



REPORT TO
THE TWENTY-FOURTH
HAWAII STATE LEGISLATURE

PURSUANT TO SENATE RESOLUTION 107 (SD1)
ADOPTED BY THE 2006 LEGISLATURE—

THE PUBLIC POLICY CENTER OF
THE COLLEGE OF SOCIAL SCIENCES
AT THE UNIVERSITY OF HAWAII
TO SPONSOR A SERIES OF
PUBLIC POLICY DIALOGUES
ON OPEN GOVERNMENT

DECEMBER 2006

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INTRODUCTION

On March 15, 2006, Senate Resolution 107 (SD1) was introduced by Senator Les Ihara, Jr. requesting that the University of Hawaii sponsor a series of public policy dialogs on open government.

Several members of the Social Sciences Public Policy Center (Center) faculty met with the Senator and a group of open government supporters and agreed that the Public Policy Center was the appropriate entity within the university to work on conducting these dialogs over the summer and fall. The Center is non-partisan and conducts objective research, facilitates policy dialogs and conducts policy analyses.

SR 107 was referred to the Higher Education and Transportation and Governmental Operations Committees on March 21, 2006. At a joint committee hearing, held on April 3, 2006, supportive testimony was provided from the Office of Information Practices, the League of Women Voters of Hawaii and the Social Sciences Public Policy Center. The committees passed out the resolution and the committee report noted that the members find “that a subject of this magnitude of public interest – possibly revising the Sunshine law- should be open to participation by as many pertinent government entities, community groups and public interest advocates as possible.” The amended measure (SR107, SD1) passed on April 7, 2006. (See Appendix I)

The resolution states that a series of public policy dialogs should be designed to include representatives of the major stakeholders interested in this issue, including the Office of Information Practices (OIP); the Open Government Coalition of Hawaii; the League of Women Voters of Hawaii; the Society of Professional Journalists, Hawaii and University of Hawaii Chapters; the Right To Know Committee; the Honolulu Community Media Council; the Big Island Press Club; Citizen Voice; the Hawaii Pro-Democracy Initiative; Kauaians for Open Government; the four County Councils; neighborhood boards; charter school boards; school community councils; the Board of Education; and the Board of Regents. Other legal entities were also named including the Department of the Attorney General, the County Corporation Counsel Offices, the University of Hawaii General Counsel Office, and various boards such as, the Board of Land and Natural Resources, the Board of Agriculture, and the Natural Energy Laboratory of Hawaii Authority.

The Public Policy Center was requested to report out findings and recommendations that outline the areas of consensus, the remaining areas that need further dialog, any suggestions for improvements or amendments to the Sunshine Law, and other strategies and options relating to open government initiatives to the Legislature. This report details these findings; the themes addressed at the dialogs, recommendations as well as suggested strategies to improve the Sunshine Law as well as other open government processes.

Bills Relating to Sunshine Introduced Last Session

During the 2005 and 2006 Legislative sessions, many bills were introduced in the House and the Senate with the intent of amending the state's Sunshine law. Some focused on the Office of Information Practices' ability to enforce Chapter 92; others were attempting to provide flexibility for multiple members of the same board to attend other informational meetings; still others related to quorum requirements necessary to conduct or complete business and some dealt with the capacity to conduct meetings through videoconferencing. A summary of the most relevant bills follows:

Senate Bill 1551, SD1 would have strengthened the enforcement powers of the Office of Information Practices (OIP) and allow the Court to void any Board's action if it violated any sunshine provisions. It also would have required the Judicial Council to select candidates for the OIP executive director's position.

House Bill 2985 and companion SB 2657 would have created a Board of Information Practices with the power to appoint and remove the Executive Director of the Office of Information Practices.

S.B. 2712, SD 1 would have clarified the quorum requirement under the existing sunshine law to allow for action to be taken by a majority of the number of members to which a board is statutorily entitled - minus vacancies. This was of particular concern to board members whose testimony described situations in which board members resigned and it took a long time filling vacancies, and yet the same quorum number remained the same, thus making it difficult to obtain a quorum in order to conduct business.

HB2404, HD1, SD1 allows two or more members of a board, but less than the number of members that would constitute a quorum, to discuss their individual positions relating to official board business at meetings of other boards or at public hearings of the Legislature, and to attend and participate in discussions at presentations, including seminars, conventions, and community meetings, that include matters relating to official business.

House Bill 2892 and SB 2876 exempt the neighborhood boards from the sunshine law's open meeting provisions.

SB 2366, SD1 would give OIP power to enforce its decisions and expand its duties. It would provide OIP a full range of enforcement and investigatory powers (including prosecution of criminal violations) and the power to apply to the Circuit Court to enforce its decisions.

The only bill that passed in the 2006 session was *SB785, SD2, HD2*, which allows public meetings by video teleconferencing to continue even if the video connectivity is interrupted or stopped.

This bill has now become law.

What is clear from this legislative activity is that the structure of the Sunshine Law is of concern to some; the enforcement provisions and interpretation of the law by OIP is of concern to others; some see the provisions of the law as constraining its main purpose of insuring open dialog and discussion by overly strict provisions, and still other want more controls and a stricter enforcement of the existing law.

The dialogs unearthed many of these same themes again, together with some additional issues. This report will attempt to classify and categorize the issues discussed and make some recommendations for future steps.

