SCR 127

AFFIRMING THAT THE STATE HEALTH PLANNING AND DEVELOPMENT AGENCY IS SUBJECT TO HAWAII'S SUNSHINE LAW AND THAT THE STATE HEALTH SERVICES AND FACILITIES PLAN IS AN AGENCY RULE SUBJECT TO THE PUBLIC HEARING REQUIREMENTS OF CHAPTERS 91 AND 92, HAWAII REVISED STATUTES.

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

LORETTA J. FUDDY, A.C.S.W., M.P.H.
DIRECTOR OF HEALTH

STATE OF HAWAII
DEPARTMENT OF HEALTH
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In reply, please refer to:
File:

Senate Committee on Health

SCR 127, Affirming that the State Health Planning and Development Agency is Subject to Hawaii's Sunshine Law and that the State Health Services and Facilities Plan is an Agency Rule Subject to the Public Health Requirements of Chapters 91 and 92, Hawaii Revised Statutes

Testimony of Loretta J. Fuddy, A.C.S.W., M.P.H.
Director of Health

Wednesday, April 13, 2011
3:00 p.m.

Department's Position: The Department of Health opposes this resolution as it does not accurately track the legal requirements of the provisions in chapter 323D, Hawaii Revised Statutes (HRS), that govern the preparation and revision of the State Health Services and Facilities Plan (the Plan). The resolution also misapplies the provisions of the Sunshine Law, chapter 92, HRS, to the State Health Planning and Development Agency (the Agency). Adoption of the resolution is unnecessary, and may contribute to ambiguity in the interpretation of the relevant portions of chapter 323D and chapter 92, HRS. If passed, the resolution may confuse members of the public.

The current provision of chapter 323D, HRS, pertaining to the preparation or amendment of the Plan states that ". . . the state agency and the statewide council shall conduct a public hearing on the proposed plan or the amendments and shall comply with **the provisions for notice of public hearings** in chapters 91 and 92." See: section 323D-17, HRS (emphasis added). Reference to chapter 91 in section 323D-17 is limited to the notice

provisions of chapter 91, and does not indicate legislative intent to require adoption of the Plan according to any of the other rulemaking provisions of chapter 91.

The chapter 91 notice provision provides for 30 days notice of a public hearing. The public hearing notice provision of chapter 92 requires notice of a public hearing in the county affected by an agency's proposed action. Accordingly, during the last amendment of the Plan in 2009, the Agency gave notice of public hearing for 30 days in accordance with the chapter 91 notice provisions, and in all Hawaii counties pursuant to chapter 92.

The reference to chapter 91 notice provisions in section 323D-17 does not make the Plan a "rule." Adoption and amendments of the Plan via rulemaking is not required by chapter 323D, and cannot be required by passage of this resolution. When it enacted and amended chapter 323D, the Legislature decided that the enhanced public notice provisions of chapter 91 were warranted, but did not require any of the other procedural steps characteristic of rulemaking. If this Legislature wants to change chapter 323D, it must do so by legislation, and cannot accomplish that purpose by passage of a resolution. If presented with a bill that would require the Agency to follow all rulemaking procedures in the development or amendment of the Plan, the Department of Health would oppose such a change, as it would result in an unreasonably cumbersome and burdensome process.

Given the current law governing the adoption and amendment of the Plan, any party seeking to establish that the Plan is subject to all rulemaking provisions of chapter 91 would need to take that claim to a court. It would be up to the court, using the legislative history of section 323D-17 and other relevant authority, to decide whether the plan is a "rule" or not. Because this resolution cannot change the existing legislative history of chapter 323D, the Department of Health takes the position that the resolution is unnecessary, and its adoption will disserve the public and the Agency.

The proposed affirmation that the Agency is subject to Sunshine Law is not supported by the Sunshine Law itself. Section 92-3, HRS, states in pertinent part "[e]very meeting of all **boards** shall be open to the public and all persons shall be permitted to attend any meeting...." (Emphasis added.) It is not the Agency, but the Agency's statutory boards - the Statewide Health Coordinating Council, the Subarea Councils and the CON Review Panel - that must conduct meetings according to the Sunshine Law. For this reason, adoption of the resolution would result in a legal error. If presented with a bill that would require the Agency to conduct all of its business via properly noticed public meetings, the Department of Health would oppose the bill.

