

QUICK REVIEW: Sunshine Law Revisions Effective July 1, 2018

The state Office of Information Practices (OIP) has prepared this Quick Review to explain the major changes to the Sunshine Law that will take effect on July 1, 2018, as a result of Act 64, (House Bill 165, SLH 2017). The law was signed by Governor David Ige on June 29, 2017, but it contained a delayed effective date so as to give agencies time to learn about the new requirements. Agencies must be prepared to implement its provisions for any meetings that take place on or after July 1, 2018. In summary, Act 64 amends the Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes (HRS), to:

- Require any board packet put together for the meeting to be made available for public inspection in the board's office at the time it is distributed to board members;
- Require meeting notices to be posted on state and county electronic calendars;
- Allow a board to use a recording of its meeting, with a written summary as its minutes, as an alternative to creating written minutes; and
- Require the board to post its minutes online within 40 days after the meeting.

Board packet requirement (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, but the public disclosure requirement only applies to documents that would be disclosable under the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA). In addition, the public version of a board packet is not required to include executive session 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.

The Sunshine Law revisions recognize the challenges that boards face in the short time they may have before meetings to put together board packets that could include materials from third parties that the board may not have previously reviewed, or materials with public information and nonpublic information mixed together. Consequently, the revised law allows boards to **create a public version of the board packet** that potentially withholds more records than could be withheld in response to a formal UIPA record request.

For example, if there is 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 withhold the entire record from the public

board packet. On the other hand, if a similarly long document is made up of several distinct sections, only some of which are confidential, then 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 consists of just a few pages or lines of confidential information, then the confidential information can be redacted before the record is included in the public board packet. If a document of any length is fully public, then it would be included in an unredacted form in the public board packet.

Board packets must be available for inspection in the board's office, and people on the board's mailing list should be so informed. Upon request, the board must provide "reasonably prompt access" to the public board packet. Due to agency concerns about costs and staff time, boards are not required to mail the packets to requesters under the Sunshine Law. There is also no requirement to automatically email packets to people on the email list, but boards must accommodate requests for electronic access to the public board packets "as soon as practicable," which means that a board should be prepared to respond to email requests for an electronic copy of the public board packet. Thus, when members of the public typically attend a board's meetings, the board may find it most efficient to make a PDF of the public board packet at the same time it makes the paper copy, so that it is prepared to email it upon request. If the public board packet is very large or if the board usually gets a lot of requests for it, it may be easier for the board to simply upload the public board packet to its website or a file-sharing site and let 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**, which time period is often likely to end after the meeting has taken place. This gives the board more time to go through the review and segregation process, so it can more carefully examine and redact any confidential information from the board packet. **Unlike the Sunshine Law, the UIPA would require the board to mail the packet to the requester, if so requested. To fulfill UIPA requests, however, the board may charge search, review, and segregation fees and copying and delivery costs**, as allowed by applicable law and rules. Thus, for most members of the public, free access to the public version of the board packet prior to the meeting under 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 starting to compile board packets, prepare the public versions at the same time. Determine what documents will or won't be included in the public packet and how they might have to be redacted. Remember

that the law specifically exempts executive session minutes and license applications from being included in board packets.

- Have at least one copy of the public packet available for inspection in the board's office as soon as the meeting notice is filed.
- If the public board packet is available for public inspection only in electronic format, then the board must be able to provide equipment for the public to be able to view the packet.
- Have an electronic 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.
- 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, 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.

Electronic notice requirement (HRS § 92-7)

Effective July 1, 2018, Sunshine Law **meeting notices must be posted on state and county electronic calendars as the official notice** of the meeting. If there is a dispute as to whether an agenda was electronically filed at least six calendar days prior to the meeting, a printout of the electronic time-stamped agenda is conclusive evidence of the posting date.

Although submission of the notice to the Lt. Governor's office or the county clerk's office will no longer be the official filing, boards must still provide copies of the notice and agenda to the appropriate office, which must continue to post the notices in a central location in a public building in paper form or in electronic format, such as via a monitor linked to the electronic calendar. This enables the public to still see courtesy copies of the meeting notices posted outside of the Auditorium at the State Capitol or at county buildings. **The electronic calendar, however, will provide the official notice** required by the Sunshine Law. Therefore, the failure to file timely copies of notices with the Lt. Governor's office or county clerks will no longer require cancellation of the meeting. Moreover, the Lt. Governor or county clerks have the discretion to determine whether they want paper documents to be provided to them, or if electronic copies can be faxed to them or emailed to an email address designated by them.