Background

Usually open government and sunshine initiatives are seen as a part of a general effort to provide the public with advance notice about decision-making deliberations. These requirements are intended to increase public scrutiny and accountability when government decisions are to be made. Open meetings are held for the same reason that the Freedom of Information Act (FOIA) and the Administrative Procedures Act (APA) exist—to open up the decision making process of policy making entities to ensure the widest possible public deliberation. Supporters also see this an important “democratic check” on decisions by elected and non-elected policy makers.

However, there is disagreement about whether there are “good” “bad” or “better” outcomes associated with open meetings requirements. There are strong beliefs held by many that the “best” decisions are those made in the most public arena. The act of public deliberation itself is often seen as a core and essential component of democracy. Many assume that for a democracy to thrive, there must be culture of open decision-making. It also serves to keep the populous educated. Open government advocates want all deliberation and votes to be done in public. State and local governmental officials must fulfill their obligation to conduct the public’s business in the open... that is the point of the sunshine law.

On the other hand, there are theories for effective administration that recommend task specialization and strategies that restrict information to only those at the “appropriate” rank or position in a decision making organization. This is commonly accepted as an efficient way to conduct business in private industry. Many support the notion that some level of “secrecy” encourages frankness and candor in policy deliberations. Others see it as important to be able to discuss complex policy issues with others and do not see the sunshine law as preventing people from talking to each other. Some suggest that there must be a balance to ensure government efficiency and effectiveness and that some communication outside of the public purview should be tolerated... even if the laws prevent behind- closed- door meetings. Others see the value of protecting the confidentiality of an individual’s or organization’s privacy when specific topics (eg. personnel issues) are being discussed.

The Deliberative Process

The Center coordinated a series of policy dialogues on the issue of open government in Hawaii. The overall strategy was based on an information processing model of citizen engagement. Through the use of such a model, “participants come to a shared understanding of underlying issues and tradeoffs, and as a result, are collectively prepared to make substantially better policy recommendations.”¹ We based much of the process on the National Issues Forums model to promote deliberation. The project involved several data-gathering steps including background research, interviews, issue framing, deliberative dialogues, and list-serve dialogues.

The first steps included a literature search and exploratory interviews. Exploratory interviews included representatives from organizations outlined as key stakeholders in SR 107, such as: Citizen Voice, The League of Women Voters, City Councilpersons, The Hawaii Media Action Group, OIP, and several legislators. They were considered by the Center as part of an initial grouping of concerns and assisted in the issue framing.

Issue Framing

On May 23rd 2006, the Center convened an issue framing forum. Among those invited were the stakeholder organizations listed in SR 107, including: the League of Women Voters, the County of Kauai, the County of Maui, the Department of the Attorney General, Citizen Voice, Kokua Council, Natural Energy Laboratory of Hawaii Authority, and the Open Government Coalition of Hawaii. (For a complete listing of attendees and organizations contacted for this project, please refer to Appendix II). Initially the issue framing discussion included concerns about the laws on open meetings and open records. In a debriefing session following the issue framing it was decided to focus only on Part I of Chapter 92, Hawaii Revised Statutes, the open meetings law because it is a separate law and it created confusion when attempting to discuss both. Also most of the concerns raised in the framing process, and in preliminary interviews focused on the issue of open meetings.

The first list of concerns were classified in to three major categories:

- 1) *Costs, Resources, Education and Time Needed to Implement Sunshine Law***
- 2) *Transparency and Inclusiveness; and***
- 3) *Access***

An issue mentioned frequently was the lack of training funds and resources for adequate enforcement of the Sunshine Law. Many felt it was impossible to oversee all the boards and commissions and even know about when violations took place. Others mentioned the fact that the OIP is insufficiently staffed and clearly does not have the capacity to enforce the sunshine law across the state.

¹ <http://www.businessofgovernment.org/pdfs/LukensmeyerReport.pdf> (citing Jones 1994.) Public Deliberation: A Manager’s Guide to Citizen Engagement. IBM Center for the Business of Government. See About NIF forums, <http://www.nifi.org/forums/about.aspx>

A comment frequently heard was the complaint about the overall lack of transparency of government. It was expressed that accessibility to government decision-making is not sufficient; that the public needs to be more easily be able to actively participate in decision making processes. The fact that the Legislature itself is exempt from the Sunshine Laws bothered a lot of people as well as the use of executive sessions that too often excluded the public. Individuals often reported that they felt discouraged by a lack of an open government culture, and that this results in a decrease in citizen participation. Additionally, there were strong concerns about conflicts of interest, wherein decision-makers and board members fail to disclose private interests to the public, and yet serve as board members fulfilling personal interests.

There were several ideas and concerns that related to electronic access. It was noted specifically that OIP lacks the funding and support necessary to implement improved technology, which would make access to governmental decision making more open and make the processes more efficient. Specifically, participants wanted to know why the internet and other modern technology could not be used in posting meeting notices and agendas? For a complete listing of these concerns, and for concerns raised in preliminary interviews, please see Appendix III.

Using all of this information, the Center developed an “issue map” outlining three distinct approaches or policy options. (see Appendix IV) The “map” describes for each option:

“What can be done?”

“What are the pros and cons of this approach?”

“What are the trade-offs?”

The issue map was used to stimulate discussion in the subsequent deliberations and interviews. The original version of the issue map was circulated on a list serve that included stakeholders in an attempt to encourage feedback on the policy options being developed. The Center revised the map several times throughout the project, based on the feedback from subsequent forums and interviews.

Dialogues

Community dialogues, also called deliberative dialogues, are designed to encourage communication between members of the community with differing opinions about a specific topic. Dialogues are run by neutral facilitators, who encourage and stimulate deliberation. Facilitators work to capture and record points of consensus and contention. The Center conducted three deliberative dialogues on Oahu and one on Kauai during the fall of 2007.

