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December 28, 2022

VIA ELECTRONIC MAIL

The Honorable Ronald D. Kouchi,
SpeakerPresident
and Members of the Senate
Thirty-Second State Legislature
LegislatureState Capitol, Room 409
Honolulu, Hawai'i 96813

The Honorable Scott K. Saiki,
and Members of the House of
Representatives
Thirty-Second State
State Capitol, Room 431
Honolulu, Hawai'i 96813

Dear President Kouchi, Speaker Saiki, and Members of the Legislature:

For your information and consideration, I am transmitting the Office of Information Practices Report on the Implementation of Sunshine Law Meetings Held Using Interactive Conference Technology, as required by Act 220, SLH 2021. In accordance with Section 93-16, HRS, a copy of this report has been transmitted to theLegislative Reference Bureau and the report may be viewed electronically at: <https://ags.hawaii.gov/reports/legislative-reports/>.

Sincerely,

KEITH A. REGAN
Comptroller

Enclosure

Report of the Office of Information Practices (OIP) on Implementation of Sunshine Law Meetings Held Using Interactive Conference Technology

Before the COVID-19 pandemic, the Sunshine Law allowed boards to use interactive conference technology (ICT) to connect multiple public in-person meeting sites where board members would be physically present. ICT was defined in section 92-2, Hawaii Revised Statutes (HRS), as “any form of audio or audio and visual conference technology, including teleconference, videoconference, and voice over internet protocol, that facilitates interaction between the public and board members.” While meetings could be conducted using ICT, including an audio-only connection, board members were still required to be present in person at one of the noticed public meeting sites, with a limited exception for disabled members.

The COVID-19 pandemic, however, forced the implementation of emergency measures that suspended the requirement for board members to meet in person at public meeting sites. These measures allowed meetings using ICT in which board members and the public could participate remotely online from their private homes, businesses, or other locations (remote meetings) and thus enabled boards to conduct necessary business while protecting participants’ health and safety and expanding public access to meetings throughout the State. Recognizing that remote meetings had proved viable and popular for Sunshine Law boards, the 2021 Legislature passed [Senate Bill 1034, S.D. 1, H.D. 2, C.D. 1](#), which was enacted as [Act 220](#) (SLH 2021) and can be found online on OIP’s [Legislation page](#). Act 220 slightly amended the ICT definition and created a new section in the Sunshine Law that allows boards to hold remote meetings for which board members are not required to attend at an in-person meeting site, although the board must still provide an in-person site for members of the public who have no desire or ability to participate using ICT. Act 220 also established new requirements for remote meetings, amended the requirements for a board holding an in-person meeting across multiple noticed meeting sites connected by ICT, and added a new element to the notice requirement for all meetings subject to the Sunshine Law.

In addition to adding a remote meeting option to the Sunshine Law and amending other Sunshine Law provisions, Act 220 instructed OIP to, in consultation with the Disability and

Communication Access Board (DCAB) and the Office of Enterprise Technology Services (ETS), "assess the implementation of meetings held using [ICT,] including participation by members of the public who need an accommodation due to a disability" and report back to the 2023 Legislature. This report sets out OIP's observations and recommendations drawn from inquiries to OIP since the law went into effect at the beginning of 2022, as well as input from DCAB and ETS.

Common Sunshine Law Issues Specific to Remote Meetings

We begin with a discussion of key Sunshine Law requirements that have been of particular concern for boards holding remote meetings. These issues relate to online links provided on the meeting notice; "zoombombing" and disruptions during online meetings; interruptions in internet connectivity; and the physical site requirement for remote meetings.

A board's meeting notice must always include a meeting's location, and remote meetings are no different. For a remote meeting, its location includes not just the physical location connected to the meeting that the board is required to provide, but also the online meeting link. Specifically, the remote meeting notice must include information on how to "[r]emotely view . . . the meeting through internet streaming or other means" and "[p]rovide remote oral testimony . . . whether through an internet link, a telephone conference, or other means." HRS § 92-3.7 (Supp. 2021). Just as the address of a physical location should be sufficient to allow the public to find it without having to call staff for more information, the link or description of how to view the remote meeting or present oral testimony should be sufficient to allow the public to attend and testify without having to take additional steps, such as contacting the board, registering to get a link, or searching a website for the link. Moreover, if the link to the remote meeting or testimony site must be changed, then just as when a meeting's physical location must be changed, the board cannot simply revise its existing agenda but must post a new notice at least six days in advance of the meeting.