Boards must continue to **keep a list of persons wishing to be notified** of meetings **and send timely notices** to persons on the notification list at least six days before the meeting, and must do so **by postal mail or electronically**, as requested. Until July 1, 2018, the Sunshine Law only addressed sending notices by mail, not by email, which meant that cancellation of a meeting was required if a board failed to mail notices at least six days before the meeting, but not if the board failed to email notices in time. With the change in the law, the **meeting must be cancelled if the board fails to provide six days' advance notice via mail or email** to people on the notification list.

Practice tips:

- Be careful to keep accurate records of postal and email addresses of persons on the notification list, and any changes to those addresses, so that notices will be timely and properly sent to them, as the board's errors in an address that made a notice non-deliverable could potentially result in the cancellation of a meeting.
- Reduce opportunities for clerical errors by board employees, particularly with email addresses. If possible, have requesters directly enter their own email or mailing addresses online to be added to the board's notification list, and keep a record of the addresses entered by the requesters so that any mistakes will be attributed to the correct source. Consider emailing an acknowledgement after requesters register for email notification, to ensure that the correct email address has been entered onto the board's email notification list.
- Consider filing agendas well before the six-day requirement, so that any potential errors in postal or email addresses can be corrected and timely notices can be sent to people on the notification list. Alternatively, before a particularly important board meeting, the board may wish to send a practice notification to requesters on the list, to ensure that the postal or email addresses on the board's notification list are correct.
- Use technology to automate the notification process, reduce duplicative requests to the boards themselves, and eliminate potential clerical errors by the board in entering email addresses. Check to see whether the state or county electronic calendars will automatically notify those persons who subscribe to certain meeting notices.
- **Keep a time-stamped copy of the agenda** to provide conclusive evidence of the date when the notice was filed.

Minutes may be recorded (HRS § 92-9)

Boards may continue to keep written minutes as they have been required to do. **But beginning on July 1, 2018, boards will have a new option to keep a recording of the entire meeting along with a written summary.** For this new option, a board must keep its minutes in a digital or analog recording format (e.g., via a cell phone, video, or tape recorder) and provide a written summary, which is required to include:

- The date, time, and place of the meeting;
- The members of the board recorded as either present or absent, and the times when individual members entered or left the meeting;
- A record, by individual members, of motions and votes made by the board; and
- A time stamp or other reference indicating when in the recording the board began discussion of each agenda item and when motions and votes were made by the board.

The written summary requirements will allow the public to quickly find key information about a meeting and skip to the point in the recording where an item of interest was discussed, without having to listen all the way through what may be hours of recorded content.

Software is available to create time stamps while taking notes at a meeting. For instance, OneNote, which is part of the Microsoft Office package used by state agencies, allows someone to record a meeting and take notes at the same time, so the note-taker can easily add a time stamp for the audio recording to a spot in the document as the notes are being written. Otherwise, if you are trying to create a written summary after the meeting, someone may have to listen to the entire recording and manually note when each topic of discussion begins.

The benefit of using a recording is that there is no need for written minutes paraphrasing discussions to give “a true reflection of the matters discussed at the meeting and the views of the participants.” On the other hand, it can be more difficult for someone to understand what was discussed at a meeting without attending the meeting or listening to the entire recording because the written summary only records the board’s motions and votes. Moreover, **recorded minutes may be more difficult to retain because of changes in technology and equipment needed to replay them in the future.** Thus, while some boards may prefer preparing recorded minutes once they are allowed, other boards may want to continue preparing written minutes because they are easier to review, approve, and retain.

The Sunshine Law does not require a board to record its minutes, and the new option to create recorded minutes does not impose any requirement to record meetings for boards that prefer using written minutes. Moreover, if a board is recording a meeting solely to help it prepare written minutes and plans to delete or record over the recording once those minutes are prepared, the temporary recording need not be posted online (see requirement below) and typically need not be retained once the written minutes have been approved by the board.

