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SUMMARY OF OIP'S 2012 LEGISLATIVE PROPOSALS
(January 11, 2012)

The state Office of Information Practices (OIP) is offering two proposals during the 2012 legislative session. Both proposals have been submitted for inclusion in Governor Neil Abercrombie's administration package and are each entitled "A Bill for an Act Relating to Open Government."

One bill ("**Appeals bill**") **proposes to create a uniform process** under the Uniform Information Practices Act ("UIPA," HRS Chapter 92F) and the Sunshine Law (HRS Chapter 92, Part I), **which would clarify an agency's right to judicially appeal an OIP decision** that either mandates the disclosure of public records under the UIPA, or concludes that an action is prohibited or required by the Sunshine Law. The other bill ("**Sunshine bill**") **seeks to modernize the Sunshine Law by requiring meeting notices to be electronically posted and to add three new permitted interactions.**

Explanations of each bill, which are provided below, discuss the current law, reasons for the amendments, what the amendments would do, and how they would benefit the public as well as the government agencies and boards. OIP is providing this detailed summary to seek your support and attempt to address your concerns when the Legislature considers the bills this session.

The bills are still being finalized and will be posted on OIP's website, along with updates on their progress. Please keep an eye out for future "What's New" articles that will be e-mailed and posted on OIP's website at hawaii.gov/oip. If you would like to be added to OIP's e-mail list, please contact oip@hawaii.gov.

OIP LEGISLATIVE PROPOSAL #1: APPEALS BILL

The Uniform Information Practices Act (UIPA) currently allows record-requesting members of the public to challenge an agency's denial of records through OIP's informal resolution process. Whether or not a requester goes through this informal resolution process, the law allows a requester to go to court to seek de novo review of an OIP decision upholding a denial of access to records by a government agency.

Proposal Allows Agencies to Judicially Appeal OIP's Decisions

In contrast to a requester's right to appeal, Hawaii's UIPA has never contained a provision allowing a government agency to appeal an OIP decision in the requestor's favor that mandates the disclosure of records. Rather, the UIPA expressly directs agencies that it "shall make the record available" when required by OIP. (HRS 92F-15.5(b)) Moreover, the UIPA's legislative history indicates that the lack of a process for agency appeals was an intentional omission, designed to prevent lawsuits between agencies, which is why OIP has argued that its decisions could not be appealed to the courts by an agency. Nevertheless, Hawaii's courts in County of Kauai v. OIP, 120 Haw. 34, 200 P.3d 403 (2009), allowed an agency to appeal OIP's decision requiring the disclosure of the agency's executive meeting minutes and rejected OIP's arguments against appellate jurisdiction. Instead, the Intermediate Court of Appeals, in a decision that was summarily affirmed by the Supreme Court, reasoned that the agency's appeal could proceed under the Sunshine Law, which allows "any person" to go to court to determine the law's applicability to a board's discussions or decisions, even though the agency was actually appealing a separate UIPA determination.

Rather than continuing to litigate whether OIP opinions should ultimately be reviewable by the courts, which could result in "agencies suing agencies" contrary to legislative intent, OIP is seeking legislative clarification of agencies' appeal rights regarding OIP opinions under both the UIPA and the Sunshine Law. **OIP proposes the creation of a uniform procedure applicable to both the UIPA and the Sunshine Law, which would strictly define and limit agencies' right to appeal OIP opinions.**

OIP and the Public Are Not Required to be Parties in an Agency's Appeal

Under OIP's proposal, **OIP or a member of the public affected by the decision shall not be required to participate in the judicial appeal, which would essentially be a review of OIP's opinion and be limited to the record that was before OIP.** Neither OIP nor the requester would be required to appear in an agency's appeal, thus eliminating the agency's ability to win simply by default. The judicial review would be of the OIP decision itself, rather than a suit against OIP or the requestor personally. Just as a judge is not sued or required to appear in a case challenging his or her decision, neither OIP nor a requestor would be named as parties to the appeal. **OIP and the requestor would be given notice of the suit and would have the right to intervene, but they would not be required to appear in the case or risk losing by default.**