The first dialogue, coordinated by The League of Women Voters, took place at the Legislature on October 18, 2006. Eleven people attended the forum, although many other stakeholders were invited. Themes that emerged in this session included:

- the need for more education/interpretation of the law;
- the need for enforcement and accountability of open meetings laws;
- the concern about the Legislature’s exemption from the law; and,
- the concern that some boards knowingly ignore the provisions of the Sunshine Law without consequence.

On November 8, 2006, a dialogue was held at the Koko Head Community Recreation Center for representatives of Hawaii Kai's neighborhood boards. The decision to convene this dialogue for neighborhood boards was based on a suggestion by Representative Lila Berg. Seven neighborhood board representatives attended. Major themes included:

- a need for flexibility within the Sunshine law, specifically for neighborhood boards;
- informational gatherings should be permitted for neighborhood board members;
- permitted interaction groups does not provide enough flexibility for neighborhood boards;
- although neighborhood board members think they are properly trained and educated about the Sunshine Law, educating the public would be helpful.
- strong support for the principle of openness

The third dialogue was held on November 30, 2006, also at the Legislature. Ms. Joan Manke, Executive Secretary of the Neighborhood Board Commission of the City and County of Honolulu assisted in the coordination of this forum and invited members from the neighborhood boards across Oahu. Seventeen people attended, most of who were representatives from Oahu's neighborhood boards.

Prior to convening this dialogue, the Center solicited advice from OIP to learn if the issue of the Sunshine Law could be discussed in the presence of multiple neighborhood board members. The Center was advised that no more than two members from any one board could attend the discussion on open meetings. This is an example of how the open meetings law in Hawaii perhaps limits information-gathering among neighborhood board members. A participant responding to this said, "Let's amend the Sunshine Law to make it useful!" A major point of contention in this dialogue had to do with the varying interpretations of the law being made by the OIP. In fact, one participant commented " that a deliberation was not possible without a better understanding of what actually is in the law!" and others asked why there are so many differing interpretations coming from OIP.

Many members in attendance at this meeting had long histories of involvement within the neighborhood board system. The major themes that emerged from this forum include:

- open meetings laws should be amended to be more flexible, specifically for neighborhood boards;
- there should be different provisions of the law for different boards, due to differing levels of authority and decision-making power;
- neighborhood boards should not be fully exempt from open meetings laws, as this would cause the neighborhood board system to lose legitimacy. Any number up to a quorum of neighborhood board members should be able to attend informational meetings, hearings and other board meeting;
- neighborhood boards should be able to receive information not on meeting's initial agendas, but not deliberate; these changes should apply to neighborhood boards *only*;
- neighborhood board member should not be subject to individual prosecution, could limit volunteer participation

all government entities should be covered by Sunshine, including the Public Utilities Commission and the legislature.

OIP should be able to enforce Sunshine;

After an extensive discussion, most of the group seemed to agree with the following four policy options:

1. *Allow members of boards to attend informational meetings sponsored by other organizations for the purpose of receiving information on matters of board interest, provided there is no deliberation on these matters. The number of members allowed to attend, in most cases, should be limited to less than the number needed for a quorum.*
2. *For duly noticed board meetings, at which no quorum is present, allow information to be received by the public or others in attendance and minutes can be taken. Deliberation would be allowed as long as no votes/actions are taken.*
3. *Allow neighborhood boards to have a public input agenda item during which any information on matters raised under this item may be received, but no action taken unless the agenda is properly amended . [current law HRS92-7(d) prohibits boards to amend agendas if the new item "is of reasonable major importance and action thereon...will affect a significant number of persons"]*
4. *Allow neighborhood boards to take action on items not on the agenda in limited circumstances where the board could not have placed the item on the agenda, or if it is in the public's interest, (e.g. health and safety, requires immediate action, and the action cannot wait until next meeting). Some thought this should only occur with a 2/3 vote of the members.*

Finally, on December 7, 2006, the Center held a dialogue at the *Piikoi Building, Lihue Kauai*. Seventeen participants attended. Major themes included:

the intent of the law has been lost;

there should be an appeal process;

OIP needs to be more consistent in its interpretations;

attendance of board members at informational meetings should not be limited;

site visits have all but vanished due to restrictions—this is a real loss for good decision-making;

a six day notice is reasonable;

the public should receive more education about Sunshine—this could start at the high school level;

individuals should not be penalized for breaches of Sunshine—hold organizations accountable instead;

the legislature should be covered by Sunshine;

counties should be able to adopt the same rules as the legislature; it would be better to have one law instead of two.

Interviews

In order to supplement the information collected at the public dialogues, the Center also conducted a series of in-depth interviews. Those interviewed included stakeholders, such as The Big Island Press Club, The Board of Education, The Board of Regents, a City Council Member, Executive Branch Members, the Office of the Attorney General, the Office of Information Practices and legislators.

Themes that emerged from this series of interviews included:

Hawaii should return to being a quorum state;
there is a lot of confusion about how the Sunshine Law is being interpreted
enforcement and accountability should be improved;

Perspectives from County Councils

The Hawaii's county councils are described as having more power than many other such city councils in the country. Such power concentration necessitates transparency and accountability - the Sunshine Law provides one such measure. Nonetheless, is there a compelling public interest to amend the Sunshine Law? Some council members are concerned about the Sunshine Law, because they feel that it prohibits free flow of frank discussions. The Sunshine Law might stifle some discussions and on occasions it might prohibit people from conducting their business in a "normal" way. But, the Law is believed to be very important for transparency and accountability of the Council. Even a Councilmember suggested that the law should also be extended to cover the state legislature. There are also concerns being voiced about the way in which the law is being implemented and the interpretations and interventions of OIP.

