

Agenda Guidance For Sunshine Law Boards

Introduction

The state Office of Information Practices (“OIP”) is providing this guidance on how to craft agendas under the Sunshine Law to give Sunshine Law boards useful information and examples to follow in their efforts to serve the public and comply with the law’s requirements. *See* HRS Chapter 92, Part I. This guidance is intended to provide boards with a model for crafting a good, informative agenda for meetings. It is **not** intended to define the **minimum** level of detail an agenda can contain to provide legally adequate notice of a particular item under the Sunshine Law, but rather is intended to assist boards in understanding what makes an agenda informative and easily understood by the public at large. In other words, a board following these guidelines can feel confident that its agendas will withstand OIP’s scrutiny and go beyond the minimum requirements to provide the public with helpful and meaningful information about what the board intends to consider at its upcoming meeting.

Attached are good and bad examples of agendas of a hypothetical Shrimp Board. Also attached is a checklist for a Sunshine Law agenda.

Legal Requirements for a Notice of Meeting

A notice of meeting must “include an agenda which lists all of the items to be considered at the forthcoming meeting, the date, time, and place of the meeting, and in the case of an executive meeting the purpose shall be stated.” Haw. Rev. Stat. § 92-7(a) (1993). More specifically, “the Sunshine Law requires an agenda for a public meeting to be sufficiently detailed so as to provide the public with **reasonable notice** of what the board intends to consider. The statute’s notice requirement is intended to, among other things, **give interested members of the public enough information so that they can decide whether to participate in the meeting.**” OIP Op. Ltr. No. 03-22 at 6 (emphasis added). Thus, as further explained below, **OIP recommends that agendas set forth brief descriptions of agenda items instead of just the titles of documents or names of persons speaking** on the agenda items. However, OIP does **not** interpret the statute to **require that a board identify the specific action that it intends to take** with respect to each agenda item. *See* OIP Op. Ltr. No. 07-06 at 3.

A board can only discuss, deliberate, act on, or otherwise consider matters that were included on the board’s agenda, so the

agenda as filed will generally define and limit the issues the board can consider at the meeting. A board does have a **limited ability to add minor items** to its agenda at a meeting, which **requires a 2/3 vote of a board's total membership** (including members not present or membership slots not filled) **to add an item that is not of reasonably major importance and does not affect a significant number of persons.** **Note that an item of reasonably major importance that affects a significant number of persons cannot be added to an agenda.** Given the difficulty of adding an item, it is rarely practical to add items to an agenda within six days of a meeting or at the meeting.

When creating an agenda, a board should not assume that the public will be familiar with its issues and areas of concern beyond what could reasonably be expected of a member of the general community, and should not assume familiarity with ongoing board issues or specialized jargon. Nor can a board expect members of the public to read an external document, such as a legislative bill or a report or letter available at the board's office, in order to understand what a board plans to discuss at its meeting. Rather, the **agenda must stand by itself in informing members of the public of what topics the board plans to consider.**

General Tips

To make its descriptions of agenda items more informative to the public at large, a board should **not use shortcuts or jargon** that may be readily understandable to the board and its staff, and even to members of the public who actively follow the board, but which may not be known by the general public. A board should consider the intended reader of its agenda as being a reasonably well-informed member of the general public – a member of the public who watches the local news or reads the newspaper, and one who lives in or is familiar with the locality that the board serves, but is still a member of the general public rather than one of the board's regular attendees.

A board should also **not use “placeholders,”** namely terms that are not meaningful to the public but are merely intended to allow the board to consider matters of which it is not specifically aware at the time that the agenda is filed. Rather, the board must know the specific matters that it intends to consider at the time that the agenda is filed and the agenda must reflect those specific matters. Some examples of shortcuts or placeholders to avoid:

- Avoid jargon or acronyms
 - “SMAP” – instead, use “Special Management Area Permit”