For all of these reasons, the Department of Health requests respectfully that this Committee defer action on S.C.R. 127. Thank you for this opportunity to provide testimony.

Comments 4.13.12

NEIL ABERCROMBIE
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To: Senate Committee on Health

From: Cheryl Kakazu Park, Director

Hearing: April 13, 2011, 3:00 p.m.
State Capitol, Room 229

Re: Testimony on S.C.R. 127
Affirming that the State Health Planning and Development Agency is Subject to Hawaii's Sunshine Law and that the State Health Services and Facilities Plan is an Agency Rule Subject to the Public Hearing Requirements of Chapters 92 and 92, Hawaii Revised Statutes

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Thank you for the opportunity to testify on S.C.R. 127, which would resolve that the State Health Planning and Development Agency ("SHPDA") was subject to chapter 92, HRS, part I of which is Hawaii's Sunshine Law; and that creation of or amendments to the State Health Services and Facilities Plan required public hearings under both chapters 91 and 92.

The Sunshine Law applies to boards of the state and counties, and generally requires that all discussion of board business by board members take place in a meeting of the board, with specific and very limited exceptions. While the various boards attached to SHPDA are in many instances subject to the Sunshine Law, it is difficult to see how an entire agency, such as SHPDA, could comply with a law written for boards with a defined and limited membership. Two of the features that would present particular problems if SHPDA as a whole was treated as a Sunshine Law board would be the inability of SHPDA employees to legally discuss work issues with each other except in a previously noticed and agendized public meeting of the entire staff (for which a quorum of the staff would need to be present at all times), and the inability of SHPDA employees to use e-mail or memoranda to communicate (because that would be a discussion of SHPDA business outside a SHPDA meeting). Indeed, the foreseeable

difficulties for any effort by SHPDA as a whole to follow the requirements set out by the Sunshine Law for government boards are so great that OIP believes SHPDA would be unable to both follow the Sunshine Law as requested by this resolution and conduct its business as an agency.

This resolution also seeks to have public hearings under chapters 91 and 92 for any creation of or amendments to the State Health Services and Facilities Plan. OIP notes as to this provision that part I of chapter 92, the Sunshine Law, requires open meetings of government boards. In other words, meetings of government boards are public because the boards themselves are inherently subject to the Sunshine Law, not because the boards are considering a particular action. There are separate standards (including those given in chapter 91) for public hearings held by an agency as a requirement of taking a particular action, such as implementing rules or a master plan. There the public hearing requirement results from the action being taken rather than the nature of the agency. OIP would therefore suggest that chapter 92 is not the right chapter to cite if this Committee wishes to ensure that the Plan is adopted only after a public hearing process. Among other things, the Sunshine Law lacks any requirement to publish a proposed plan or proposed amendments being considered by a board subject to the Sunshine Law; rather, the board can satisfy the Sunshine Law's notice standards by an agenda that gives reasonable notice of which provision will be discussed, and the subject matter of the provision.

Please note, also, that if the Plan is to be voted on by a board subject to the Sunshine Law, that board's consideration of the Plan will itself be subject to the Sunshine Law, including the Sunshine Law's public testimony provision. Thus the public may well have the opportunity to testify on the Plan in the course of the relevant Sunshine Law board or boards' consideration of the Plan.

Thank you for the opportunity to testify.

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Testimony of Ellen Godbey Carson
Submitted on behalf of Kaiser Foundation Health Plan, Inc.

Before the House Committee on Health
April 13, 2011, 3:00 p.m.
Conference Room 229

SCR 127: AFFIRMING THAT SHPDA IS SUBJECT TO THE SUNSHINE LAW...

Chair, Vice Chair and committee members, thank you for opportunity to provide testimony on this Resolution.

Kaiser opposes this Resolution as contrary to proper legal process, unnecessary, confusing and prejudicial to pending litigation.

