

Task Force on Charter School Governance
September 16, 2005 8:30 a.m. – 11:00 a.m. meeting
Hawaii State Capitol, Room 329
Honolulu, Hawaii

Attendees:

Mark Bennett, Attorney General
Charleen Aina, Holly Shikada, and Lane Tsuchiyama, Attorney General staff
Jim Shon, Charter Schools Administrative Office director
Marion Higa, Legislative Auditor
Chuck Higgins, Department of Education Charter Schools Program Office, Department of Education designee
Breene Harimoto, Board of Education chair
Francis Keeno, Department of Human Resources Development
Don Young, Hawaii Educational Policy Center director
Arlene Lee, Hawaii State Teachers Association
John Thatcher, Hawaii Charter Schools Network
Ku Kahakalau, Na Lei Na'auao Hawaiian Charter School Alliance
Taffi Wise, Kanu o Ka 'Aina New Century Public Charter School, Ho'olako Like designee
Earl Fusato, Ho'okoko'o Corp.
Jeannie Wenger, Governor-appointed business representative
Stan Shiraki, Department of Budget and Finance
Kevin Nakata, Hawaii Government Employees Association

Harimoto announced the reappointment of Shon as executive director of Charter Schools Administrative Office (CSAO). Shon outlined the agenda of the Task Force (TF) meeting. Approval of minutes was deferred until after the Attorney General (AG's) presentation.

Bennett: (He introduced three members of the AG staff.) We in the AG's office want to do everything we possibly can to help charter schools (CS) succeed. Their success is crucial to the success of the state as a whole.

One of main functions of AG is to interpret the law. In an unbiased,objective way. We don't interpret with eye to favor one branch of government over any other.

Second function is to assist our clients.

These two functions are separate. In legislature matters, the duality of these roles comes into play. When asked how to interpret a law, we call them as we see them.

We can assist any client with proposed legislation, without judgment as to whether it is good or bad.

Same is true with the CS. During this presentation will address areas of CS law that are ambiguous and areas where we have come down on one side or the other a difficult situation. If TF, Board of Education (BOE) wants assistance in changing CS law, AG delighted to help.

Convinced there is a great deal of ambiguity in CS law. Everyone would benefit from legislative changes to clarify.

One example, lawsuit on the Big Island: "Is the CS which wants to build a facility subject to state land use laws and county zoning?" County of Hawaii corporation counsel: CS is subject to county zoning, not state. AG: exact opposite. Court may not agree with either one. With regard to

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state land use laws, if state wanted to exempt CS from state land use laws, it could. If it wanted to subject CS to county zoning, it could. It would be easy to draft such legislation.

This is a dialog. We can deal with TF questions as we go along during this presentation. Just raise your hand or interrupt.

One of the issues I want to discuss in general is what laws do and don't apply to CS. The easiest answer is regarding federal law: it applies to every state agency. CS, just like the rest of the state, can be sued in federal or state court for violating the U.S. Constitution. The State of Hawaii gets sued on this often, as does every other state. Due process and right to a property interest apply. If state is depriving someone of a property interest, the state has to give him notice and opportunity to be heard.

The first amendment applies to CS. For example, I can fire a deputy AG for almost any random reason; they are exempt employees. But not for a reason that violates existing law, like race, religion, gender, or for exercising their First Amendment rights. In private realm, other than under the whistle blowers statute, you can fire employees for being a thorn in your side. In the public arena, it is much harder even for at will employees.

Freedom from unreasonable search and seizure provisions apply to CS. Though, it is easier for a school to search a student's locker than the police stopping someone on the street.

CS may be free from certain state laws but not from any federal or state constitution. Individuals (including CS employees) who violate rights can be sued personally.

Among the applicable federal laws are: federal civil rights act inc. vocational rehab; Titles 6, 7, and 9; portions of the Americans with Disabilities Act; special education (SPED) laws; Individuals with Disabilities Act (IDEA); No Child Left Behind (NCLB); elementary and secondary education act; and a lot of constraints with the state. Some days people ask is it really worth it being part of the country!
due process; first amendment to the U.S. Constitution; the right to be free from unreasonable search and seizure.

Shon: To what extent are CS part of state or separate?

Bennett: I will cover that in subject areas.

The legislature when it established CS, passed law saying CS are free from state law except for certain things like health and safety, non-discrimination, and collective bargaining (CB). Early on we wrote opinion as to what this meant.

