

March 4, 2024

To: Office of Information Practices; oiip@hawaii.gov
Cc: Board of Education Chair and Vice Chair; warren.haruki@boe.hawaii.gov,
kaimana.barcarse@boe.hawaii.gov

re: **Complaint - BOE Not Adhering to Sunshine Laws Apparently Per OIP Guidance**

Aloha State of Hawai'i Office of Information Practices,

I've attended State of Hawai'i Board of Education meetings off and on since 2012, and witnessed many iterations of how the BOE conducts its meetings. This fiscal year, I resumed participation in BOE meetings, and I have grave concerns that its current practices are actually designed to discourage public participation in the public meeting process. On more than one occasion I have appealed to the Board to improve, but the Board seems to think it's following the Sunshine Laws, when it's not, and they apparently are getting their advice from the Office of Information Practices.¹

I discovered that the latest OIP *Guide to "The Sunshine Law" for State and County Boards*² (OIP Sunshine Guide) has content that:

1. establishes a rule not supported by, *and* in contradiction to, the HRS Chapter 92 regarding written testimony;
2. confuses the purposes of and requirements for oral and written testimony; and,
3. informs boards what they must do at a minimum, but omits clarity about what they are permitted to, and empowered to do above and beyond Chapter 92' minimal requirements.

In this letter, when I refer to "**the intent of the Sunshine Laws**," I refer to the overarching philosophy of Sunshine Laws:

Government meetings shall be conducted in a manner that enables as much public scrutiny and participation as possible in the formation and conduct of policy.³

I'm asking the OIP to clear up the issues I raise below and either you tell me why I'm wrong so I'll stop bugging the BOE to improve, or tell me I'm right so the Board may improve.

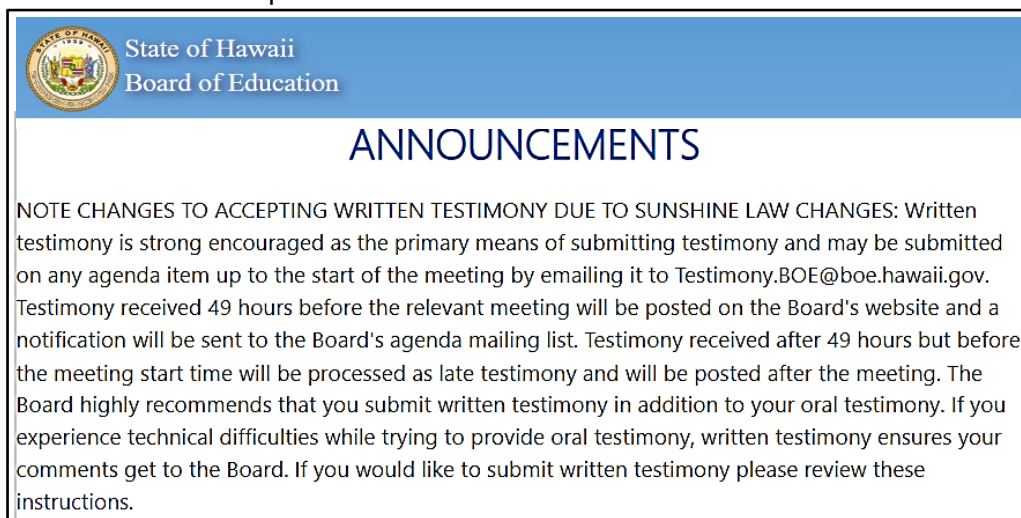
¹ In the APPENDIX is a [transcript of my recent oral testimony](#) and [my written testimony](#) asking the Board for procedural improvements; and a [transcript of the committee chair's response](#) in which he states, "We follow guidance from the State's Office of Information Practices."

² <https://oiip.hawaii.gov/wp-content/uploads/2023/08/2023-Sunshine-GUIDE-1.pdf>

³ **HRS §92-1 Declaration of policy and intent.** "...Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest.... it is the policy of this State that the formation and conduct of public policy – the discussions, deliberations, decisions, and action of governmental agencies – shall be conducted as openly as possible."

1. *OIP Sunshine Guide's* Rule Not Aligned with HRS Chapter 92

The BOE homepage⁴ has the following announcement which references changes to the Sunshine Law regarding written testimony. Can the OIP please identify what Chapter 92 statute changed to demand such a process.