This resolution grows out of efforts by Liberty Dialysis-Hawaii LLC ("Liberty") to preserve its status as sole provider of dialysis services on Maui and other neighbor islands; that dispute is now on appeal in the First Circuit Court. Liberty seeks to use SCR 127 in a misguided effort to repeal the 2009 State Health Services and Facilities Plan ("HSFP"), so that it could then attack SHPDA's approval of dialysis services at Kaiser facilities in Maui. **SCR 127 could endanger SHPDA's approval of services for Maui Memorial Hospital, Aloha Wellness Center, Cancer Center of Hawaii, Maui Diagnostic, Koolau Radiology, Wahiawa General Hospital, Hospice of Hawaii, Kula Hospital, and many other facilities who received SHPDA approvals since 2009. This could wreak havoc and cause major unnecessary expense for SHPDA, DOH and these facilities.**

SCR 127 is inconsistent with current law, would violate legal procedure, and is not a proper means to amend or interpret Hawaii Law. The Sunshine Law and SHPDA Law should be interpreted by the courts in a fair and consistent manner according to their own terms. The Director of the Dept. of Health has already opposed similar resolutions (HCR 195/HR 169) because they "do not accurately track the language of the provisions of [HRS] chapter 323D," would create ambiguity" and "confuse health care providers." (*See* Exhibit A, Testimony of Loretta Fuddy).

SCR 127 would interfere with pending court proceedings, create a dangerous precedent, inconsistent interpretations, and unintended consequences far beyond the stated scope of this resolution, as noted above.

Liberty has already sought -- unsuccessfully -- to use similar statements to obtain repeal of the HSFP by SHPDA. Liberty's Petition to repeal the HSFP was denied in 2010 by SHPDA, on multiple grounds. *See* Exhibit B. Liberty has had full appeal rights and currently has an appeal pending in First Circuit Court

regarding SHPDA's approval of services under the 2009 HSFP. The Office of Information Practices has also held that the HSFP cannot be invalidated based on prior events, and that any violations of the Sunshine Act by SHPDA were not intentional and were based on "reasonable reliance" on earlier OIP Guidance, which OIP has now updated. *See* Exhibit C, pp. 2, 5.

Kaiser therefore opposes SCR 127 and asks that this Committee to defer or deny it.

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

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In reply, please refer to:
File:

House Committee on Health

HCR 195 / HR 169, Affirming the Intent of the Legislature that Amendments to the State Health Services and Facilities Plan be Done Through the Public Hearings Process

Testimony of Loretta J. Fuddy, A.C.S.W., M.P.H.
Director of Health

Friday, April 1, 2011
9:00 a.m.

Department's Position: The Department of Health opposes these resolutions as they do not accurately track the language of the provisions of chapter 323D, Hawaii Revised Statutes (HRS), which govern the State Health Services and Facilities Plan (the Plan) and the procedures for its preparation and revision. Adoption of either resolution would create ambiguity in the interpretation of chapter 323D provisions related to the Plan; such ambiguity would confuse the health providers who are subject to the provisions of chapter 323D, as well as the public.

As background, section 323D-17, HRS states in pertinent part "...the state agency and the statewide council shall conduct a public hearing on the proposed plan or the amendments and shall comply with the provisions ***for notice of public hearings in chapters 91 and 92***" (emphasis added). In the adoption of the most recently amended Plan (2009), the Agency and its advisory Statewide Health Coordinating Council (SHCC) complied with the notice provisions of chapters 91 and 92 for the required public hearing. Reference to chapter 91 in section

EXHIBIT A

323D-17 is limited to the notice provisions of that chapter, and does not indicate legislative intent to require adoption of the Plan according to the rulemaking provisions of chapter 91.

The statutory responsibility to prepare the Plan, and revise it, as necessary, rests with the SHCC pursuant to section 323D-14, HRS. The resolutions, however, would affirm, incorrectly, that the State Health Planning and Development Agency amends the Plan. (H.C.R. No. 195 and H.R. 169, at page 1, lines 29-31). Passage of either resolution will create ambiguity concerning the legislature's intent as to which entity is empowered to prepare and revise the Plan. Correction of this inconsistency, however will not assure that passage of the resolutions does not create ambiguity in the interpretation of the law.

Comparison of the text of the "whereas" clauses of the resolutions with chapter 323D reveals many inconsistencies that will add to the ambiguity that concerns the Department of Health and the Agency tasked with implementing the law. For example, at page 1, lines 20 and 21, both resolutions state that certificate of need decisions of the Agency, "if requested by the health care facility" are "done through the public hearings process[.]" This characterization of the certificate of need hearing process is inconsistent with the relevant provisions of chapter 323D, HRS, which describe holding a **public meeting** (emphasis added), if requested, for administrative review of certain applications, pursuant to section 323D-44.5; as well as review of certificate of need applications through a series of **public meetings** (emphasis added), as required by the provisions of section 323D-45. Exceptions to both processes are made in the case of emergency situations or other unusual circumstances. Additionally, section 323D-17 HRS, specifies that in the adoption of the Plan, the Agency and the SHCC "shall conduct ***a public hearing"***, while the resolutions repeatedly refer to "the public hearings process." As the terms are significantly dissimilar, passage of the resolutions will result in unnecessary ambiguity in the interpretation and the application of SHPDA's governing law.