In January, 2006, Circuit Court Judge Eden Elizabeth Hifo ruled that the Honolulu City Council's practice of holding private one-on-one meetings violates the serial communication provision of the Sunshine Law. However, the city has appealed the ruling and no further court rulings have been announced.

Boards' and Agencies' Perspectives

While this report has focused primarily on the neighborhood boards, since that is where most of the complaints to legislators and the OIP seem to be coming from, the Executive Branch has many policy making boards and commissions that are subject to the Sunshine Law. The Land Use Commission, the Water Commission, the Board of Land and Natural Resources, the Housing Authority, the Liquor Commission, the University of Hawaii Board of Regents and the Board of Education, to name a few. Deputy attorneys general from the Office of the Department of the Attorney General provide legal advice to the executive branch and the board members of the various boards and commissions to insure compliance with the Sunshine law's provisions. A representative from the Office of the Department of the Attorney General explained that there are relatively few complaints about the existing law but that the ones they do receive are mostly about the neighborhood boards. There is a standing committee composed of deputy attorneys general that meets to discuss any issues arising from the Boards or Commissions to insure consistency in their legal advice and compliance with the law.

Themes that emerged from interviews from members of the executive branch included:

- that the open meeting rules at times make dialog and deliberation cumbersome;
- that recent interpretations have become too rigid;
- that using more modern technology (like web sites for giving notice or changing the agenda) would be helpful
- that permitting discussion even when there is not a quorum is a good idea as long as no votes are taken
- that perhaps allowing an agenda change as long as 2/3 of the group agrees, should be permitted to attend to newly emerging, important issues
- that being able to have several members (less than a quorum) attend informational meetings seems reasonable.

Open government perspectives

Although we heard from many board members that there was sufficient training and that most board members were very knowledgeable, observers of various boards and commissions said they saw numerous violations. There are a number of advocacy and media groups that are concerned that there isn't enough "sunshine." They voiced concerned that too many boards go into executive session unnecessarily, hold private meetings, don't disclose conflicts of interest or violate the law in other ways. Individuals from this perspective noted that OIP is finally trying to follow the Sunshine Law. Complaints from years passed as well as current complaints are being answered with opinions from OIP. Individuals argued that there aren't any "teeth" to the opinions since OIP can't fine any violations.

Ultimately public trust can't be legislated and it is up to everyone—legislators, policy makers, advisory and decision-making boards, citizens-- to follow the letter and spirit of sunshine. Overall advocates for Sunshine think there is insufficient respect for the public's right to know. Although some citizens who see themselves as watchdogs do not want to see the Sunshine Law eroded away, they did acknowledge that some changes to the law is necessary.

Conclusions

Everyone agrees in the principle of openness but agreement on the optimal operation of the principle is more problematic. Some argue that the existing Sunshine law creates situations that are inefficient and at times dysfunctional. But for others, proposals to change the law, raise concerns about the efforts to make processes more efficient will inhibit the public's right to know. The lack of agreement on the problems and the solutions is demonstrated by the failure of previous attempts to amend the law.

The dialogues and interviews have surfaced some areas where we believe agreement on proposed changes is possible. One clear point of consensus was a critique of the legislature's exemption of the Sunshine Law for itself. Many participants argued that the legislature, at a minimum, needs to adopt rules promoting more sunshine, especially in regards to notice and decision-making. We heard contradictory themes throughout our discussions. Many of the solutions proposed are strongly opposed by others. For example, while some wanted exemptions for site visits for board members, others were strongly opposed to such an exemption. Greater flexibility (particularly for Neighborhood Boards) was proposed but many opposed allowing changes regarding notice and adding items to the agenda at meetings. While there was no clear consensus on any one specific change to the Sunshine Law, there are a number of areas that do emerge as having general support. It may be important to include some measures that allow for more flexibility and at the same time include measures that promote increased educations and enforcement.

RECOMMENDATIONS

A number of areas appear to have sufficient support for potential agreement for legislative changes to the Sunshine Law:

Allow any number of board members but less than the number that would constitute a quorum to attend informational meetings sponsored by other organizations for the purpose of receiving information on matters of board interest, provided there is no deliberation on these matters.

Neighborhood Boards (and potentially other advisory boards established to receive impromptu citizen input) could receive public input on items not on the agenda.

Increase resources for OIP. While a number of participants felt that they were well informed about the Sunshine Law, there are many who are not well informed and OIP lacks the resources for increased education and training.

Strengthen OIP Enforcement Powers and at the same time decriminalize individual behavior. Give OIP power to enforce its decisions and expand its duties. Provide OIP a full range of enforcement and investigatory powers and the ability to apply to the Circuit Court to enforce its decisions. The Court could void any Board's action if it violated any sunshine provisions. Individuals could be removed from a board but would no longer be subject to prosecution. Fines for violation of Sunshine should be levied against the organization and not individuals.

Develop positions with expertise on the law within each state and county agency.

Appendices

- I Senate Resolution 107, SD1**
- II People & Organizations**
Consulted for this project
- III Initial Grouping of Concerns**
- IV Issue Map**

SENATE RESOLUTION

REQUESTING THE PUBLIC POLICY CENTER OF THE COLLEGE OF SOCIAL SCIENCES AT THE UNIVERSITY OF HAWAII TO SPONSOR A SERIES OF PUBLIC POLICY DIALOGS ON OPEN GOVERNMENT.

