, generally speaking, when you're talking about testifiers, is going to mean that you need to reflect who spoke, both testifiers and any board members that ask questions. For testifiers you want to show they spoke on this topic and at a minimum whether they were for or against. In other words, a very brief synopsis of what they said as the minimum level of detail, and for any board members who spoke, perhaps to ask questions of testifiers you want to record which board member spoke and the brief gist of what they said.

At the next meeting of the board, the next non-cancelled meeting, the members who were there to accept the testimony or presentation presentations from the cancelled meeting, those members are also required to report back to the full board on the testimony they heard at the next meeting. And I've said next meeting on this slide as kind of a shortcut. It really means the next meeting where the same issue arises. So it's possible that it would be the second or third meeting afterwards, if the issue that people testified on doesn't come up again for a couple of meetings, but before the full board can take up this issue that was testified on at the canceled meeting, again, the members who were there have to report and that would be both an oral report as well as providing whatever written testimony was received. And only after that can the full board now discuss, deliberate, decide on that issue.

Slide 15: Permitted Interactions – Other Meeting or Presentation (0:32:03)

For the permitted interaction allowing board members to go to another group's meeting or a presentation, first of all, this one again is limited to less than a quorum of the board's membership. It allows those members to go to an informational meeting or presentation, and some of the examples in the statute would include a meeting of another Sunshine Law board or a meeting of a community group, a legislative hearing, or perhaps a conference or a seminar. This is not supposed to be an event specifically arranged for the board, and that is a statutory limitation. It can't have been specifically arranged for the board. The legislative intent here was to allow board members to more readily go to community meetings, other boards' meetings, conferences, this sort of thing. The intent was not to facilitate group lobbying of the board. Basically you, you have the developer or lobbyist saying, well, it'll be easier if we can sit you all down in one room and we'll give you our show. That's not what this is intended to facilitate.

Board members using this permitted interaction can discuss board business with each other, but only as part of the event that they are attending, and again, an event not specifically arranged for the board. So for instance, if the members are at a conference and -- seven member board, three of them are at a conference and they are all attending a pullout session on an issue that is of interest to the board. Well, they, those three members then can do a back and forth with the presenter at this conference. They can ask questions that are specific to the issue they're dealing with, that would be considered board business. They can have a back and forth where they're all chiming in and basically they're, all three of them, involved in this discussion and that would fall under this permitted interaction. But what they can't do is then go out with three of them for a private lunch to discuss, "Well, what did you think of that? And what are the implications for what we're going to do?" So discussions of board business with each other are OK, but only so long as they are actually in and as a part of the event they're attending.

Board members using this permitted interaction can't make or seek a commitment to vote. That's the same language as we saw in the two-person permitted interaction and as we discussed there, basically that means you're not horse trading. And then finally, the board members who attend this other meeting or presentation are required to report back on their attendance at the next board meeting. So that would basically be, well, "The, you know, the three of us, this person, that person and I all went to the annual conference of the Pig Producers of America and that was in this city on this date. And we talked about these issues that are before the board." So, report back.

You notice that unlike the investigative task force this permitted interaction does not require the members to actually set it up ahead of time, and it doesn't have the same number of meetings required. Really, the only meeting that's required is the one where you report back, "Well, we went to this and here's what happened." So it is easier for boards to use if what they want to do is have less than a quorum of them go to a community group or another board meeting, legislative hearing, conference, something of that sort.

Slide 16: Sunshine Law Requires (0:35:59)

We'll move on now to the next of our major Sunshine Law points, which is the idea that a meeting of a board has to be open to the public unless a closed meeting is specifically allowed by law, and a closed meeting under the Sunshine Law is also known as an executive meeting.

Slide 17: Executive Meetings (0:36:19)

So even though what we're talking about is the concept that a meeting is open, unless it's specifically allowed to be closed, we're actually going to spend most of the time talking about is when and how a meeting can be closed. The presumption that the meeting is open, that's actually relatively easy. If it's open, it's open. People can attend. So the question comes up, well, when is a board allowed to close a meeting, and how does that 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 2/3 vote in favor of all the board members that are present. And by the way, that also has a 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 2/3 of those 6, 4 vote in favor of an executive meeting. You actually wouldn't have quite enough. You would need to have six, which would be a majority of the full membership of 10. But that doesn't usually come up. So the main thing to remember is 2/3 of the board members present, a supermajority, need to vote in favor of closing it. Now this vote would be in the public session, and also in the public session, the board needs to announce the purpose for the closed meeting. This would be one of the eight purposes we will briefly talk about. And then the vote on closing the meeting needs to be recorded and entered into the board's minutes.