"Palpably Erroneous" Standard for Agencies' Appeals Only

OIP's opinions would be admissible on appeal and shall be considered as precedent unless found to be "palpably erroneous." The "palpably erroneous" standard is a high standard of review **that requires great deference to OIP's factual and legal findings and conclusions**, and it was previously applied to an OIP decision by the Hawaii Intermediate Court of Appeals in Right to Know Committee v. City Council, 117 Haw. 1, 13, 175 P.3d 111, 123 (2007). **The codification of a high standard of review for the agency appeals process is necessary to discourage**

agencies from routinely challenging or ignoring OIP's opinions and thus undermining OIP's value as an alternative to the courts in resolving UIPA and Sunshine Law disputes.

To avoid confusion as to the effect of the new review process on a record requester's existing right to go to court on a "de novo" basis, the bill would further clarify that the lesser "de novo" standard of review only applies in a requester's (not an agency's) UIPA appeal to court.

Uniform Standards

The bill would further align the standards under UIPA Parts II and III regarding a record requester's appeal to court after an OIP decision upholding an agency's denial of access, and **it would provide a uniform appellate process under the UIPA and Sunshine Law,** which are both administered by OIP.

The bill would add a new section to part IV of chapter 92F and amend sections 92-12, 92F-15(b), and 92F-27, Hawaii Revised Statutes. To give OIP time to adopt administrative rules, the bill's effective date would be January 1, 2013.

OIP LEGISLATIVE PROPOSAL #2: SUNSHINE BILL

The Sunshine Law was originally enacted in 1975, long before the widespread use of the Internet and electronic devices. **To modernize the Sunshine Law, while enhancing public participation and government transparency, OIP has proposed a bill that would require the official meeting notice to be electronically filed and would create three new permitted interactions regarding cancelled meetings, attending informational and other meetings, and using social media.**

Meeting Notices to be Electronically Filed

Currently, the Sunshine Law requires public meeting notices to be physically filed with the Office of the Lieutenant Governor, and copies are posted on the bulletin board in the Capitol Chambers. By Executive Order, Governor Abercrombie and the previous administration also required state boards to electronically post their notices on the state calendar.

OIP's bill will require the official meeting notices of state boards to be electronically filed on the State's electronic calendar. The bill will also give counties the option to electronically file board notices on the state's website or on official county websites. The bill further clarifies that the proper electronic filing location for other types of state agency notices is the electronic calendar, rather than the defunct Hawaii FYI system. **The emergency meeting provisions have also been amended to require electronic posting** of the emergency meeting agendas and findings justifying the emergency meeting, so as to prevent any confusion that could result from inconsistent filing methods.

The Sunshine bill will make it easier for the public to be notified of state and county board meetings as well as emergency meeting notices and findings

because all the notices will be centrally located on the state calendar (or the county's official website) where they are easily accessible and searchable over the Internet. **The statute, as amended, will continue to provide alternative means of receiving notice through mail or electronic transmission for those members of the public who do not have access to the Internet.**

In addition to **cost savings** resulting from the near elimination of paper, copying, and delivery costs, use of electronic posting will **promote government efficiency by reducing staff resources and duplication of effort** spent to maintain and physically post the notices with the Office of the Lieutenant Governor, in the Chambers, and on the state calendar.

There is a **built-in safeguard** to ensure that only timely filed notices are electronically posted, as the **state calendar will automatically reject a notice that is posted with less than six days' advance notice.** The board can print out an electronically time-stamped agenda to retain proof that it timely filed the meeting notice.