WHEREAS, most citizens believe that open government is important for the maintenance and success of a strong democracy and a civil society; and

WHEREAS, the Legislature expressly declared in section 92-1, Hawaii Revised Statutes, that "it is the policy of this State that the formation and conduct of public policy - the discussions, deliberations, decisions, and action of government agencies - shall be conducted as openly as possible"; and

WHEREAS, Hawaii's open meetings law under chapter 92, part I, Hawaii Revised Statutes, more commonly known as the Sunshine Law, governs the manner in which state and county boards must conduct their business; and

WHEREAS, the intent of the Sunshine Law statute is to open up the government process as much as possible for public scrutiny and participation; and

WHEREAS, in implementing this policy, the Legislature directed under the provisions of the Sunshine Law that boards must conduct their business in a public meeting, including all board discussions, deliberations, decisions, and actions, provided that the business of

the board does not meet any of exceptions under the Sunshine Law; and

WHEREAS, absent a specific statutory exception, board business cannot be discussed in secret, without public access to the board's discussions, deliberations, and decisions, without keeping minutes of the meetings, and without an opportunity for the public to submit testimony; and

WHEREAS, several board members have complained about some of the Sunshine Law requirements being too stringent, and have suggested that certain types of board business be exempt from the Sunshine Law provisions; and

WHEREAS, a number of critics of the Sunshine Law have called for a review of the Sunshine Law to determine if additional exemptions are needed to allow members to discuss board business outside of a meeting; and

WHEREAS, some Sunshine Law critics have interpreted Chapter 92, Hawaii Revised Statutes as creating barriers to innovative forms of democracy that will bring citizens to the cutting edge of governance; now, therefore,

BE IT RESOLVED by the Senate of the Twenty-third Legislature of the State of Hawaii, Regular Session of 2006, that the Public Policy Center of the College of Social Sciences is requested to hold a series of public policy dialogs on the Sunshine Law; and

BE IT FURTHER RESOLVED that the series of public policy dialogs be designed to include representatives of the major stakeholders interested in this issue, including the Office of Information Practices; the Open Government Coalition of Hawaii; the League of Women Voters of Hawaii; the Society of Professional Journalists, Hawaii and University of Hawaii Chapters; the Right To Know Committee; the Honolulu Community Media Council; the Big Island Press Club; Citizen Voice; the Hawaii Pro-Democracy Initiative; Kauaians for Open Government; the four County Councils; neighborhood boards; charter school boards; school community councils; the Board of Education; and the Board of Regents; and

BE IT FURTHER RESOLVED that the series of public policy dialogs are also to include other legal entities, including the Attorney General, the County Corporation Counsel Offices, and the Legal Affairs and University General Counsel Office, and the various boards such as, the Board of Land and Natural Resources, the Board of Agriculture, and the Natural Energy Laboratory of Hawaii Authority; and

BE IT FURTHER RESOLVED that the Public Policy Center is requested to report findings and recommendations that outline the areas of consensus, the remaining areas that need further dialog, any suggestions for improvements or amendments to the Sunshine Law, and other strategies and options relating to open government initiatives to the Legislature no later than twenty days before the convening of the Regular Session of 2007; and

BE IT FURTHER RESOLVED that certified copies of this Resolution be transmitted to the President of the University of Hawaii; Public Policy Center of the College of Social Sciences, the Director of the Office of Information Practices; the Attorney General; the Chairperson of the Board of Agriculture; the Chairperson of the Natural Energy Laboratory of Hawaii Authority; the Chairperson of the Board of Education; the Chairperson of the Board of Land and Natural Resources; the Chairperson of the Board of Regents; the Chairperson of the Honolulu City Council; the Chairperson of the Hawaii County Council; the Chairperson of the Kauai County Council; the Chairperson of the Maui County Council; the Corporation Counsel for the City and County of Honolulu; the Corporation Counsel for Hawaii County; the Office of the Kauai County Attorney; the Corporation Counsel for Maui Counsel; the Chairperson of the City and County of Honolulu Neighborhood Commission Office; the President of the Open Government Coalition of Hawaii, the President of the League of Women Voters of Hawaii; the President of the Society of Professional Journalists, Hawaii Chapter; the President of the Society of Professional Journalists, University of Hawaii Chapter; the Chairperson of the Right To Know Committee; the Chairperson of the Honolulu Community Media Council; the President of the Big Island Press Club; the President of Citizen Voice; the President of the Hawaii Pro-Democracy Initiative; and the President of Kauaians for Open Government.