For all of these reasons, the Department of Health requests respectfully that this Committee defer action on H.C.R. 195 and H.R. 169. Thank you for this opportunity to provide testimony on the resolutions.

STATE HEALTH PLANNING AND DEVELOPMENT AGENCY

LINDA LINGLE
GOVERNOR OF HAWAII

CHIYOME LEINAALA FUKINO, M.D.
DIRECTOR OF HEALTH

RONALD E. TERRY
ADMINISTRATOR

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CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Written Notification of Action and Ruling Denying Petition

TO: Liberty Dialysis-Hawaii, LLC
Unite Here! Local 5
Lawyers for Equal Justice

Re: Denial of Petition to Request Repeal of Rule

Pursuant to Hawaii Administrative Rule (HAR) 11-185-55, the State Health Planning and Development Agency (the Agency) denies your undated Petition to Request Repeal of Rule, by which you sought the "repeal" of the current version of the Hawaii Health Services and Facilities Plan entitled: "State of Hawaii Health Services and Facilities Plan" dated 2009 (the "Plan"), for the following reason(s):

1. The relevant administrative rule states:

"Any interested person may file with the agency a petition requesting the agency to adopt, amend, or repeal any rule." HAR section 11-185-50 (emphasis added). The Plan, however, is not a rule, as it is not adopted, nor is it required to be adopted in accordance with all of the rulemaking requirements of Hawaii Revised Statutes (HRS) chapter 91.

2. Rather, Hawaii law requires as follows concerning the Plan:

"There shall be a state health services and facilities plan which shall address the health care needs of the State, including inpatient care, health care facilities, and special needs. The plan shall depict the most economical and efficient system of care commensurate with adequate quality of care, and shall include standards for utilization of health care facilities and major medical equipment. The plan shall provide for the reduction or elimination of underutilized, redundant, or inappropriate health care facilities and health care services." HRS section 323D-15 (emphasis added).

Additional directions from the Legislature concerning the preparation of the Plan are provided in other sections of chapter 323D; see e.g., section 323D-17, but the Legislature did not give the Agency the authority to "repeal" the Plan.

EXHIBIT B

3. While HRS chapter 323D gives the agency rulemaking power pursuant to HRS chapter 91, the Agency was not engaged in chapter 91 rulemaking when it prepared the Plan, and presented it at public hearing as required by HRS chapter 323D. Accordingly, the Agency's general rule of practice and procedure concerning the petition for adoption, amendment or repeal of rule, HAR 11-185-50, is not available as a remedy to invalidate or "repeal" the Plan. Such "repeal," even if allowed, would leave Hawaii without a State Health Services and Facilities Plan, in contravention of the requirements of chapter 323D, an action beyond the scope of the Agency's authority.

DATED: August 18, 2010
Honolulu, Hawaii

HAWAII STATE HEALTH PLANNING
AND DEVELOPMENT AGENCY

Ronald E. Terry
Administrator

LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
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CATHY L. TAKASE
ACTING DIRECTOR

The Office of Information Practices (OIP) is authorized to resolve complaints concerning compliance with part I of chapter 92, Hawaii Revised Statutes (HRS) (the Sunshine Law) pursuant to HRS § 92F-42(18).

MEMORANDUM OPINION

Requester: Liberty Dialysis-Hawaii LLC
Board: Statewide Health Coordinating Council
Date: December 6, 2010
Subject: SHCC Plan Development Committee (S INVES-P 11-1)

Request for Investigation

Requester asked for an investigation into whether the requirements of the Sunshine Law were complied with in the development of the current state health services and facilities plan that was adopted in 2009 (the State Plan). The underlying issue is whether the Plan Development Committee (PDC) of the Statewide Health Coordinating Council (SHCC), and the PDC's subcommittees, violated the Sunshine Law by failing to properly notice its meetings and by meeting without quorum, or by failing to create permitted interaction groups that would allow the PDC and its subcommittees to meet outside of noticed open meetings.