Slide 18: Executive Meeting Purposes (0:38:01)

As I mentioned, there are eight purposes for which a Sunshine Law board can hold an executive meeting. The first is to discuss professional or vocational license applications, and this specifically applies to the DCCA boards, which have cause to consider these frequently. To discuss personnel matters, and this one, we're going to talk about in more detail. To discuss the authority of a person designated to negotiate labor issues or purchase of land. To discuss legal matters with the board's attorney, and this one also we'll talk about in more detail. To investigate criminal misconduct. To discuss sensitive matters relating to public safety. To talk about the receipt of private donations, this is another one that is fairly board-specific. And finally, to discuss information that is made confidential by law or by court order.

So we're going to break out these two more specific ones that are the most frequently used purposes for executive sessions, and that would be the personnel matters and discussion of legal matters with the board's attorney. The personnel executive session purpose applies where a board is discussing hire, fire, discipline, or dismissal of an officer or employee and individual privacy is concerned, with the proviso that the individual whose privacy is concerned 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're going to talk about how many positions we need and what the duties should be." Or "We're forecasting our personnel needs for next quarter or next year. And we're, we're going to discuss that." Those wouldn't allow a closed meeting. What would allow a closed meeting would be something like, "We're going to hear a complaint against an employee. We're going to discuss that complaint" or "We're hiring some people and we're going to be interviewing the applicants" or "We have, we're a board that has an executive director. We're doing the 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 and so could properly be done in a closed meeting.

I want to emphasize again that the individual whose privacy is concerned, that's who this executive session purpose is meant to protect. You know, most of the executive, executive session purposes are intended to protect the board's interests 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 open. And if that person says, "I waive my privacy, I want it open," as a 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 executive session purpose 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. For instance, it might be a discussion with the board's attorney. You've talked about how the executive director's performance has been and where you, what you want to do with the executive director, but you want to discuss with your attorney, "What's our liability if we fire our executive director?" So, so there might be some portion of a personnel discussion that would actually fall under a couple of different purposes, and the person concerned couldn't waive, say, the board's attorney-client privilege. But the person could certainly waive his or her own individual privacy, and again, in that sense, the personnel matters executive session purpose. Ultimately, ultimately, it's that individual who can waive it, not the board's decision in that case.

The other one I have highlighted is the 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 limitation there is that the attorney does in fact have to be present. This would not apply where, for instance, 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. But if the attorney is there, then yes, they could go into executive session.

Slide 19: Sunshine Law Requires (0:43:19)

Moving on now to the next of our major sunshine law requirements, we're going to talk about the requirement for Sunshine Law boards to accept public testimony.

Slide 20: Testimony (0:43:31)

The board is required to accept testimony from any interested person, and that would include both written testimony and oral testimony at the meeting. Now this would be on any agenda item. I've emphasized agenda item because the board is not required to accept testimony on issues that are not on its agenda. So you are not required to have a general soapbox period and open forum for whatever issues people want to talk about. Rather, your obligation as a board is to hear the testimony on anything that is on the agenda. Now, what is the agenda item? It would be interpreted reasonably broadly, but it still isn't 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 formal policy, a policy that's reflected in writing. We don't interpret the Sunshine Law to require Chapter 91 rulemaking for setting time limits, but if you as a board 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 extend the time for some testifiers and hold others strictly to their time limit for the members of the public who are just there to speak their piece. They should have an equal opportunity to speak their piece. And if you're going to waive it for some, the time limit, then waive it for all the members of the public.

Now boards should also be aware that they cannot take all the public testimony at the beginning of the meeting. A board can take the testimony before each agenda item. It can take the testimony for several items together before the board considers those items, always allowing the full time for each agenda item in that group. Or a board can do a hybrid where some testimony is taken immediately before each agenda item, maybe some is taken for several items together as a group, and maybe the board has a testimony period at the beginning to accommodate people who want to just say their piece and go. But what the board cannot do is to take all the testimony at once at the beginning of the meeting. That is something that was formerly a common practice, but the law was amended and it's no longer allowed.