Report Title:

Sunshine Laws; Public Access; Boards and Commissions

Appendix II

Organizations and Individuals Contacted:

Office of Information Practices	Todd K. Apo	Chris Lee
Open Government Coalition of Hawaii	Bill “Kaipo” Asing	Walter Lewis
League of Women Voters of Hawaii	Cyndi Ayorion	Jonathan J. Lillie
Society of Professional Journalists,	L. Gary Balitista	Robert Loomis
Hawaii & University Chapters	Belma A. Baris	Robin Loomis
Right To Know Committee	Mark J. Bennett	Sylvia Luke
Honolulu Community Media Council	Rose Bettencourt	Joan A. Manke
Big Island Press Club	Peter M. Bower	JoAnn Maruoka
Citizen Voice	Kat Brady	Tom Marzec
Hawaii Pro-Democracy Initiative	Jennifer Brooks	Michelle Matson
Kauaians for Open Government	Romy C. Cachola	Sean McLaughlin
the four County Councils	Wayne Cahill	Sterling Morita
neighborhood boards	Chris Conybeare	Lester Murdoka
charter school boards	Corrinna Corneja	Kris Nakamura
school community councils	Henry Curtis	Lani Nakazawa
Board of Education	Kat Curtis	Aida Okasaki
Board of Regents	Barbara Davis	Carrie K.S. Okinaga
Office of the Attorney General	Donovan M. Dela Cruz	Gary H. Okino
County Corporation Counsel Offices	Charles K. Djou	Richard Oshiro
Legal Affairs and University General Counsel Office	Amy Esahi	Jackie Parnell
Board of Land and Natural Resources	Robert Finley	Ernie Pasion
Board of Agriculture	George Fox	Christina Pilkington
Natural Energy Laboratory of Hawaii Authority	Donald M. Fujimoto	Dick Poirier
Kokua Council	Wayne Gail	Judy Rantala
Hawaii Media Action Group	Nestor H. Garcia	Kim Rihelha
ACLU Hawaii	Larry Geller	Mariana Scheffer
Hawaii Newspaper Guild	Richard Henderson	Bob Shon
Life of the Land	Stacy K. Higa	Jim Shon
Mike Abe	Peter Hoffman	Tom Smyth
Charlene Aina	G. Riki Hokama	Thomas Takatsuki
Jean Aoki	Les Ihara	Rod Tam
	Virginia Isbell	Patricia Tummons
	Bob Jacobson	Larry Veray
	Bev Keever	Emily Viglielmo
	Karen Knudsen	Ricky Watanabe
	Ann H. Kobayashi	Kitaoka Yamashiro
	Les Kondo	Randall M. L. Yee
	Beth-Ann Kozlovich	Pamela Young
	Sandra Lee Kunimoto	Peter T. Young
	Steven Kyono	Arvid T. Youngquist
	Kitty Lagareta	

Initial Grouping of Issues Concerning Sunshine Laws

College of Social Sciences Workshop
May 22, 2006

Costs-Resources Education-Time

Lack of Resources to Implement Open Government
Agencies Lack Training on Sunshine
Lack of Training on the Law
Time and Effort to Resolve Disputes
Disagree on What Information Deserves Protection
Legislators Are Exempt From Sunshine

Transparency/Inclusiveness

Inability to Verify Private Communication
Lobbying Without Public Testimony
Transparency = Participation Not Simply Accessible
No Common Definition of “Transparency in Government”
Public Policy Decisions Are Delayed
Transparency Ethics Overlap
Lack of Knowledge About Potential Conflict of Interest
Conflicts of Interest
Confidentiality of Exchange
Long Term Efficiency V.S. Short Term Efficiency
Hard to Balance Efficient Operation and Openness
How to Decide Between Efficiency and Transparency
Cost of Copies Are Prohibitive
Lack of Openness by Legislators
Media is Decreasingly Objective and Useful
Individuals are Discouraged and Lack Power
Presumption of Intense Citizen Time and Effort

Access

Not Using Modern Tools Especially Internet
More Notices Needed on Web
Question: Appropriate Use of Technology
Cost: Training
The OIP Lacks Funding and Staff
High Fees For Cost of Searching, Relocating, and Copying
Lack of Information About Decision-Making Process
Public Decision – Making Not Always Valued by Boards
Not Just Access, Also Participation

Sunshine Laws

Conference Committees Are Not Open
Requests Are Not Anonymous
Agencies Think Sunshine laws are Inconvenient
Lack a “Culture” of Open Government
Sunshine Prohibits More Than Two Members to Work on Things
Legislature Not Subject to Sunshine Law
“No More Than Two Council Members Can Attend a Public Meeting Without Public Notice”
Insufficient Public Notice About a Hearing
Lack Different Levels of Sunshine for Different Situations
Open Records Law Lacks Teeth
Sunshine Slows Things Down and Hampers Public Interest
“Council Members Can’t Have a Conversation With Another Member”
Some Provisions Hamper Government’s Authority

People Don't Know How Decisions are Being Made
 Costs-Resource Education
 More Information of Board Action
 Lack of Standardization in Sunshine Law
 Lack of Training for Board Members
 Hindrances to Free Exchange – Erodes Efficiency
 Hinders Information Gathering Through Private Communication
 Not Enough Dialogue on Public Policy Issues
 Hard to Maximize Group Decision-Making Advantages
 Disagreements Over Decisions Confuse Process Issues
 Hard to Define Accountability for Different Board Roles
 One Size Law Doesn't Fit All
 Not Clear That Process Satisfies Goal (Openness)
 Council Members at Neighborhood Boards
 Discourages Site Visits
 Elected and Appointed Officials Require Different Accountability
 Framework on Framing is Ill-Advised = Openness Presumed
 Differences in Interpretation of Sunshine Law
 How Was Framing Done for This Frame?
 What Sunshine Issues Are Off the Table?
 Privacy Issue With Technology Use
 Nobody Understands the Sunshine Requirements
 The Sunshine Requirements Prevents Sharing Information
 OIP Lacks Enforcement Authority
 Poor Implementation of Sunshine Diminishes Citizen Participation
 Don't Have a Culture of Open Government
 Sunshine Rules Slow the Process
 Requests Are Automatically Denied
 No Penalty if OIP is Not Obeyed
 Misinterpretations of the Law Are Making it Seem Unreasonable
 Often Are Stonewalled
 Sunshine May Not Be Efficient, But is Essential for Democracy
 House and Senate Don't Respect Open Government
 Most People Don't Understand the Sunshine Law