I can't find any statute that says that written testimony must be accepted after the forty-nine-hour, prior-to-meeting-start-time deadline (all the way up until the start of a board meeting according to FIC Chair's statements).⁵

In fact, such actions *contradict* Sunshine Laws. Both the intent of the Sunshine Laws and HRS §92-7.5 specifically, if interpreted using common English, require that if written testimony is distributed to a board, it is part of the board packet. The statute makes clear that, "board packet means documents that are compiled by the board and distributed to board members before a meeting for use at that meeting."

A board packet, by law, is ALL written material distributed to board members for use in a meeting. If a state board distributes written documents to its members, they might include, but not be limited to presentations, reports, minutes of the last meeting, *and* written testimony from the public. The board packet 48-hour pre-meeting deadline exists to give the public a reasonable opportunity to prepare for (participate in) a meeting. Someone else's testimony often gives other individuals ideas for their own testimony. So, the law gives the public at least 48 hours to intelligently prepare to give oral testimony which may be based on written testimonies by the time the meeting starts. Distributing written testimony for use at a meeting *after* the statutory deadline is prohibited per HRS Chapter 92.

Please identify exactly which Chapter 92 statute justifies the text I've underlined in the following *OIP Sunshine Guide* quotation. As I explained above, deadlines for written testimony are governed by board packet statute HRS §92-7.5 *including* its 48-hour statutory deadline. So, it seems the text I've underlined in the box below isn't accurate.

⁴ <https://boe.hawaii.gov/Pages/Welcome.aspx>

⁵ See [TRANSCRIPT of COMMENTS by BOE FIC CHAIR, KEN KURAYA](#) below.

May a board set a deadline for the public to submit written testimony or register for oral testimony?

No. The Sunshine Law does not authorize boards to set deadlines or require registration as a condition of giving oral testimony, and doing so would be inconsistent with the requirement to allow all interested persons the opportunity to provide written and oral testimony. However, a board may still request that the public submit written testimony by a set time or sign up in advance for oral testimony, so long as it makes clear that the request is not a requirement, accepts written testimony submitted at a later time, and offers all public attendees the chance to present oral testimony even without prior registration.

2. Purposes of, and Requirements for, Oral vs. Written Testimony Are Comingled and Confused in the *OIP Sunshine Guide*

The above quotation from the *OIP Sunshine Guide* seems to confuse both the purpose of, and requirements for, oral and written testimony. These two types of testimony are very different, and merit different treatment. One is real-time, the other is not.

Written testimony is effective for communicating: (a) detailed reports and complicated ideas; (b) resources and references; (c) information in advance for board members and the public to read prior to the meeting; and (d) if one is unable to speak at a meeting for whatever reason.

Oral testimony is effective for communicating: (a) last minute ideas or information that come to light due to others' written or oral testimonies; (b) emotion and humor; (c) a last resort if there was not time to prepare written testimony; and, (d) if someone is unable to write testimony for any other reason.

Written documents (including testimonies) often take folks a while to read and comprehend, especially if they have reading difficulties. That is why Sunshine laws set a drop-dead cut-off for board packet distribution of two days. The public must be given access to the materials the board can see, and a reasonable opportunity to participate (i.e., be prepared). Distributing written testimony after the 48-hour and up until a meeting starts does not give the public fair and equal access to these materials *and* it makes meetings unnecessarily dilatory.

For generations, oral-testimony tradition at boards across the nation has been for testifiers to "get in the queue," and wait their turn to speak. They are present at the meeting (be it physically or remotely). Distribution of each oral testifier's testimony is in real time, and everyone has equal access. That is why signing up to give oral testimony either in person or via WebEx up until the time allotted for oral testimony is over is appropriate.

To assist the Office of Information Practices in improving the *OIP Sunshine Guide*, I have taken the time to compose the following revisions which clarify the differences.

SUGGESTED REVISIONS to OIP SUNSHINE GUIDE:

May a board set a deadline for the public to register for oral testimony?

No. Board meetings are open to the public with few exceptions. Boards must give all interested persons an opportunity to give oral testimony on any agenda item; individuals may sign up to testify orally until the time for oral testimony ends. Boards may adopt reasonable rules for the administration of oral testimony. For example, depending upon the number of people signed up to testify orally, a chair may limit the amount of time each speaker may testify on an agenda item, provided all testifiers are offered the same amount of time.

May a board set a deadline for the public to submit written testimony?