One issue that has repeatedly come up with respect to remote meetings in particular is the effect of a typographical error in the online link(s) listed in a board's notice and agenda. Boards have long had such errors in the notice and agenda for in-person meetings, but a spelling error in listing the physical location of a meeting is often insignificant. If the "Kalanimoku Building" is misspelled as the "Kalaminoku Building" but the address and room number are otherwise

correct, that error would not prevent members of the public from finding the meeting. By contrast, a swapped or missing character in an online link address typically means the link is broken and unusable, requiring the board to either refile its notice (if time allows) or reschedule the meeting to a later time (if the filing deadline has passed). Similarly, a board can often leave the physical location information the same from one meeting to the next, but if an agenda accidentally uses last meeting's outdated online link instead of the new link for the upcoming meeting, the board will need to either refile its notice or reschedule the meeting.

Another issue specific to remote meetings is “zoombombing,” a type of cyber-harassment in which an individual or a group of unwanted and uninvited users interrupt a meeting held via ICT. While an open meeting is not limited to specifically invited users, zoombombing in a Sunshine Law meeting may interrupt any point in the meeting, not just public testimony, and it often involves repeatedly screen-sharing pornographic or other offensive images, shouting obscenities, or similar disruptive acts. Zoombombing has been a relatively rare issue for Sunshine Law boards, but OIP has had occasional inquiries from boards that have dealt with it and seek to prevent a recurrence. The Sunshine Law's remote meeting provision requires a board to provide for remote public participation and testimony, but it does not require boards always use a single meeting link for both board members and the public to watch and testify at the meeting. Thus, while a board expecting relatively minimal public participation might choose the straightforward approach of setting up a remote meeting and providing the public with the same link board members will use to participate, a board expecting a larger crowd or with concerns about potential disruptions could set up its remote meeting as a webinar, where board members will use a private link intended only for board members and staff, with a different public access link intended for public participants. Boards also have the option to use a separate link for public testimony or to take public testimony via phone. OIP explained these options and how to properly list them in a board's notice in its [Quick Review: Tips for Remote Meeting Notices](#), issued in August 2022 in response to a number of related questions from boards and the public.

Connectivity is a potential issue for both remote meetings held via ICT and in-person meetings held at multiple noticed sites connected by ICT. By the time the Sunshine Law's remote meeting provision went into effect in January 2022, boards had spent the better part of

two years running remote meetings under emergency measures, and as a result had worked out most of their technical challenges and understood what to do in case of a connectivity problem. In addition, those boards that experienced persistent challenges with connectivity and other technical issues when holding remote meetings via ICT began returning to fully in-person meetings held at a single location at around the time the emergency measures expired and the Sunshine Law's remote meeting provision went into effect. As a result, OIP has had relatively few inquiries from boards or the public stemming from connectivity issues during remote meetings held via ICT or in-person meetings held at multiple meeting sites connected via ICT.

Finally, a board holding a remote meeting via ICT is still required to provide a physical site connected to the meeting, even though board members are not required to attend in person. Boards have taken different approaches to this requirement, depending on their nature and their typical level of public attendance. Some boards have moved to holding what they call hybrid meetings, set up as remote meetings with remote access available for members and the public, but with most if not all board members attending in person at the noticed physical location. Other boards greatly prefer to have all members attend remotely, and they have informed OIP that no one ever shows up at their noticed in-person location and asked whether it would be sufficient for the notice to state that a connected physical location will be made available upon request. The Sunshine Law does currently require a board's notice of a remote meeting to list a physical location connected to the meeting, so that public participation in public meetings is not made contingent on having reliable internet access. However, if over the next few years it becomes the common experience for most smaller boards that no one shows up in person at the connected physical location, the Legislature could consider at that time whether to amend the law to require boards to provide a physical location connected to the meeting only upon request, rather than automatically needing to list one in the meeting notice.