Permitted Interaction Regarding Cancelled Meetings

OIP has advised boards that the current Sunshine Law does not allow board members to hear testimony or presentations on items on the agenda of a cancelled meeting because the board members would be doing so outside a meeting, even though a notice and agenda had been filed and members of the public may not want to have to return for a rescheduled meeting. **This proposed amendment to the law is intended to accommodate the public by allowing the receipt of testimony and presentations, even though a meeting must be cancelled.**

The Sunshine bill would create a new permitted interaction to allow board members to hear public testimony and presentations on agenda items when the meeting is cancelled as a matter of law due to the lack of a quorum or videoconference equipment failure. Despite the cancellation of a meeting in such cases, the board members present will be able to receive public testimony or presentations so that people will not have to spend more time and incur additional travel costs in order to give their testimony or presentations at a subsequent meeting. The public can choose to attend the subsequent meeting before a duly constituted board in lieu of, or in addition to, testifying at the cancelled meeting. The **reporting requirement**--that the board members at the cancelled meeting must report on the testimony and presentations to the full board at its next meeting--will generally ensure that the entire board has access to the information received at the cancelled meeting. **A board's deliberation and decisionmaking must still occur at a subsequent duly noticed board meeting.**

Permitted Interaction to Attend Other Meetings

The Sunshine Law prohibits members from discussing official board business outside of a meeting of their board, except as specifically permitted. One aspect that has been a source of much frustration for board members is that the Sunshine Law does not generally allow more than two members to discuss board business in the course of attending another board's meeting, a presentation, a legislative hearing, or a seminar, even though that other board's meeting may be open to the public either as a

Sunshine Law meeting or for other reasons. Thus, for example, three of seven City Council members who represent districts overlapping with one neighborhood board district cannot all attend and participate in that neighborhood board's public meeting relating to Council matters, or in a community meeting regarding a proposed development, or in a legislative hearing on a bill of interest to that community. Although the law allows a board to set up a permitted interaction group ("PIG") of less than a quorum to attend such meetings, there often is not sufficient lead time before the other bodies' meetings for the board to hold its own meeting to establish such a PIG.

Consequently, OIP believes that the Sunshine Law, as currently written, deters board members from attending presentations or other meetings, discourages board members from testifying or participating in discussions that are a part of those presentations, lessens the public's ability to interact with board members, makes it difficult for board members to be fully informed of all sides of an issue, and reduces communication and cooperation between various boards on issues of mutual concern. To correct this, the **Sunshine bill proposes to create a second new permitted interaction that would allow less than a quorum of board members to attend meetings of other boards, conferences, or community groups.**

OIP's proposal is based on the 2008 amendments to the Neighborhood Board law (Part VII of Chapter 92), which allow those board members to participate in informational meetings and presentations before other entities. **OIP proposes to have a similar provision apply to all Sunshine boards and would allow less than a quorum of board members to participate in other boards' meetings, legislative hearings, seminars, presentations, community meetings, and similar events to enhance board members' knowledge and performance of their duties, increase the public's input into the board's deliberations, and promote cooperation between various boards on matters of common concern.**

The proposed amendment is intended to improve the performance of the board members and their boards by **allowing for a more thorough gathering of information and a fuller understanding of various perspectives, which would promote better discussion and deliberation before the full board.** So long as there is no quorum to make decisions, board members would be able to attend other entities' meetings (e.g., legislative hearings) on short notice and they will no longer have to leave or refrain from participating in the discussions held as part of the presentations. The proposal is also intended to **foster better and more effective communication and coordination between boards and other entities on issues of common concern.**

By giving board members greater freedom to attend and participate in meetings other than their own board meetings, the proposal will also increase the public's ability to engage with board members on matters of public concern. **Board members can now go to the public, and not simply wait for the public to come to their board meetings. Thus, the proposal will give the public increased access to information about a board's current business and greater ability to interact and express their views with board members.**

The bill contains safeguards for the public by limiting the number of board members who may participate to less than a quorum, allowing discussion only

during and as part of the presentation, and requiring subsequent reporting by the board members at a duly noticed open meeting. The reporting requirement protects the public's interest, as the report by the minority of members to the full board will need to be sufficiently detailed if they wish to influence any decision on issues discussed under this permitted interaction.