Yes. Written testimony is part of the board packet. Therefore, written testimony must be distributed to board members and made available to the public no later than forty-eight hours before the meeting. Boards are entitled to adopt their own rules and deadlines for written testimony provided that these rules do not conflict with the Sunshine Laws, board bylaws, policies, or administrative rules; and, the adopted procedures afford the maximum amount of public scrutiny and participation as possible.

3. Lack of Information About Sunshine Laws' Latitude to Adopt Best Practices Stunts Our Growth & Frustrates Public Participation

I've read Chapter 92 and OIP Guides countless times for over a decade. In the beginning, I learned that the OIP is authorized to provide guidance *only* on the UIPA and Sunshine Laws. They do not advise on best practices. *Robert's Rules of Order Newly Revised* (RONR) is the gold standard for how to conduct meetings. Most, if not all Hawai'i state boards have adopted RONR as their parliamentary authority as stated in their bylaws – on paper.

Unfortunately, the OIP Sunshine Guides over the years have never made it clear that Sunshine Laws are the minimal legal requirement, but boards are supposed to follow their own bylaws (and RONR). This lack of clarity creates myriad problems. Board members across the state have come to believe that Sunshine Laws and the advice from the OIP are best practice. They are not. Sunshine laws are the bare minimum of what constitutes a fair, open, and participatory meeting. The result of this misunderstanding is very poorly-run Board of Education meetings that minimize public participation, and are so disorganized that sitting through meetings or trying to submit testimony is an excruciating, frustrating experience.⁶

In the interests of aiding the people in the formation and conduct of public policy through its interactions with state boards, it's extremely important that the *OIP Sunshine Guide* make the following points much clearer to board members and the public:

- Regarding requirements of state board meetings, the OIP provides advice *only* on Sunshine Laws.
- Sunshine laws are the minimal procedural requirements for state board meetings.

⁶ Refer to [RECORDINGS of DEAD AIR at BOE MEETINGS](#) in APPENDIX, p. 9.

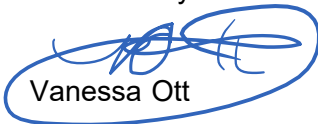
- HRS §26-3 gives a state board the power to adopt its own meeting rules and preparatory deadlines, provided no rule conflicts with statutes, administrative rules, or board policies.⁷
- Many state boards have adopted *Robert's Rules of Order, Newly Revised* as their parliamentary authority.⁸
- A state board is required to follow its own rules, especially those defined in its bylaws.
- If a state board officially adopts *Robert's Rules of Order, Newly Revised* as its parliamentary authority, the board is required to abide by these rules.
- The OIP does not advise how to abide by *Robert's Rules*. The public can contact the Hawai'i State Association of Parliamentarians concerning *Robert's Rules* training.
- State boards are empowered by *Robert's Rules* and state statute to adopt their own procedural rules provided these rules fulfill the intent of Sunshine Laws and enable as much public scrutiny and participation as possible.

Conclusion

I am trying to help the Board of Education to best fulfill its roles and responsibilities so that the public education system can improve. That means better-managed public meetings. I want to advocate for a better BOE meeting notice and board packet distribution process which I describe in, [OPTIMIZING PUBLIC PARTICIPATION IN BOARD OF EDUCATION MEETINGS](#) in the APPENDIX, on pag 10. To do this I need the OIP to answer these questions:

- **Are any of the statements I made above incorrect? If so, what's not right?**
- **What are the changes to HRS Chapter 92 reference in the Announcement on the BOE homepage copied above on page 2?**
- **Is there anything in the best practices schedule to optimize public participation in BOE meetings (p. 10) I'm trying to have the BOE implement that violates HRS Chapter 92, or prevents the BOE from adopting this schedule? If so, what?**

Mahalo for your consideration,


Vanessa Ott

доверяй, но проверяй.

Rhyming Russian proverb meaning: "**Trust, but check.**"⁹

⁷ Per [HRS §26-38](#), state boards may prescribe regulations for the performance of its business provided that the regulations shall not be inconsistent with the requirements of chapters 76, 91, and 92, rules promulgated by the governor, or other laws of the State. These regulations are usually included in a Board's bylaws and policies.

⁸ [BYLAWS OF THE HAWAII STATE BOARD OF EDUCATION](#). ARTICLE X. PARLIAMENTARY AUTHORITY. Section 10.1. "The rules contained in Robert's Rules of Order, newly revised, shall govern meetings where they are not in conflict with the law, these bylaws, or other rules of the Board. In making a ruling or interpretation of the rules, the order of determination shall be 1) the law, 2) these bylaws, 3) Board policy, and 4) *Robert's Rules of Order*, newly revised."