Unless otherwise indicated, this opinion is based solely upon the facts presented in letter to OIP from Requester dated July 19, 2010; letters to OIP from SHPDA dated September 29, 2010 (with attachments), and October 22, 2010; letter to OIP from SHCC Chair Patricia Uyehara-Wong dated August 19, 2010 with attachments; and letter to OIP from Marilyn A. Matsunaga dated October 21, 2010 with attachments.

Opinion

The presence of more than two members on both the SHCC and the PDC caused a violation of the Sunshine Law. The same is true for any subcommittee that had more

EXHIBIT C

than two SHCC members or more than two members of any one subarea health planning council. SHCC is provided guidance below on prospective compliance with the Sunshine Law with respect to the PDC and its subcommittees.

We do not find that SHCC intentionally violated the Sunshine Law, given SHCC's reasonable reliance on informal OIP guidance provided regarding the status of the PDC as a Sunshine Law board and the opportunities provided for public participation with respect to the State Plan. Moreover, we note that the Sunshine Law does not provide a basis for voiding the State Plan based upon the violation because a suit to void a final action under the Sunshine Law must be commenced within ninety days of the action.

Statement of Reasons for Opinion

The SHCC is an advisory board to the State Health Planning and Development Agency (SHPDA). HRS § 323D-13. One function of the SHCC is to "[p]repare and revise as necessary the state health services and facilities plan[.]" HRS § 323D-14. The subarea health planning councils (SACs), each of which serves a geographical subarea of the State, review the state health services and facilities plan "as it relates to the respective subareas and make recommendations to the state agency and the council." HRS § 323D-22(a)(3).

SHPDA is directed by statute to "[s]erve as staff to and provide technical assistance and advice to the statewide council and the subarea councils in the preparation, review, and revision of the state health services and facilities plan." HRS § 323D-12(a)(2). The statute also provides that SHPDA may "[p]repare and revise as necessary the state health services and facilities plan." HRS § 323D-12(b)(2). Thus, although SHCC has the ultimate responsibility to prepare and adopt the state health services and facilities plan, the statute anticipates that SHPDA could be substantially responsible for its creation. The only other statutory provision that concerns the adoption or amendment of the state health services and facilities plan states that SHPDA and SHCC "shall conduct a public hearing on the proposed plan or the amendments and shall comply with the provisions for notice of public hearings in chapters 91 and 92." HRS § 323D-17.

There is no statutory provision that creates the PDC or defines its membership or role with respect to the state health services and facilities plan. However, for some time, the PDC and its subcommittees appear to have served as vehicles to bring members of the health care industry into the State's health and resources planning process, including professionals with specific expertise in the various health care areas addressed by the state health services and facilities plan. The PDC subcommittees, in particular, appear to bring together a wide range of community health care providers and government officials in specialized fields to assist in the development of those portions of the plan that affect those services, namely acute care/technology services, primary care services, psychiatric (behavioral) services,

and long-term care services. The PDC and its subcommittees here were apparently charged with researching specific healthcare issues, and subsequently provided their members' recommendations to SHPDA or SHCC in the form of draft amendments to the state health services and facilities plan.

This opinion first addresses the conduct of the PDC and its subcommittees as they existed at the time complained of, which preceded adoption of the State Plan. The opinion then provides the SHCC and SHPDA with general Sunshine Law guidance in light of the current makeup of the PDC and its subcommittees.

1. The PDC is Not a Sunshine Law Board

OIP does not believe that the PDC meets the definition of a "board" under the Sunshine Law. The Sunshine Law defines a "board" subject to its terms as follows:

> (1) "Board" means any agency, board, commission, authority, or committee of the State or its political subdivisions **which is created by constitution, statute, rule, or executive order,** to have supervision, control, jurisdiction or advisory power over specific matters and which is required to conduct meetings and to take official actions.

HRS § 92-2(1) (emphasis added). To determine whether an entity is a "board" under this definition, OIP looks to whether an entity meets five elements. See OIP Op. Ltr. No. 01-01 (adopting the test articulated in Green Sand Cmty. Ass'n v. Hayward, Civ. No. 93-3259 (Haw. 1996) (mem.)). Specifically, an entity is a "board" if it is: (1) an agency, board, commission, authority, or committee of the State or its political subdivisions; (2) created by constitution, statute, rule, or executive order; (3) given supervision, control, jurisdiction or advisory power over specific matters; (4) required to conduct meetings; and (5) required to take official actions. Id. at 11. As presented, the PDC during the relevant time did not meet elements (2), (4) and (5).