Concerns mentioned by forum participants:

- ❖ Bureaucratic process doesn't satisfy goal of open access
- ❖ Length of time required for notice gets in the way of decision making
- ❖ Lengthy agenda gets in the way of communicating (95-pg UH Regents agenda)
- ❖ Personal connections (who you know) counts
- ❖ Lack of meaningful access (remote office; limited information available online)
- ❖ Right to privacy may be violated
- ❖ Lack of Information on the board process that is generally available
- ❖ Prohibitions on board members speaking outside of a formal meeting may disrupt day-to-day operation
- ❖ Prohibitions on board members speaking outside of a formal meeting may short circuit public input
- ❖ Lack of communicating decisions made put a affected organizations in violation without realizing it
- ❖ Culture of exclusivity
- ❖ Arm-chair-lawyering makes for disruptive participants
- ❖ Lack of commonly-held definition of "transparency in government" leads to disappointment and unsatisfied public (what it means; what is its goal(s))
- ❖ More transparency may lead to a shift in who has influence (special interests)
- ❖ Without the bureaucracy I might loose my job
- ❖ Without the status quo I might loose my influence/access
- ❖ Without a notice period decisions will get made without the opportunity for public input
- ❖ As a taxpayer don't I have the right to know an official's salary, performance evaluation, etc
- ❖ Keeping the proposals board process less public means less time is wasted on unqualified, spurious issues
- ❖ Lack of computer-based information systems make it difficult to locate information
- ❖ The process for meetings, notification and records needs to transparent
- ❖ It's not just about access it's also about participation
- ❖ I don't like the framing of this framing
- ❖ There's a presumption of openness not balancing various interests
- ❖ Many people are concerned about privacy but do not consider the danger of the government violating privacy rights
- ❖ There is no commonly held definition of "transparency in government". This leads to public dissatisfaction

- ❖ It's unclear that the bureaucratic process doesn't satisfy the goal for open access
- ❖ Is technology being used effectively to share information?
- ❖ Clear limits
- ❖ Want to understand opposition to changes
- ❖ Public needs to understand broader picture of government
- ❖ BD members and staff not trained
- ❖ Inadequate resources for staff not trained
- ❖ No single place for public notices
- ❖ More specific sunshine Laws
- ❖ Keeping up to date with law
- ❖ Oahu centric
- ❖ Uneven application of sunshine amongst agencies – no standardization
- ❖ Access to and cost of copying records
- ❖ Some communication chrs. required form to be filled out before they will meet or even granting mtg.
- ❖ Legislative notices sometimes posted after hrg. Takes place
- ❖ Hrg notices too scattered-s/b groped by subject
- ❖ Chair's inclinations posted before decision making
- ❖ Got and replace bills
- ❖ Backroom lobbyists who never testify in public
- ❖ Testimony s/b on leg website
- ❖ City council limits public test to 1-3 minutes
- ❖ Each agency has its own priorities and some records needs to be redacted or not available
- ❖ It costs gov to service public and with cost of elec. And staffing-gov needs to recoup costs
- ❖ 60-day session doesn't allow leg. time to see everyone wanting an appointment
- ❖ 60 day session is short and sometimes it is impossible to post notices on 48 hours schedule
- ❖ Thousands of bills introduced and hundreds ref. To com. Chrs. and short time frame make this difficult
- ❖ Posting chr. Inclinations would compromise 'discussion' among com
- ❖ Emergencies arise making this necessarily
- ❖ Some lobbyists have personal relationship with leg. and they may only be having pers. conver. with leg
- ❖ Testimony on website – too labor intensive
- ❖ City council – 1 to 3 minutes test is for efficiency
- ❖ truth is hidden in shadows that are designed to benefit special interests
- ❖ Corruption is woven into the fabric of proceedings where public interests are silenced and monied/ corporate interests are amplified
- ❖ Deliberative process is crippled by legal requirements so that real issues and concerns are not addressed at all
- ❖ "sunburn" effect of overexposure favors dishonest posturing and superficial talk over real conversations that get to deeper issues
- ❖ Public awareness is degraded to watching shadow puppets perform while real decisions are made outside the public process
- ❖ Money and political power control public discourse through a system that rewards compliant media while punishing those with temerity to report background "news"
- ❖ Media are supposed to report news and renewal facts without fear or favor, but hey are dominated by corporate owners who refuse to provide transparency about their own interest
- ❖ Competing interest can not fully participate in open process because that risks revealing proprietary information and invades their privacy
- ❖ Information needs to be completely free to prevent unfair advantage for monied interest
- ❖ Lobbyists/activist – access to timely and accurate information which would not inhibit their function as a stake holder in the process of policy formation/others
- ❖ Public Union Members – Like corporations / employer groups unions being their opposites must be allowed to operate with the knowledge available in a timely manner to ensure their ability to be effective stakeholders. In addition, must also hare interests of members just a cop's must share interests in business practice
- ❖ Process and ability to effectively participate-- original intent democratic process hasn't changed. Technology, technicality and public interest has changed. Lack of confidence in government accountability to the problems
- ❖ Government purpose and process hasn't changed; nor have stakeholders involved. Problems today tend to arise from changes in technology and technicality which seem to limit effective participation in the government/policy process. Additionally, lack of confidence in the government/process and a lack of accountability scream for greater openness and oversight. The problem is effective accountability to the process.
- ❖ Government seems unable to operate efficiently, operate at all