There are a lot of things that are not necessarily part of those laws. For example workers compensation (WC) maybe, land use maybe could be considered under health and safety. State ethics code, others, ambiguous. Generally applicable laws applicable to the state as a whole and not applicable to education still apply to CS.

The AG opinion read legislative intent to mean that CS exemptions wouldn't include other laws of general applicability that have nothing to do per se with education. For example, state land use laws.

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Am I certain that the courts would agree? No.

It would be better if the legislature made clearer which laws it wants to exempt CS from and not. The legislature can clearly say which provisions it wants to apply to CS and which not.

CS are not subject to procurement, sunshine law. Some aspects of the civil service laws; hard to say which aspects of civil service apply.

Clear it up. It should be legislature, as policy makers, not AG or courts to do so.

A surprisingly large number of cases in court involving CS demonstrate some of the issues that CS ought to be concerned about.

One case: [A service company] vs. Halau Lokahi PCS. It is a breach of contract suit. Issue: buying goods and services without the protection of a written contract. The CS believed that goods and services would be paid for by a federal grant, but the grant was less than the cost of the goods and services. Provider suing school for not paying agreed amount. Here is an example of where a CS should call AG and ask how to approach this. Other state agencies should too. We would have suggested a written contract in this case. This isn't something that deals with the legislature but CS should be cognizant.

AG recognizes that our office may not have been as responsive of CS issues as it should have been in the past. Moving forward, we will make a real effort to be more responsive, especially with new Deputy AG for CS matters in place, Lane Tsuchiyama.

Another case: Ka Waihona o ka Na'auao vs. BOE

It is now on appeal. This case examined how a local school board (LSB) is seated after a charter is granted to a non-profit organization. Is a non-profit board the CS school board or is it a separate election? Circuit Court affirmed CS should elect its LSB after it was ordered by the BOE. This is also a policy issue: could go either way, but legislature should decide.

Another case: State of Hawaii (ex er el Earl Anzai) v. Waters of Life Therapy Center, Inc. To enjoin operation of Wai Ola CS for accepting cash reimbursements and the benefit of payroll disbursements beyond the annual allotment for the school. This case was thrown out because the state had not developed standards or procedures for revocation of charters. We should have clear, understandable standards on revocation. Everyone ought to know what the rules are. That's something that ought to be dealt with.

Land Use case: County of Hawaii vs. Ala Loop Homeowners, involving Waters of Life CS regarding the CS building in area zoned agricultural. Will be dealt with in the courts or by the legislature. I hope it is by the legislature.

There are also SPED cases involving Myron B. Thompson Academy CS and Voyager PCS. There may be other cases in the pipeline.

The DOE is responsible for satisfying the state's obligation under IDEA for students enrolled in CS. Regardless of who we as state government purport to hold responsible for SPED, the federal government will hold state government as a whole responsible. Federal court will tell us what we have to do. Fighting amongst ourselves will be irrelevant. If any problems emerge, the federal

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government will hold someone in contempt of court. Don't want to be behind the eight ball on SPED due to inadequate coordination and communication between state agency stakeholders. Not sure where CS are now in terms of facilitating this coordination. It is incredibly important. Am not a cynic regarding SPED. Not cynical to say that individual SPED cases in regular DOE schools with hundreds of students have severely damaged morale, etc. In smaller schools, like CS, this would be greatly magnified. What is the smallest CS?

Shon: 39 pupils.

Bennett: Imagine a SPED pupil in a 30-person CS who is disruptive, assaultive, throws feces. Do CS think they have right to simply call parents, or suspend or physically discipline the pupil, as in regular education disciplinary cases? No, not at all. It is very complicated what schools have to do. (Asks his staff) What is the maximum annual expenditure by the state for a mainland-based education for a single SPED pupil?

AG staff: \$198,000 per year.

Bennett: Such an expense could tear a CS apart. It is crucial that when you have a SPED issue that you let us [the AG's office] know quickly and that you have a process for working with the DOE.

New topic: collective bargaining (CB) and CS. It is likely that the legislature, AG, major unions, Hawaii Labor Relations Board (HLRB), Department of Education (DOE), and Department of Human Resource Development (DHRD) all have differing views on the matter.

This is the issue which ought to be the number one priority for the legislature to say precisely what CS have the right or obligation to do with regard to CB.

My view is that individual CS can negotiate with unions and can be treated as the employer. My understanding is that the unions do not agree, don't treat CS as employers and that Hawaii Labor Relations Board in general doesn't agree, although that latter statement may be an oversimplification. The law isn't entirely clear. CS exceptions to CB are themselves inconsistent with Chapter 89 Hawaii Revised Statutes (Chapter 89).