Slide 21: Sunshine Law Requires (0:46:22)

And we are now up to the fourth of the Sunshine Law concepts we are covering in the course of this slide show: the requirement that a board file a notice, including an agenda, ahead of any board meeting.

Slide 22: Notice Requirements (0:46:38)

First of all, a board's meeting notice does need to be written. The notice needs to include the date, the time and the place for the meeting. It needs to include contact information so that members of the public can use that to submit testimony, and that contact information includes the board's e-mail address as well as its mailing address. The notice also, it needs to include instructions for anyone who wants to request an accommodation for a disability and if there is a deadline to do so, that needs to be listed in the notice and the deadline does need to be a reasonable one. The meeting notice needs to include the agenda of everything the board will consider at that meeting, and we'll talk about that in a little more detail further on. And then if it's an executive meeting, the agenda needs to state the purpose and the statutory basis for which the executive meeting is anticipated to be held.

Slide 23: (Notice Requirements continued) (0:47:46)

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 Lieutenant Governor or the County Clerk, depending again on whether it's a State or county board. And the board is required to keep proof that they provided it to the Lieutenant Governor or Clerk. It's also required to be posted at the meeting site when feasible.

So note here that the ones that absolutely if you don't do it you're going to have to cancel your meeting, are the posting on the online calendar and at the board's office, because there is a statutory provision that says that the providing it to the Lieutenant Governor or the Clerk, while this is required and it would be a violation to not do it, the statute specifically says the board is not going to have to cancel its meeting if there is an error in that, whether it's on the board's or the Lieutenant Governor or Clerk's end. And then, of course, the meeting site requirement is when feasible rather than absolute. So, you know, 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 6 calendar days prior to the meeting. A calendar day is a full day, it's not 6 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 1st 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 in between. And so it's not 6 times 24 hours. If you are filing at 4:00 PM and you're filing for a 9:00 AM meeting, that's still OK as long as it's 6 calendar days ahead, you can, you know, 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 agendas in the mail. Postal mail or email, that's at the option of the person who is so 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, "Oh no, we only do email." You do have to allow them to get it whichever way they prefer.

Slide 24: Meeting Agenda (0:51:05)

The agenda, of course, is probably the most difficult part of the filing of the notice and 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, that the reader is in the local area and has that level of familiarity with local issues. But don't assume that this is somebody that already knows what's before your board, 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 still be able to understand what you're going to consider. So show it to your spouse or show it to your neighbor, and hopefully they look at it and say, "oh, you're talking about such and such." If they look at it and say "I can't tell what you guys are going to talk about," maybe you'd better add a little bit more detail or perhaps explain some of the terms or some of the jargon a little better.

Slide 25: Pest Control Board Meeting Agenda Example (0:52:39)

So we're going to show some bad examples from past agendas and then a good example as well. And these are old ones. I think the boards in question do them better at this point, but you can see the highlighted thing there, rule revisions, what rules, what, what rules are being revised, what are the revisions going to do? What are the rules dealing with? We can't tell any of that. And "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, and it can't leave itself room to talk about additional things by having catch-alls like "other." "Scope" obviously also.

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, 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 actually 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 if you always want to list new

business on your agenda but you're not going to discuss anything under that, perhaps just note under it "none" or "none this meeting," or something like that, so that we don't have members of the public 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.

Slide 26: OHA Meeting Notice Agenda Example (0:54:39)

Now here are a couple of examples of open session or open forum or soapbox periods, community concerns and beneficiary comments. And, 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's nothing in the Sunshine Law that says you can't do that. However, a board that does this should be aware that that 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 2/3 vote, which we'll talk about in a moment. But generally speaking, if it's not on the agenda and somebody else brings it up, you can, 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 mentioned before, it's, unfinished business 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.

Slide 27: Board of Regents Agenda Example (0:56:05)

Now we're going to see a before and after set. At one point the UH Regents listed their gifts, grants and contracts simply as gifts, grants and contracts. And the problem, of course, when if you're listening something like gifts, grants and contracts without detail, is that it really doesn't tell you anything if you're an interested member of the public thinking about whether you should go to the meeting, you don't know what they're, what they might be receiving, what, 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. You don't. If you wanted to testify, you wouldn't know what to testify about.