Issues Not Specific to Remote Meetings

There are additional Sunshine Law issues that have arisen or been exacerbated during meetings using ICT, but are also applicable to in-person meetings, such as preregistration for testimony, management of testimony, and access and notice requirements for individuals with disabilities.

The Sunshine Law does not allow boards to require prior registration or set deadlines for public testimony; a board can request, but not require, preregistration or submission by a certain date. This is not an issue specific to the use of remote meetings via ICT, as questions about whether a board may require preregistration for testimony arose even when all meetings were in-person. But the use of remote meetings under emergency measures led some boards to begin requiring preregistration and deadlines for remote testimony. When the Sunshine Law's remote meeting provision came into effect and the emergency measures expired at the beginning of 2022, some boards were initially unaware that they could not require preregistration and set testimony deadlines as they had become accustomed to doing during the emergency period, resulting in complaints to OIP. Such complaints faded over the course of 2022 as boards adjusted to holding their meetings (remote or in-person) under the Sunshine Law again.

OIP also heard complaints from some boards about the difficulty of administering public testimony at remote meetings, including issues with people going off topic or taking too long to present their testimony. This, too, is something that has been an issue with in-person meetings and is not specific to remote meetings. However, the challenges may have been exacerbated for boards by the easier accessibility of remote meetings to the public, resulting in an increase in the number of testifiers to the point where some boards began to find testimony management extremely challenging. Through its online training materials and its Attorney of the Day service, OIP reminded boards of the Sunshine Law options available to them for managing testimony at either remote or in-person meetings, which include adopting testimony time limits, requiring testifiers to limit their testimony to the agenda item they are testifying on, and removing anyone who wilfully disrupts a meeting.

Many boards ended up having to refile meeting notices, and in some cases, having to reschedule their planned meetings due to a failure to include information that is required for all meeting notices, whether the meeting is in-person or remote via ICT. The two items most frequently left out were relatively new requirements: instructions for how a member of the public can request a disability accommodation, and the board's contact information for submission of testimony. Another issue involving disability access that OIP was asked about, also not specific to remote meetings, was a board's technical problems in making documents in

pdf format, such as public testimony, fully accessible to board members and the public using Adobe Acrobat's accessibility tool.

Notably, although the Sunshine Law requirement for a meeting notice to include instructions on how to request a disability accommodation does **not** require OIP to determine or advise on what disability accommodations may be legally required, just adding to the Sunshine Law the requirement for meeting notices to include disability accommodation instructions has led to confusion among boards as to where to address general disability accommodation questions. Because OIP is the office reminding boards about the requirement to include disability accommodation instructions in meeting notices through OIP's training materials and Attorney of the Day advice, boards will often ask OIP questions about what sort of accommodations are required and how to arrange for them, which OIP must refer to DCAB. Additionally, the Sunshine Law disability accommodation instructions requirement allows a board to include a reasonable deadline to request an accommodation, but DCAB currently advises that boards should not set a deadline and at most should recommend requesting an accommodation by a stated day, after which an accommodation cannot be guaranteed. This, too, causes confusion when people contact OIP to ask about a disability accommodation instruction in a Sunshine Law notice that complies with the Sunshine Law requirement, but not with DCAB's recommendation.

To avoid further confusion about where boards should address disability accommodation questions and what is required by law, OIP strongly recommends against including requirements related to disability access in the Sunshine Law. Even when the requirement does not directly require OIP to make determinations about disability access requirements under the Americans with Disabilities Act and other applicable laws, it still creates confusion about conflicting requirements and which agency is responsible for and can advise on disability access and accommodations.

DCAB's Experience with Remote Meetings Via ICT

Pursuant to Act 220, OIP sought input from DCAB and ETS for this report. DCAB informed OIP that it does not necessarily track the number of accommodation requests made to agencies regarding participation in remote meetings. It instead provided the following

description of its subjective experience as a board holding remote meetings under the Sunshine Law.