Permitted Interaction to use Social Media

The Sunshine Law prohibits board members from discussing official board business outside of a meeting of their board, except as specifically permitted. Presently, there is no permitted interaction that would allow more than two board members to participate in a social media discussion, even though board members' intent in doing so is typically to make current policy discussions more accessible to more people. This prohibition could apply to board members who, for instance, directed "tweets" about board business to one another via Twitter or even "followed" one another's Twitter accounts, or who used Facebook to comment on each other's posts about board business or to post on each other's "walls" about board business, even if the discussion was open to anyone with internet access. Depending on the specific situation, even board members' status as Facebook "friends" could be considered participation in a serial discussion if the members were writing posts about board business and those posts automatically showed up in the other members' news feeds as posts by "friends."

The proposed amendment would create a new permitted interaction that would allow less than a quorum of board members to openly participate in a social media discussion, while ensuring public access to those discussions and retaining OIP's ability to examine specific cases to determine whether the spirit and intent of the Sunshine Law has been violated through surreptitious means of utilizing social media. Limiting participation to less than a quorum of a board's membership ensures that the social media discussion will not result in a board decision being essentially made online, as a majority of the board will not be part of the discussion and, thus, would not be part of any consensus reached in the course of the discussion.

As an additional safeguard, any social media discussions taking place must be accessible for review and participation by the public-at-large, and the discussions must be in a written, continuously accessible form that allows members of the public to review what has been said and to add their comments according to their own schedule. **In other words, Twitter, Facebook, or similar accounts used to discuss board business must be set as public, and the discussions of board business must be left online and available, to meet the terms of the permitted interaction.** To ensure that the public can readily find and access the social media sites being used by board members, **the proposed bill further requires the board to provide a list of all board members using social media and their social media addresses or identifications.**

Unlike more private means of communicating via personal meetings, letters, e-mails, or telephone calls, the social media discussions permitted by this proposal would provide greater transparency and enhance OIP's ability to determine the content and context of board members' communications, as all social media comments can be viewed and examined. For example, in contrast to a

conversation in the hallway or a phone call, a written record of tweets or postings could be downloaded by a member of the public who believed board members' discussions violated the Sunshine Law. Given the inherently open and transparent nature of the social media discussions being permitted by this amendment, it would be foolish for someone to intentionally violate the Sunshine Law using this method of communication.

Instead, **the proposed bill should be viewed as a means for board members to engage in more effective communication with the public and to enhance public participation in the decisionmaking process.** OIP recognizes that a significant segment of the public enjoys communicating through social media or may have difficulty participating in the board's decisionmaking process through the traditional means of personally attending and testifying at board meetings. For example, people of all ages and economic backgrounds may have work, school, or family obligations that conflict with typical meeting times, and many people find it difficult to attend meetings due to distance, disability, or other responsibilities. **Social media encourages public participation in governance by providing members of the public with additional and more convenient access to and interaction with board members regarding board business**. **In addition to allowing board members to communicate with their constituents, social media also provides a means for the public to read and respond to different views and perspectives from other people's comments on various board issues. All of the social media communication can take place according to individuals' preferred schedules throughout the day or week, rather than being limited to the time, date, and place set by a board. Thus, OIP views social media as a means to greatly enhance openness, transparency, and public participation in government.**

OIP strongly recommends that boards adopt their own social media policies that will address important constitutional, legal, or practical concerns, and notes that the state Office of Information Management and Technology and the Attorney General's Office have been developing a model social media policy for the state. By proposing this amendment, OIP is not setting out a policy on how board members should best use social media, but simply intends to ensure that the Sunshine Law does not present an impediment to social media usage while still providing safeguards to protect against Sunshine Law abuse.

The Sunshine bill would amend HRS sections 1-28.5, 92-2.5, 92-7, and 92-8, and its effective date is July 1, 2012.

Conclusion

OIP requests your support of both legislative proposals, which we believe reasonably enhance government efficiency and cost savings while effectively protecting the public's right to openness and transparency and increasing public participation in government. If you have any questions or concerns, please contact oip@hawaii.gov, call (808) 586-1400, or review updates and other materials on OIP's website at hawaii.gov/oip.