Slide 28: Gifts, Grants and Contracts Agenda Example (0:56:45)

Now they since that time changed their method of of agendizing gifts, grants and contracts, and you can see from this sample they, they changed to really an excellent level of detail and, and this goes well beyond the minimum that would be required by law, by the way. But it's very, 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. Whether based on the topic of the research that is receiving a grant, or based on the person who's doing the research, or on which school it's going to, on the amount of money, on the source of the award. There's just a

wealth of information there and so 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 really allows people to give -- both decide whether they're interested and give intelligent testimony on the subject matter.

Slide 29: Amending the Agenda (0:57:44)

I mentioned a couple of minutes ago that the agenda, there is some possibility of amending it at the meeting. To do so, you need a 2/3 vote of all members to which the board is entitled. This is different from the 2/3 vote that we talked about under executive sessions. That one I sometimes refer to as a supermajority, 2/3 vote is a supermajority. That one was 2/3 of members present at the meeting. This one is 2/3 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 you have 2/3 of nine. You don't have 2/3 of 10. You don't have enough votes. Even if every all six of them vote in favor. You're not going to have enough votes to actually amend the agenda, so if you are a board that just barely makes that, just barely meets quorum, you might as well forget about ever adding something to the agenda at the meeting because you're simply not going to have the votes. However, if you are a board that does tend to have at least 2/3 of its membership present at a meeting, then you could potentially vote to add something at the agenda.

There is the 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 meeting. 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 board. If you have something that is a one of the City and County neighborhood boards or one of the similar boards that other counties have where it's really focused on a specific locality, in that case reasonably major importance is going to mean how important is it 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's 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, well, nobody's going to be ticked off, nobody even cares about this, then it's probably suitable to add. If you can immediately picture which individuals are going to be ticked off, perhaps it's not suitable for adding to the agenda with a 2/3 vote.

Slide 30: Board Packet (1:01:23)

Now we're going to talk about the Sunshine Law's board packet requirement. This is something that is related to notice and agenda, but is not actually filed as part of the 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 has actually put together a packet of materials for its members to review before 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 members before a meeting for use at that meeting. And a board packet as defined in the statute only includes those documents that are actually public under chapter 92F, the Uniform Information Practices Act, to begin with. So in other words, as a board, you're never going to have to include in the public version of a board packet anything that you wouldn't have to publicly 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 is a very short turn around for a board from when its board packet is ready to go to when it has to be making it available.

The board needs to make the packet available to the public at the same time it goes out to the members, and we'll discuss what it means to make it available. That also has to happen at least 48 hours before the meeting. If it's less than 48 hours before the meeting, it's too late for the board to distribute anything to the members in advance of the meeting because it's not possible to meet the deadline to also make it available to the public. So the timing on a board packet is not like the UIPA where you have your 10 business days to respond initially and then initial time to actually, additional time to actually do your redaction. That's why the law 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, as expected, couldn't reasonably redact in time. So those aren't considered part of the board packet. And then 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 for that part of the packet, you could just withhold the whole document because it wouldn't fall within the definition of a board packet that 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 a document is just a few pages long, even if there is confidential information throughout those pages, you can get that redaction done so you know, reasonably speaking, 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 the public board packet.

Slide 31: Board Packet (Distribution) (1:05:24)

Let's assume that your board does have a board packet for its 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 know, you have to have that public version ready to go. Second, you need to notify your email and postal mail mailing list that there is a board packet available in the office. You notice this doesn't say that you have to attach it, you just have to notify the mailing list 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 e-mail 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 and ready to go to let people know through the mailing list that it's there and available, and then to accommodate requests, especially electronic requests, quickly because you already have it there and available. So if you want to, if you feel it would make things easier for your board, you certainly could, especially with your e-mail list, do something proactive like either attaching it to the list or including a 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, you get responses coming in and saying I'd like a copy and you're sending out all 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.

Slide 32: Board Packet (Practical Tips) (1:07:41)

OIP has a few practical tips for boards that have a board packet and are 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 board packets. In other words, as things come in leading up to the meeting, for board staff, as you're putting it all together, think as you go about what will and what won't 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. Where in fact you will have already kind of thought through the, what can go in and must go in 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 you're not just to

have it in mind as you go through, but actually go ahead and do the work, especially if you have things that are trickling in over a period of perhaps a couple of 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 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 the board packet, given that you're 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, to 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.

Slide 33: Break Time! (End of Part 1)