The Disability and Communication Access Board's experience concerning the implementation of remote meetings has been mostly successful by allowing persons with disabilities to fully participate. We provide American Sign Language interpreting and real time captioning service for persons who are deaf and or hard of hearing. Persons who are blind or who have low vision may participate by phone. Documents that are screen shared are read aloud for persons who are blind or who have low vision. Board packets are put into formats that are readable by screen reader software. The ability to meet on a virtual platform allows our board members, especially those who reside on the neighbor islands, to participate in our meetings without spending time commuting to and from our office by car, taxi and airplane. The same is true for members of the public who participate in our meetings. The drawbacks are the occasional technical difficulties that participants have in joining a virtual meeting (wrong URL or phone number, faulty electronic device, unstable Internet connection, etc.). General board meetings are held every two months. The board's committees (facility access, parking, communication access, special parent information network (SPIN) advisory committee, legislative) meet less frequently, but all meet on a virtual platform, with the exception of the SPIN advisory committee, which holds hybrid meetings. For the committees, the benefits and drawbacks of meeting on a virtual platform are roughly the same as those for the boards general meetings, except that committee meetings typically have less participants (board members and public participants) than the general meetings and therefore the technical difficulties described above tend to be resolved more quickly.

ETS's Experience with ICT For Remote Meetings and Teleworking

ETS provided the following account of its experience assisting agencies in using ICT for remote meetings both during the emergency period and after the Sunshine Law's remote meetings provision went into effect, as well as for teleworking, internal meetings, and general workplace use. Please note that some features listed by ETS as desirable for ICT meetings generally, such as requiring registration to attend a meeting, may be inconsistent with the requirements Sunshine Law meetings specifically.

Interactive conference technology (ICT) was a key component of the software solutions that helped keep our government operational throughout the pandemic. ICT allowed for core communications to continue through the use of tools such as Zoom, Webex, and Microsoft Teams, and has transformed the way the state continues to do business today.

ETS provided assistance in evaluating various ICT software and the functional criteria available to support remote, accessible, and secure meetings. ETS provides Microsoft Office 365 as an enterprise shared service, where all licensed state employees have access to Microsoft Teams. Microsoft Teams was the preferred ICT for internal communications within the state. Zoom, amidst its scrutiny for privacy concerns, eventually became the state's accepted standard for public meetings because of its familiarity and ease of use. ETS' evaluation of various tools was not an endorsement of one product over the other. The main contenders in the ICT space provided the base functionality needed to run a remote, accessible, and secure meeting.

The crux of the challenge lay with how users used the ICT tools. We saw a steep learning curve and much time invested in the practice of facilitating remote meetings. Meeting facilitators needed to learn how to

moderate speakers and presentations of media content, chat, audio, and video, using the available controls in the platform.

Minimum requirements assessed for a virtual board meeting operating under the Sunshine Law:

- Attendees must be able to see and hear the meeting.
- The public should be able to submit testimony orally and in real-time.
- The virtual meeting must be accessible to those with disabilities.

Additional features that would further help facilitate a more accessible, efficient, and secure meeting with the least disruptions:

- Ability to force mute and allow a moderator to control the un-muting of attendees.
- Ability to force disabling of attendee video.
- Ability to require registration.
- Ability to require a meeting password to join.
- Ability for a moderator to use a waiting lobby before attendees can join.
- Ability to dial in via a provided phone bridge.
- Ability to invite board member attendees as panelists who can speak and share.
- Ability to enable auto-captioning.
- Ability for a moderator or transcriber role to provide real-time transcription of the meeting.
- Ability to enable a gallery view to display board member video.
- Ability to disable attendee chat.
- Ability to disable attendee notes.
- Ability to disable attendee file transfer.

- Ability to disable attendee rich media.
- Ability to disable attendee remote control.
- Ability to hide the participant list.
- Ability to allow attendees to virtually raise their hand to speak.
- Ability for a moderator to remove an attendee.
- Ability to record a meeting.

Specific concerns for disability accommodations that were presented to ETS for holding public meetings using ICT revolved around the availability of CART (Communication Access Realtime Translation) features available for anonymous external users joining the meeting. Zoom had supported the functionality prior to Microsoft making it available for Microsoft Teams in our Government Community Cloud (GCC) in June of 2022.