- “Restructuring of Instructional Program and Redesignation of Facilities: Twain Elementary School” – use “School Closure: Twain Elementary School”
 - “BIMRS” - use “Bridge Incident Management and Response System”
- ☞ Avoid brief references to issues without details
- “Miller claim” - use “Claims against the County: Robert W. Miller, claim for \$1500 damage to automobile due to pothole”
 - “Hauula site” - use “Proposed educational facility at 654 Okole Maluna Road, Hauula”
- ☞ Avoid references to another document without specifying the subject matter
- “Bill No. 1234” - use “House Bill No. 1234, ‘A Bill for an Act Regarding Sand Reclamation,’ authorizing the Department of Land and Natural Resources to seize sand from preschool sandboxes”
 - “Corr. No. 08-95” - use “Correspondence from the Publisher’s Clearinghouse Sweepstakes advising that the Council may already have won \$5 million (No. 08-95)”
 - “Ahuialama Stream Master Plan (available in board’s office)” - use “Ahuialama Stream Master Plan: proposal to raise fees on ducks, rats, and other stream users, to install landscaping along culverts, to permit limited radio-controlled boating activities, and to install a radio-controlled boat launch”
- ☞ Avoid catchalls or placeholders used as a stand-alone item, not followed by specific items to be considered
- “Grants and contracts”
 - “Correspondence”
 - “Permit applications”
 - “New business”

One simple way to check whether a board’s proposed agenda gives members of the general public enough information about what will be considered to allow them to decide whether to attend and testify is the **“neighbor test”**: show the proposed agenda to a neighbor (or spouse or other person not particularly familiar with the board) and ask if he or she can tell what subjects the board will be talking about at the meeting. If not, the agenda probably needs further clarification.

Giving Notice of Reports as Agenda Items

Many boards include reports of one type or another in their meetings, and the best way to notice a report will usually depend on who is reporting, and for what purpose. As with any other agenda item, **a board cannot discuss, act on, or otherwise consider an issue being reported on if that issue is not described with sufficient detail on the agenda. For this reason, if a board wants to be able to discuss or act on a report's contents, then the agenda must set out the topics being reported on with adequate specificity.**

1. Reports by Board Members or Staff

When the board expects to hear a report made by board members, the **subject matter of the report must always be specifically identified** because even without any further discussion, those members' presentation of report to the rest of the board would constitute board consideration of the issue. Examples might include a subcommittee's report to the full board, a Chair's Report, or the report back to the board made by a permitted interaction group (also known as an investigative task force) under section 92-2.5(b)(2), HRS. In each of these situations, as well as in any other situation where a board member is reporting to the board, **all topics that will be included in the report must be described on the agenda with enough detail to allow the public to understand that those topics will be discussed.**

When a board hears a report from its own staff or administrator, the administrator's presentation of the report does not automatically constitute board consideration of the issue in the same way that presentation of a report by a board member would be. A board could conceivably listen without comment to a report on a matter that the board did not intend to take up or act on, and then move on without discussion. Nonetheless, in most instances the board will want to at least have the option of actually discussing and acting on the topics raised in a report by its own staff, and a board can reasonably ask its own staff to provide details about what will be reported on early enough to include those details in the agenda. Similarly, when a board hears a report from a government office or agency over which the board has some oversight, the board will generally want the ability to discuss the matters reported on and can reasonably ask the agency to provide details about the report in advance to be able to include the details in the agenda. Consequently, **it is a good practice to have the agenda specifically identify the subject matter of any report to the board, so that the**

board can ask questions, engage in discussion, and possibly take action on the report.

2. Reports by Third Parties

When a board hears a report from a third party—such as a developer’s representative reporting on a project seeking board approval, an expert presenting information on a subject of general background interest to the board, or a police department representative reporting crime for the last month to a neighborhood focused board—the board may or may not anticipate the need to take up and consider the issues being reported on. **But where the board does want to be able to discuss the matters reported, it should ask the presenter to provide in advance the specific subjects that will be reported so as to include their description in the agenda.**

A board should also bear in mind that **how an agenda item is framed will determine the extent of the testimony, discussion, and deliberation of that item. A broadly framed description of the issue that is the subject of a report could allow the board to discuss the issue broadly, but would also require the board to allow testimony on an equally broad range of aspects of the issue.** Thus, for example, an agenda item such as

Developer’s report

would not give adequate notice of the topic being reported, and would not allow the board to consider the topic being reported at all. An agenda item such as

Developer’s report, Pohaku Estates residential project, Niu Valley, TMK 123-4567

could allow board discussion of the project generally, but would also allow members of the public to discuss all aspects of the project. Even if the board’s actual intent was to focus on the developer’s traffic mitigation plans, the board would still be required to hear public testimony on the environmental hazards of the development, its effect on neighbors’ views, and other aspects of interest to testifiers. So if the board wanted to hear about the traffic mitigation plans specifically and did not plan to consider (or hear testimony on) other aspects of the project, an agenda item such as this below would better serve the board’s needs.

Developer's report, Pohaku Estates residential project, Niu Valley, TMK 123-4567:
Traffic mitigation strategies

By narrowly tailoring the agenda item, the board can limit the testimony to that item, and must also limit its discussion and deliberation to that narrowly described item, e.g., traffic mitigation strategies.