Concerns mentioned by interviewees:

- ◆ No penalty when OIP is not obeyed
- ◆ Requests (for information) are automatically denied
- ◆ Enforce open records laws
- ◆ Requests should remain anonymous
- ◆ Open records law needs teeth
- ◆ Agencies need to respect the Law
- ◆ Need a culture of open government
- ◆ Often are stonewalled
- ◆ No resources are provided to implement open government
- ◆ People must know how decisions are being made
- ◆ Sunshine may not be efficient, but it is essential to democracy
- ◆ Legislators shouldn't be exempt from Sunshine
- ◆ Agencies think sunshine is inconvenient
- ◆ House and Senate don't respect open government
- ◆ Conference committees should be open
- ◆ Legislatures change and "gut" bills and the public is excluded
- ◆ Insufficient public notice about a hearing and the bill's language
- ◆ Government should say "the public DESERVES to know"
- ◆ Start with the assumption everything is open... then exempt
- ◆ Agencies need training on OIP and UIPA
- ◆ OIP needs enforcement authority
- ◆ Most people don't understand the Sunshine Law
- ◆ Misinterpretations of the law are making it seem unreasonable
- ◆ Open government helps engage the community
- ◆ Open government keeps people accountable
- ◆ No more than two city council members can attend a public meeting that hasn't been posted
- ◆ Council members "can't have a conversation with another member"
- ◆ Involvement is important for democracy
- ◆ Some provisions hamper government's authority
- ◆ Sunshine prohibits more than two members to work on things
- ◆ Sunshine slows down things and hampers public interest
- ◆ OIP is a strict constructionist... doesn't understand reality
- ◆ Need more public understanding and involvement
- ◆ Apply Sunshine laws to the State legislature
- ◆ Maybe need different levels of sunshine

Issue Map

Issue maps were provided at all public dialogues.
Original maps were printed on 8-1/2" x 14" paper.

How open do we want our government?

All fifty states and the District of Columbia have some version of an open government law. Hawaii's Sunshine Law is intended to maintain transparency in government, through the regulation of meetings. The Sunshine Law seeks to guarantee that all discussions, deliberations and decision making actions are conducted in public with only a few specific exceptions. Opinions about the Sunshine Law differ greatly here in Hawaii. For some, the provisions of the Sunshine Law is essential for the protection of individual right. For others, some aspects of the Sunshine Law obstruct democratic process and can be a procedural nuisance. Still others believe the law that are in place are satisfactory and should be left alone.

In the Sunshine Law should be amended to be more flexible. The procedures such as requiring notice of every meeting far in advance, and forbidding a subsequent meeting with more than two members without additional notification can get in the way of effective committee work. The rules do not allow for free exchange of ideas and dialogue on issues. More resources for easier access to meeting and minutes, are needed.

What can be done?

- Any number (up to a quorum) of Neighborhood Board members can attend other meetings to gather information
- Increase exemptions to Sunshine Law:
 - ✓ site visits
 - ✓ informational meetings
 - ✓ task forces
- Utilize technology for meeting minutes and agenda postings for easy access.
- Shorten the notice time
- Allow for discussion of items not on the agenda with agreement from the participants at the meeting.

Pro:

- Using technology could promote transparency and access.
 - More flexibility will increase citizen participation.
- Existing law promotes inefficient and ineffective meetings. The existing rules actually limit deliberation.

Con: Increasing the flexibility could allow more abuses, more computation to occur, less citizen input and engagement

Trade-offs:

Exemptions could be used to circumnavigate the intent of the Sunshine Law.

2 There needs to be more education rather than changes in the Sunshine Law. The major reasons for the Law's inefficiency seem to stem from a lack of knowledge about the Sunshine Law on the part of the general public, government agencies, officials, public board members and nonprofits. Many stakeholders interpret the Sunshine Law differently leading to inconsistent implementation/

What can be done?

- Increase the resources of OIP to provide wide scale education, outreach and training for citizens and enforcers.
- Launch a large public information campaign
- Use the Hawaii state government's e-hawaii.gov internet portal and other government agency websites to disseminate standardized information on Sunshine Law.

Pro:

Better public understanding of the Law will improve decision making and knowledge on how decisions are being made.

Con: Education will not solve the problem of deals being conducted behind closed doors.

Trade-offs: Educating more, if not all, stakeholders will increase their inquiries and participation in various meetings, thereby increasing additional burdens on making decisions efficiently in a timely manner.

3 There is still a lack of a "culture" of open government. In the absence of an enforcement mechanism, those who ignore the law get away with it. The scope of the Sunshine Law should be expanded and the existing law needs more enforcement capacity. Some people think that the Sunshine Law does not clearly define 'transparency in government' and that many decisions/communications are still made in private that the public and other stakeholders are unable to verify.

What can be done?

- The legislature should adopt the principles of the Sunshine Law. Open government should hold everyone accountable.
- The Sunshine law is not a cohesive law. There are actually two laws—open records and open meetings. Only a holistic mechanism will solve existing problems of accessing information.
- Provide OIP with authority to enforce the Sunshine Law. This includes the capacity to impose penalties for those who ignore the law.

Pro:

Expanding the Sunshine Law to include additional provisions will not only improve access to information, but also improve participation.

Con:

Expanding scope would create even greater inefficiencies

Trade-offs:

Penalties might limit individuals' willingness to volunteer for task forces, boards, neighborhood boards