First, the PDC is not created by constitution, statute, rule, or executive order. OIP has reviewed SHCC's governing statute, chapter 323D, SHPDA's administrative rules, and the submittals of the parties. The PDC has apparently existed for many years, but there is no statute, rule or other authority that creates the PDC. The only statutory provision that reflects the existence of the PDC is HRS § 323D-47, which includes the chair of the PDC on the reconsideration committee for SHPDA decisions. The legislative history to HRS § 323D-47 provides no historical background on the PDC. The PDC is informal in formation and makeup – there is no set number of PDC members, who are SHCC and SAC members, government officials, and community health leaders, who are apparently either chosen by SHCC or volunteer.

In light of the informal advice given by OIP, upon which SHPDA reasonably relied, OIP does not find an intent by SHCC to violate the Sunshine Law. As shown by the makeup of the PDC and its subcommittees and the agendas of SHCC and the SACs, [1] as well as SHCC's notices of public hearings, SHCC clearly intended to provide multiple opportunities for public input on revision of the state health services and facilities plan throughout the process, belying an intent to preclude public participation in the amendment of that plan. This included three public hearings on the neighbor islands, which were beyond the one hearing that it was statutorily required to hold to amend the state health services and facilities plan.

OIP cautions SHCC and SHPDA that although this type of collaborative community and government health planning used by SHCC and SHPDA can be highly beneficial, the process must be carefully designed to avoid inadvertent Sunshine Law violations where members of a Sunshine Law board will be involved in other aspects of the planning process outside of their board meetings.

3. The Violation Does Not Provide a Basis for Voiding the State Plan

The Sunshine Law provides that "[a]ny final action taken in violation of sections 92-3 and 92-7 may be voidable upon proof of violation. A suit to void any final action shall be commenced within ninety days of the action." HRS § 92-11. Because SHCC adopted the State Plan in 2009, the Sunshine Law's limitation period bars any future suit to void that action.

4. Guidance for Operating in Compliance With Sunshine Law

By copy of this opinion to SHCC, OIP offers the following guidance to SHCC going forward with respect to operating the PDC and its subcommittees in compliance with the Sunshine Law.

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[1] However, OIP notes that, although certain agendas reviewed provided sufficient notice of the topic to be discussed, the majority of the agendas did not provide sufficient detail to allow the public to understand what was to be discussed. For example, the following agenda items, listed alone and especially utilizing acronyms not generally known by the public, do not allow the reader to understand the subject matter to be discussed under those items: "H2P2 Update," "H2P2 Plan Development Committee Update," "Review of Health Services and Facilities Plan," "Tri-Isle's Recommendations Regarding Highest Priorities," "Finalize KSAC's Kauai County health priorities," Updating H2P2 for Hawaii County," "SAC Priorities for HSFP," and "Administrator's Report." By copy of this opinion to SHCC and SHPDA, we invite them to seek further guidance from OIP regarding the amount of detail that should be provided in agendas filed under the Sunshine Law.

Second, the PDC is not required to conduct meetings or take official actions. The PDC was charged with researching various healthcare issues and reporting its findings in the form of working papers submitted for use by SHPDA and SHCC in their preparation and adoption of amendments to the state health services and facilities plan. The PDC thus was not required or expected to take any official action. Further, although the PDC did meet, it was not required to and did not vote, and thus it did not always have quorum. It was not therefore required to hold "meetings" as that term is defined in the Sunshine Law. See HRS § 92-2(3); OIP Op. Ltr. No. 05-01 ("meeting" is the convening of a board "for which quorum is required" to make or deliberate toward a decision).

For these same reasons, the PDC's subcommittees are also not "boards" under the Sunshine Law. The subcommittees are also not created by constitution, statute, rule, or executive order. The subcommittees are apparently formed by volunteer PDC members who then sought out government and community volunteers with technical expertise in the subcommittees' assigned health care fields. The subcommittees also did not vote on any of the matters assigned to them.