Historically, the Department of Health (DOH) has been the largest zoom consumer across the executive branch. The DOH Care Coordinators use Zoom for meetings with clients and their families and their administrative staff use Zoom for meetings with contracted providers and any meetings that need to be publicly accessible. As such, they had an established Zoom Enterprise Agreement, and brokered licensing to other departments who wanted to leverage their existing contract.

DOH is using a commercial subscription of Zoom with a Business Associate Agreement (BAA) in place for Health Insurance Portability and Accountability Act of 1996 (HIPAA) compliance. Note for greater regulatory compliance Zoom, Webex, and Microsoft Teams have available subscription for government that have a Federal Risk and Authorization Management Program (FedRAMP) Moderate standing.

Further reading:

<https://o365.hawaii.gov/teleworking/>

<https://www.tomsguide.com/news/zoom-security-privacy-woes>

Apparent Public Preference for Remote Meeting Format

OIP has not surveyed boards and the public about which meeting format they prefer, but based on the nature of the inquiries made to OIP, it believes that remote meetings are popular and have helped to increase public access to Sunshine Law meetings.

To reiterate, the Sunshine Law provides three options for a meeting's format: (1) a fully in-person meeting at a single noticed location, (2) a fully in-person meeting at multiple noticed locations connected via ICT, or (3) a remote meeting held via ICT with at least one noticed physical location connected to the meeting, but with board members and the public able to participate remotely from wherever they choose. Notably, all meeting formats require at least one physical meeting location open to the public.

There are two significant things, however, that distinguish a fully in-person meeting from a remote meeting that must list a linked physical location. First, an in-person meeting is not required to provide any sort of remote access to the meeting location(s). Second, board members can participate in an in-person meeting only from a noticed in-person location (with a limited disability exception). Thus, an in-person meeting will usually require board members as well as members of the public to go to the physical meeting location. By contrast, for a remote meeting, board members and the public both are free to participate remotely and therefore, the remote access link is a critical part of the meeting notice. Attending a remote meeting can be done either by the online link or by going to the physical location provided, but there is no guarantee that any of the board members will be present at the physical location.

At the time the new remote meeting law went into effect, all or almost all Sunshine Law meetings were still being conducted remotely, but as the pandemic eased, some boards chose to return to traditional in-person meetings without burdensome technical requirements while many others continued to hold remote meetings with the addition of the in-person location required by the new law. Some larger boards and the County Councils hold what they refer to as hybrid

meetings, which are technically remote meetings but still have most members attending in person at the noticed physical location.

OIP has received a few complaints that the notice for an in-person board meeting did not include a remote link when, as an in-person meeting, no link was required. While there was no violation of the Sunshine Law, these were effectively complaints that the board had chosen to hold an in-person meeting rather than a remote one, from members of the public who wanted to attend remotely. On the other hand, OIP has not had complaints effectively questioning a board's choice to hold a remote meeting, such as by complaining that board members continued attending remotely even as the pandemic waned. In addition, as noted above regarding testimony at remote meetings, some boards have had the experience of consistently receiving noticeably more oral testimony for remote meetings than they typically received for in-person meetings. Particularly for statewide boards and boards covering a wide geographic area, the convenience to the public of remote participation is self-evident. Thus, based on this admittedly limited and anecdotal information, OIP's impression is that remote meetings are broadly popular with the public and their use has increased public access to Sunshine Law meetings.

Recommendations

Act 220 represented a major change to the Sunshine Law and even now, nearly a year after the Sunshine Law's new remote meeting provision went into full effect, boards are still finding their way as new issues arise. This has been complicated by further changes to the Sunshine Law in the 2022 session, which have caused further confusion and questions. Nonetheless, Act 220's addition of a remote meeting option to the Sunshine Law has been a broadly popular change and the implementation of remote meetings via ICT has gone reasonably smoothly, thanks in large part to Act 220's delayed effective date, which gave OIP time to extensively revise its training materials and inform boards of the new statutory provisions.

At this time, OIP does not recommend legislative changes to the remote meeting provision specifically or the Sunshine Law generally. Instead, OIP recommends that the Legislature allow boards additional time to adjust to the major Sunshine Law amendments that went into effect in January and July of 2022 before considering significant further Sunshine Law amendments.

Respectfully submitted,



CHERYL KAKAZU PARK

Director, Office of Information Practices