Retention requirements are not administered by OIP. For many state agencies, the default retention policies are set by the Department of Accounting and General Services (DAGS) if the agency does not have its own retention policies. For many records, DAGS's retention period is "permanent;" but audio records of meetings made exclusively for note-taking has a retention period "[u]ntil approval or transcription of minutes is approved." There is no requirement in the Sunshine Law as to how long minutes must remain posted on the board's website, so questions about retention of minutes should be directed to the agency to which the board is attached.

Practice tips:

- Boards are not required to switch to preparing recorded minutes; they can continue preparing written minutes if they prefer. Recorded minutes are just another option.
- Because of the new requirement to post minutes online (describe below), a digital recording is preferable to an analog recording.
- If the written summary already reflects who is present at the time, then a unanimous vote without abstentions would not require the minutes to include another listing of all members.
- Know what is the applicable retention requirement (which are not covered by the Sunshine Law or UIPA) and how long you must maintain your minutes or any recording of a meeting.

Minutes must be posted online (HRS § 92-9(b))

Currently, the Sunshine Law does not require online posting and, upon request, boards have 30 days from the date of the meeting to make minutes "available." This requirement will be replaced. The new law, effective July 1, 2018, **requires all boards to post their written or recorded minutes online within 40 days after the meeting.** If the board chooses to post a **recording of its meeting**, it still needs to **also post a written summary within 40 days after its meeting**, because the written summary is part of the recorded minutes. A board that is preparing written minutes does not need to post a recording, even if it has one – for instance, temporary recordings intended to be used for

note-taking to prepare written minutes do not need to be posted online, since the written minutes will be posted online instead.

As before, the new law does not require boards to **approve** minutes. If a board does approve its meetings as a usual practice but there are no approved minutes for a meeting, then **draft minutes must nevertheless be posted online within 40 days after the meeting**, because there is no exception to the posting requirement even when a board has not approved its minutes. The draft minutes posted online may be marked as a “draft,” and they may be replaced with the minutes that are eventually approved by the board when those are ready, but the board must still post minutes that satisfy the Sunshine Law’s requirements within the required 40 days.

A board that has its own website will most likely prefer to post its minutes there, but a board that does not have its own website may post its minutes on an appropriate state or county website instead, such as the website for the department to which the board is administratively attached. To provide additional time that may be needed for an IT office or administrator to post minutes online after they have been prepared by the board, the new law added ten days to the time for disclosure, so that the deadline for posting is now **40 days after a meeting**. But since public access to a board’s minutes will no longer depend upon persons requesting to inspect or obtain a copy of the minutes, the public now has easier, and probably faster, access to minutes.

Minutes of an executive session closed to the public should not be posted online if the disclosure would defeat the purpose of going into executive session. In response to a UIPA request for executive minutes, a board may withhold executive session minutes from disclosure, but only for so long as their publication would defeat the lawful purpose of going into the executive session. Thus, if a UIPA request is made for the executive session minutes, the board must review the minutes to determine if the need for confidentiality has passed, and it may be required to disclose all or part of the minutes.

Practice tips:

- Because there may be a delay from when the minutes are completed to when they are actually posted online, the board should aim to have them ready to post by 30 days after the meeting, to ensure that they are available online within 40 days after the meeting.
- If your board will not be able to approve the minutes in time to post them within 40 days after the meeting, post the draft minutes. You can mark them “DRAFT” and replace them with the final minutes when ready, but you must still have the draft minutes online by the 40-day deadline.
- Remember that the Sunshine Law allows a board to enter into an executive meeting closed to the public only for the eight purposes listed in

HRS section 92-5(a), and the board must follow certain voting procedures. HRS § 92-4 and -5.

- Keep in mind that executive session minutes may eventually be disclosed, such as in response to a UIPA record request, but they do not have to be posted online or included in board packets under the Sunshine Law.
- 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.

For questions about the Sunshine Law or UIPA, please feel free to contact OIP's Attorney of the Day by calling (808) 586-1400 or emailing oiip@hawaii.gov. Additional training materials are available on OIP's training page at oiip.hawaii.gov.