In some instances, though, a report from a third party is expected to be purely informational and the board does not expect to discuss the matters raised in it, and may not even know ahead of time what topics will be covered. In such a case, the board may prefer to simply list

Monthly report by representative of Honolulu Police Department

or

Briefing by Dr. Richard Pritchard of the H.H.H. Institute regarding new federal regulations for mental health facilities

with the understanding that if the board should become interested in considering a specific issue reported on, it would wait to discuss it at the next meeting when the issue was properly included on the agenda.

Giving Notice of Executive Sessions

When a board lists agenda items that it anticipates discussing in executive session, it is required to note on its agenda that it anticipates an executive session and the purpose for which the executive session is anticipated. Thus, **an executive session agenda item will include the specific matter to be discussed, and a statement that the board anticipates going into executive session for the item, and the executive session purpose (from the list in section 92-5(a), HRS) that allows the board to discuss the item in executive session.** The full agenda item would read something like

Purchase of vacant lot at 55-987 Kamehameha Hwy, TMK 12-345: Board anticipates going into executive session pursuant to section 92-5(a)(3), to discuss the authority of Board's negotiator with respect to the purchase.

In some instances, a board may find it challenging to write a description of the topic to be discussed in the executive session that adequately notifies the public of what the board will consider, without revealing information that the executive session is intended to protect. This most typically arises when an executive session is intended to protect the privacy of an individual who is applying for a position, or who is the subject of a complaint or possible disciplinary action. **Even though the public will not be attending the executive session itself, members of the public still have the right to submit testimony on the item, and thus the board should do its best to give the public enough detail to allow for meaningful public testimony, while still protecting any information the executive session is intended to protect.** For example, a description such as,

Complaint against an officer

is too vague to allow for meaningful testimony. An agenda description such as,

Complaint against Officer Kawika Doe: Allegation that Officer Doe swore at driver and pushed a passenger during traffic stop

is too specific, as it contains the identity of an employee for whom disciplinary action is being considered, which the executive session is intended to protect. However, the board could take a middle ground with a description such as

Complaint against an officer: Allegation that an officer swore at driver and pushed a passenger during traffic stop

which would provide the public with information that could be used to create meaningful testimony – people would at least know to focus on police behavior at traffic stops – without revealing the identity of the officer in question.

Giving Notice of Opportunity for Public Testimony or General Public Comments

Because the Sunshine Law requires a board to allow public testimony on every agenda item, it is **not necessary for a board's agenda to specifically state that public testimony will be allowed**, or to list public testimony as an agenda item. Regardless of whether the agenda actually lists an opportunity for public testimony, **public testimony must still be allowed**. However, a **board may certainly choose to specifically state**

when, during the course of the meeting, testimony will be taken and make this timing clearer to the public. For example, a board may state on the agenda that all testimony will be taken at the beginning of the meeting by listing the first agenda item as follows:

I. Public testimony on all agenda items.

Some boards choose to hear not just public testimony on every agenda item as is required by the Sunshine Law, but also statements from the public on items that are not on the agenda. A board that has a “Community Concerns,” “Statements from the Public,” or a similar soapbox period during its meeting obviously will not know ahead of time what specific issues will be brought up during that period, and so cannot list those specific issues on its agenda. For this reason, **when the board is hearing the public’s concerns during the soapbox period, the board’s members should keep in mind that they cannot discuss or consider those concerns until such time as those concerns are properly on the board’s agenda.** If a board finds that it would like to take up and consider an issue raised during the soapbox period, the board has the option of either (1) telling the member of the public that the item will be considered for a future agenda, or (2) adding an item to the agenda, but only if the board meets statutory requirements about the item’s importance and obtains approval of 2/3 of the board’s full membership.

Sample Agendas

The entirely fictional State Board of Shrimp Affairs, which OIP created for training purposes, has two sample agendas for its meeting of June 31, 2005, which are attached to the end of this guidance and can also be found on OIP’s website at <http://hawaii.gov/oip/training.html>. In our training scenario, the first agenda (which has 20 items) was filed eight days before the meeting; the Shrimp Board’s chair called OIP with questions about the agenda; and a revised version of the agenda (which has 17 items) was then filed six days before the meeting. Version 1 is an example of an agenda with various shortcomings, which does not adequately notify the public of what the board will consider; in other words, **Version 1 is not meant to be a model** to follow. Version 2 is an example of how the same agenda could look with the problems fixed, mostly by adding additional detail. **Version 2 can thus serve as a model** for what level of description is adequate to notice different types of items.