As stated by SHPDA and confirmed by OIP's records, SHPDA contacted OIP in 2007 seeking guidance on whether the PDC was subject to the Sunshine Law. OIP's records note that the PDC was described to OIP as a working group of individuals with various expertise who would contribute to a draft plan for consideration by SHCC, but OIP was given no indication that SHCC members were or would be serving on the PDC. Based upon the facts presented, OIP informally advised SHPDA that the PDC did not appear to be a Sunshine Law board because it was not required to take formal action, but that SHPDA could seek a formal OIP opinion on that issue.

2. A Violation Occurred Because of the Joint SHCC and PDC Members

Unlike the PDC, SHCC is indisputably subject to the Sunshine Law. At the relevant time, at least five SHCC members served as PDC members along with other community members and government officials. The PDC participation of these joint members of SHCC and the PDC violated the Sunshine Law: the matters discussed by the PDC and its subcommittees were also board business of the SHCC, so the SHCC members could not discuss that SHCC board business outside of a noticed SHCC meeting unless a permitted interaction under HRS § 92-2.5 applied. Based upon the facts presented, none of the permitted interactions applied. The Sunshine Law was therefore violated both whenever three or more SHCC members met as part of a PDC meeting, and whenever three or more SHCC members met in the course of serving on the same PDC subcommittee. Because we do not find that the PDC itself is a Sunshine Law board, no violation occurred where more than two PDC members who were not SHCC members or members of the same SAC served on the same subcommittee.

A. Two-Member Permitted Interaction

It is our understanding that currently only two SHCC members are PDC members. This approach falls under a permitted interaction. Specifically, the Sunshine Law provides that "[t]wo members of a board may discuss between themselves matter relating to official board business . . . as long as no commitment to vote is made or sought and the two members do not constitute a quorum of their board." HRS § 92-2.5(a). These members, however, must be very careful not to then discuss the same board business with any other board member. See HRS § 92-5(b); Right to Know Committee v. City Council, 175 P.3d 111 (2008) (serial communications using permitted interaction not allowed); OIP Op. Ltr. No. 05-15. That bar on serial communications under the two person permitted interaction is also likely to present a practical problem in that the discussions of SHCC business these two SHCC members are likely to have with SHPDA staff in the course of their PDC participation, may not then be discussed by SHPDA staff with other board members.[2]

B. Investigative Committee Permitted Interaction

The Sunshine Law also provides that "[t]wo or more members of a board, but less than the number of members which would constitute a quorum for the board, may be assigned to . . . [i]nvestigate a matter relating to the official business of their board." HRS § 92-2.5(b)(1). If it is desirable to have more than two members of the SHCC, or of the same SAC, serve on the PDC or any one subcommittee, this permitted interaction may be used. However, the requirements for setting up this investigative committee as well as the subsequent reporting and other requirements must be closely followed. See id. Note that this permitted interaction would not allow regular, unlimited substantive reports by the PDC and subcommittees to SHCC or the SACs, and would not allow any discussion to occur at the SHCC or SAC meetings on any report made.[3] Instead, the language of the statute anticipates that an investigative task force will undertake an investigation of defined and limited scope, will make a single report of final findings and recommendations back to its board, and that the board will then have any deliberation and decision making on the matter investigated at a subsequent meeting of the board. See id.; OIP Op. Ltr. No. 06-02.

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[2] We note that an additional potential for violation exists if two SHCC members serve on both the PDC and a subcommittee unless they both are the only two SHCC members on the same subcommittee.

[3] OIP believes that certain limited reports without discussion by the board may not violate the Sunshine Law, but this determination is fact specific.

C. PDC as SHCC Subcommittee

In providing its informal advice in 2007, OIP's understanding of the PDC was apparently that the PDC would consist solely of individuals who were not board members, and who would work with and through SHPDA staff to provide its recommendation to SHCC. OIP suggests that this approach would, in the end, be the least problematic option to receive input on any future amendment to the State Plan. SHPDA staff would be able to freely work with these non-board members and freely report on any progress back to and discuss this input with SHCC.

If SHCC wants certain but not all of its members involved in the initial drafting of future amendments, SHCC may want to form the PDC as a SHCC subcommittee made up of the interested SHCC members. As a committee of the parent board SHCC, the PDC could only consist of SHCC members and would itself be required to follow the Sunshine Law's open meeting requirements. See OIP Op. Ltr. No. 03-07. SHPDA staff would be free to report to this constituted PDC on the progress of any related group made up of the non-board members subcommittees.

OFFICE OF INFORMATION PRACTICES

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