⁹ The aphorism, "Trust, but verify," became internationally known in English after Suzanne Massie, a scholar of Russian history, taught the proverb to Ronald Reagan, then president of the United States who used the phrase on several occasions in the context of nuclear disarmament discussions with the Soviet Union.

APPENDIX

TRANSCRIPT of VANESSA OTT'S 2024-FEB-08 TESTIMONY¹⁰

State of Hawai'i Board of Education Finance & Infrastructure Committee Meeting

[starts @ 19:23 after start of BOE meeting video; ends @ 21:50]

"Aloha Chair and Members of the Finance and Infrastructure Committee.

"My name is Vanessa Ott. I have many years of experience testifying to the Board of Education, and over the last twelve years, I've seen many changes in how Board meetings are conducted. I hope you had an opportunity to read my written testimony¹¹ where I express disappointment that today's agenda didn't provide any board packet materials in a timely manner. What I didn't point out in that testimony because there wasn't time, is that I think the committee could do better when it comes to public engagement.

"The current practice is that the agenda is posted at the end of the day the Friday before a Thursday meeting, and then the testimony is due forty-eight hours before that Thursday meeting. That gives only one work day, a Monday, for members of the public to prepare any testimony. If that Monday's a legal holiday, then basically the public has *no* work days to prepare testimony.

"What I think would be fairer to the public is if the committee would set a deadline that each agenda and board packet be posted ten calendar days prior to meeting. Given that the Board habit is to post at the *end* of that calendar day, that leaves nine calendar days to prepare testimony. Two of those days are weekends, and two would account for the forty-eight-hour prior meeting deadline for written testimony. Nine minus four is five working days left for any organization or individual to prepare statements. Five working days. And, if one of those is a Monday holiday, that *still* leaves four working days for the public to prepare. And, I think that's fair.

"They need to be able to see the board packets, and to prepare their thoughts, and I hope you agree. And, I *hope* you will decide to show the public that you actually care to hear from them, in a thoughtful and meaningful way, and be willing to make this change of getting the board packet materials and the agenda out much earlier. Please post your agendas and board packets ten calendar days prior to a meeting.

"Thank you for your consideration."

¹⁰ Listen to **2024-02-08 BOE FIC meeting excerpt Part 1 - Ott's Testimony** here: <https://youtu.be/kVjqEZ2g9b0>

¹¹ See [Ott Written Testimony to BOE FIC re: 2024-Feb-08 Meeting Agenda and Packet](#) below Chair Ken Kuraya's comments.

APPENDIX

TRANSCRIPT of COMMENTS by BOE FIC CHAIR, KEN KURAYA¹²

[starts @ 26:28 after start of BOE meeting video; ends @ 27:22]

“We note that the Board and its committees are committed to following the Sunshine Law and confirm we follow guidance from the State’s Office of Information Practices. The Board welcomes testimony as an important part of the policy making process.

“One, written testimony strongly encourages a primary means of submitting testimony.

“Two, written testimony is accepted all the way up until the start of the meeting and posted on the Board’s website.

“Three, late written testimony accepted and posted after the meeting.

“Four, oral testimony accepted by anyone all the way up until the agenda item is taken up.

“So, again, I understand the concern, but these are the things we are following as far as Sunshine Law.

“Thank you.”

¹² Listen to **2024-02-08 BOE FIC meeting excerpt Part 2 - FIC Chair Ken Kuraya's Response** here:
https://youtu.be/H_063snSyWw

APPENDIX

Ott Written Testimony to BOE FIC re: 2024-Feb-08 Meeting Agenda and Packet

 **Vanessa Ott**

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FreeSpeech4us.com

808 · 854 · 1018
MsVOtt@gmail.com

February 6, 2024

To: BOE Finance and Infrastructure Committee

Testimony re: **February 8, 2024 Agenda Items III A., B., C., and D.**

Aloha FIC Chair and Committee Members,

It's quite obvious that, in practice, the BOE Finance and Infrastructure Committee has no real interest in public input. You don't post your Agendas until the very last legal limit, the *end* of the calendar six days before a meeting. This gives the public only one business day to submit timely written testimony. That's ridiculous!

Also, you don't bother to submit any materials concerning your discussion items. As I write this, it's less than 30 minutes before the written testimony deadline, and there's not a link to the minutes you're going to approve, nor any Board Packet materials. Message received folks. You don't want the public to give input.