Most of the improvements in Version 2 consist of additional detail. Thus, for instance, items that were shown as “placeholders” without specifics in Version 1 (‘Aquaculture License Applications, if any,’ ‘Amendment to Rules

of the State Board of Shrimp Affairs,' and others) have turned into category headers, with specific items listed under them. In the listing of specific items, please note that the descriptions of proposed legislation or rule changes identify not only the bill number or the section affected, but also the title and a brief description of what the bill or rule change would do.

The Shrimp Administrator's report from Version 1 was revised by adding specific topics, since the Shrimp Board is likely to want the ability to discuss the issues its Administrator is reporting on. Note also that an item formerly listed for executive session, "Shrimp Administrator -- Strategic Planning," has been given more detail and a different place in the Shrimp Administrator's report, since strategic planning does not fall under one of the permitted purposes for holding an executive session. Some of the other executive session items in Version 1 (approval to retain special counsel; revocation of Pilau Bar & Grille's pupu license) were eliminated from Version 2, because those items do not appear to fit an executive session purpose.

One item that does remain in executive session, "Hiring of Secretary/Fry Cook II," has been changed in two ways. First, while Version 1 listed only the purpose for the executive session, Version 2 also states the actual subject matter to be considered in the executive session. Second, Version 2 lists the subject matter first, and then notes that the board anticipates hearing the item in executive session for the listed purpose. Because a board must publicly vote to go into executive session (with 2/3 of members present and at least a majority of the full membership in favor), the board may anticipate going into executive session but cannot be certain that it will be able to do so until the vote on the question is taken at the meeting. For this reason, **OIP recommends that executive sessions be listed as "anticipated."**

An item that was listed only as "Correspondence" in Version 1 has been amended in Version 2 to add not only the letter's date and sender, but also to specify the topic of the letter. As discussed above, **an agenda must stand on its own and cannot require the public to consult extrinsic documents to understand it.** For this reason, when a piece of correspondence is listed as an agenda item, the description must include the subject matter of the correspondence if the description is to be meaningful to the public.

Finally, this meeting concludes with a soapbox period. As discussed above, because the board does not know what concerns members of the public will raise during such a session, there are no specific items for discussion listed on the agenda. However, Version 2 has added a **qualifier**, "Public comment on issues not on the agenda, for consideration for Board's agenda at

the next meeting,” **to make it clearer to members of the public that matters raised during the soapbox period will not be immediately taken up by the board.**

Agenda Checklist

A checklist is attached as a convenient reminder of the Sunshine Law requirements for a public meeting notice.

Version 1: What not to do

STATE BOARD OF SHRIMP AFFAIRS



AGENDA FOR SEVENTH MEETING
FRIDAY, JUNE 31, 2005
4:30 P.M.
LARGE FISHTANK, TAMASHIRO MARKET

Pravni Vista
Pier 38 Makai Side
Honolulu, Hawaii 96813

Chair: Giovanni Brine
Members:
Goby Magare
Tiger Shrimp
Pravni Travolta
S. Scampi

Phone: 808-588-8888
Fax: 808-588-8889
E-mail: shrimp@hawaii.gov
Web: www.shrimp.hawaii.gov

1. Call to Order, Public Notice, Quorum
2. Approval of Meeting Minutes
3. Shrimp Administrator's Report
4. Approval of Aquaculture License Applications, if any
5. Amendment to Rules of the State Board of Shrimp Affairs
6. Proposed Legislation
7. Executive Session:
 Shrimp Administrator– Strategic Planning
8. Executive Session: Pursuant to Haw. Rev. Stat. § § 92-4 and 92-5(a)(4), the purpose of this executive session is to request approval to retain special counsel to represent the Board in Heinz Cocktail Sauce v. State Board of Shrimp Affairs.
9. Executive session: Pursuant to Haw. Rev. Stat. §§ 92-4 and 92-5(a)(4), the purpose of this executive session is discussion/recommendation for Board action on revocation of coconut-crusted shrimp pupu license for Pilau Bar & Grille.
10. Executive session: Pursuant to Haw. Rev. Stat. §§ 92-4 and 92-5(a)(2), the purpose of this executive session is to consider the hire, evaluation, dismissal, or discipline of an officer or employee where consideration of matters affecting privacy will be involved.
11. Gifts, Grants, and Contracts
12. Correspondence
13. Unfinished Business
14. Scope
15. Report
16. New Business
17. Announcements
18. Open Forum
19. Adjournment