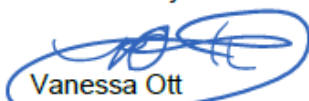
AGENDA

The Finance and Infrastructure Committee ("Committee") will accept public testimony with each agenda item.

- I. Call to order
- II. Approval of meeting minutes of October 4, 2023, December 7, 2023, and January 11, 2024
- III. Discussion Items
 - A. Review of status of Department capital improvement projects
 - B. Update on status of schools' fire alarm systems
 - C. Update on Department actions and updates in response to the final report of the House of Representatives Lahaina wildfire interim working groups
 - D. Review of Strategic Plan Desired Outcome 3.1.2, "All systems to address school facility needs are responsive and able to meet all needs effectively, efficiently, and quickly," relating to overall real estate optimization
- IV. Adjournment

Every time a Board Member says, "We want to hear from the public, those boots on the ground folks who are actually involved," I cringe. It's so disingenuous. If you truly want the public to participate, post your meeting agendas and board packets earlier.

Mahalo for your consideration,


Vanessa Ott

APPENDIX

RECORDINGS of DEAD AIR at BOE MEETINGS

**Board Members are instructed to
review written meeting materials
while attendees watch board members read.**



Dead Air 1 - Feb 8, 2024 BOE F&I Committee wasting time during a meeting reading late testimony.	https://youtu.be/AvaxhQDsas0 2 min, 21 secs
Dead Air 2 - Feb 8, 2023 HR chair wastes meeting time having board members read minutes.	https://youtu.be/bCBnyYjotdg 1 min, 52 secs
Dead Air 3 - Feb 8, 2024 BOE HR Committee wasting time during a meeting reading late testimony.	https://youtu.be/PYXb4NnMDuw 2 min, 13 secs
Dead Air 4 - Feb 8, 2024 BOE SA Committee wasting time during a meeting reading late testimony.	https://youtu.be/la0DAmPt5hl 1 min, 28 secs
Dead Air 5 - Feb 22, 2023 BOE chair wastes meeting time having board members read minutes.	https://youtu.be/QOPIIQaPVJ8 59 secs
Dead Air 6 - Feb 22, 2024 BOE wasting time during a meeting reading late testimony.	https://youtu.be/S1vUIbdvkE0 1 min, 21 secs

APPENDIX

OPTIMIZING PUBLIC PARTICIPATION IN BOARD OF EDUCATION MEETINGS

Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest.

For the public to be able to participate fully in Board of Education meetings, they need a *reasonable* amount of time to scrutinize written meeting materials (called a "board packet"), comprehend them, do their own research, and write well-prepared testimony submitted early. The board members need time to prepare, too.

The following schedule is an example of best practices for board meeting notices and distribution of the board packet materials. This optimizes the intent of Sunshine Laws for public scrutiny and participation.



HOW THE BOARD STAFF PREPARES FOR A MEETING						
SUN	MON	TUES	WED	THU	FRI	SAT
	Day 1 5:00 PM - NOTICE & BOARD PACKET POSTED ONLINE	Day 2	Day 3	Day 4	Day 5	Day 6
Day 7	Day 8 12:00 PM -DEADLINE to SUBMIT WRITTEN TESTIMONY	Day 9 8:30 AM - WRITTEN TESTIMONY POSTED ONLINE	Day 10	MEETING		

HOW BOARD MEMBERS PREPARE FOR A MEETING						
1. Read Board Packet. 2. Contact DOE personnel, legislators, or others for more information as needed. 3. Prepare motions for Agenda Items.						
SUN	MON	TUES	WED	THU	FRI	SAT
	NOTICE & PACKET ONLINE	Prepare for Mtg.	Prepare for Mtg.	Prepare for Mtg.	Prepare for Mtg.	
	Prepare for Mtg.	TESTIMONY ONLINE Read Written Testimony.	Prepare for Mtg.	MEETING		

HOW ORGANIZATIONS (and individuals) PREPARE FOR A MEETING						
SUN	MON	TUES	WED	THU	FRI	SAT
	NOTICE & PACKET ONLINE	Meet with colleagues and discuss if and what testimony is appropriate.	Day 2 Draft organization testimony.	Day 3 Draft organization testimony.	Day 4 Finalize Testimony. Submit if Monday is holiday.	
	Day 5 Monday DEADLINE for WRITTEN TESTIMONY [potential holiday]	WRITTEN TESTIMONY POSTED ONLINE Prepare Oral Testimony	Prepare Oral Testimony	MEETING		