Version 2: What to do (page one)

STATE BOARD OF SHRIMP AFFAIRS



AGENDA FOR SEVENTH MEETING
FRIDAY, JUNE 31, 2005
4:30 P.M.
LARGE FISHTANK, TAMASHIRO MARKET

Prawn Vista
Pier 38 Makai Side
Honolulu, Hawaii 96813

Chair: Giovanni Brine
Members:
Goby Maguire
Tiger Shrimp
Praven Travolta
S. Scampi

Phone: 808-588-8888
Fax: 808-588-8889
E-mail: shrimp@hawaii.gov
Web: www.shrimp.hawaii.gov

1. Call to Order, Public Notice, Quorum
2. Approval of Meeting Minutes of April 1, 2005
3. Shrimp Administrator's Report:
 - Illegal prawn fighting
 - Staff recruitment efforts
 - Projected shrimp economic activity in 2015
 - Strategic Planning for 2015
4. Aquaculture License Applications:
 - Prawn with the Wind Shrimp Pond, South Point
 - 'Opae in the Sky Hydroponic Farm, Maunaloa
 - Shrimp My Ride Mobile Aquafarm, Kahuku to Honolulu
5. Amendment to Rules of the State Board of Shrimp Affairs:
 - Rule 12: Shrimp Size Designations—to prohibit use of the term "jumbo"
 - Rule 17: "Salt-and-Pepper Shrimp" — to allow restaurants to use low sodium salt in preparation
6. Proposed Legislation:
 - H.B. 3015, Relating to Crustaceans: Appropriates funding for treatment programs for incarcerated crabs, lobsters, and shrimp
 - S.B. 4129, Relating to Education: Requires public schools to teach zoology with a focus on shrimp
7. Approval to retain special counsel to represent the Board in Heinz Cocktail Sauce v. State Board of Shrimp Affairs.
8. Revocation of coconut-crusting shrimp pupu license for Pilau Bar & Grille.

Version 2: What to do (page two)

9. Hiring of Secretary/Fry Cook II position. The board anticipates convening an executive meeting to interview candidates for the position pursuant to Haw. Rev. Stat. §§ 92-4 and 92-5(a)(2).
10. Gifts, Grants, and Contracts:
 - Grant to tour and compare shrimp trucks of Oahu
 - Grant to film documentary, "The Natural Life of Shrimp"
 - Contract with Crustacean Consultants to study feasibility of aquatourism industry on Kauai
 - Contract with Columbia Studios for Hawaii shrimp placement in "From Here to Eternity" remake
 - Bequest of \$25,000 from estate of Crevette Etouffee.
11. Correspondence from Kahoolawe County Council: Seeking Board's comments on a proposed shrimp-themed resort hotel
12. Proposals to increase population of aquarium shrimp
13. Proposals to deal with giant mantis shrimp in the Ala Wai Canal
14. Report by designated investigators:
 - New slurp gun
 - Crustaceans Galore Wholesalers: financial position
15. Announcements:
 - New board website
 - Winner of student Shrimp Bee
 - Next meeting date and time
16. Open Forum: Public comment on issues not on the agenda, for consideration for Board's agenda at the next meeting
17. Adjournment

Office of Information Practices

Sunshine Law:

PUBLIC MEETING NOTICE CHECKLIST

1. Notice Includes:

- Date
- Place
- Time
- Agenda - describing with reasonable specificity matters to be considered
- If an executive meeting is anticipated, agenda describes topic(s), purpose(s) of executive session, and statutory authority

2. Filing Notice:

- 6 calendar days prior to meeting, file at:
 - Lieutenant Governor's Office (State) **or** County Clerk (county)
 - State Calendar: <http://calendar.ehawaii.gov/calendar/html/event>
(State only)
 - Board's Office
 - Site of meeting (when feasible)
 - Mailing list

3. Meeting Cancelled for Late Filing of Notice:

- Notice cancelling meeting posted at meeting site
- State Calendar: <http://calendar.ehawaii.gov/calendar/html/event> (State only)

4. Special Instructions for Emergency Meetings

(less than 6 calendar days prior to meeting):

- File emergency agenda and board's findings justifying emergency meeting at:
 - Lieutenant Governor's Office (State) **or** County Clerk (county)
 - Board's Office
 - State Calendar: <http://calendar.ehawaii.gov/calendar/html/event>
(State only)
 - Persons on mailing list contacted by mail or telephone