The law ought to say the extent to which individual CS (individually and as a whole) can bargain with union, consistent with overall BOE policies. Should spell out areas the CS can negotiate, grievances process, whether master agreements govern or don't govern CS, what types of cost items ought to be negotiated, and if it is permissible to bargain non-cost items which may be a management rights that oughtn't be bargained anyway.

If intent is to allow CS local school boards (LSB) to negotiate with individual unions, perhaps the simplest approach would be to amend Chapter 89 adding LSB in the definition of public employers. This is easier said than done. What is it you want LSB to be able to do in negotiations?

There is a lot of unfortunate stuff going on. I've been told that there is a LSB that is purported to enter into bargaining contract with someone other than exclusive agent. I have been told they negotiate salaries directly with their teachers, and not the union. This seems destined to end up before the Hawaii Labor Relations Board or in the courts. Even if we [the AG] gave a definitive

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opinion as to whether LSB are employers under Chapter 89 and we said yes, those opinions don't carry weight with labor board. Why have ambiguous law decided by the labor board? Just have a clear law.

Just because these are hard questions is not a reason for the legislature to not address them, or for the TF to not come to consensus.

Will stop here to take Chapter 89/CB questions.

Keeno: Thank you for emphasizing the importance of CB and personnel issues and pressing for the TF to address potential remedies.

Shon: Chapter 89 section 6, designates bargaining units, for example, teachers. Definition includes the words "DOE." Assuming that there would be agreement that CS are not a part of DOE, is there some legislative context in which even though the law says DOE, could include CS, or do they not fit in?

AG staff: The language of 302A-1184 Hawaii Revised Statutes (HRS) schools designated as CS shall be exempt from certain civil service provisions, except CB. Then have to ask, for every instance where DOE is mentioned do you substitute CS in preexisting CB structure? Problem is, if try to visualize how this CB occurs, how LSB bargains, what's the counterpart to employer organizations? Is it limited to those already recognized by Hawaii Labor Relations Board under Chapter 89? i.e. HSTA for teachers, UPW for custodial/blue collar, HGEA units 2 and 3, single admin HGEA unit 6? Is it worthwhile to negotiate with HGEA for a single principal? It doesn't quite fit.

Bennett: What we say can't force someone to negotiate. It's unlikely that the labor board would force unions to work with a particular LSB.

Shon: If all CS employees are subject to Chapter 89, does that by itself imply workers compensation, etc? Because if you are a public employee that is what you get. Chapter 89 implies full array of public employee benefits. How many other laws are brought in because things like workers comp are referenced?

Bennett: I don't know. Legislature has right to decide which laws are applicable to CS, unless they make a decision that is clearly irrational. Then it could be challenged in court.

Shon: If the legislature should designate LSB as employer, I assume a lot of implications. Personnel matters, for instance. Also, can Charter Schools Administrative Office (CSAO) reach into CS?

Bennett: Those ought to be defined.

Shon: Does it [the LSB as employer] carry a whole cascade of other implications?

AG staff: Of course it does. Individual CS usually don't have personnel offices or labor relations division. A CS may only have few office personnel. Next question: should it be done by individual schools? Should you have a centralized system. Workers compensation has been centralized for CS into the DOE by memorandum of understanding, now to DHRD. This provides

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economies of scale, efficiency. If leave these responsibilities with the individual CS you need to consider cost. May want to have it at a centralized level. But this would mitigate some of the autonomy originally intended for CS. Law now simply states that state agencies are “to be available to CS,” for instance through memoranda of agreement. If you change law without providing adequate institutional infrastructure it won't work either.

Bennett: New issue: interscholastic sports, can CS be denied participation by the league? 302A-1190 HRS requires the DOE to provide same opportunities to CS students. Interscholastic leagues are private entities but the DOE is the majority member, therefore the DOE should be able to make interscholastic sports available to CS students.

Shon: One of the issues is whether the interscholastic leagues charge a CS the full school fee when the CS is just feeding a few students to DOE teams.

Bennett: DOE should be able to come up with equitable rules. The public schools have vast voting rights in the league.

Wise: Can we use what you said regarding interscholastic sports?

Bennett: You could, but it is not a formal opinion, just a comment.

Shon: On the issue of quoting the AG's comments, formal opinions, these have different weights in law...

Bennett: AG may provide written opinions for any public officials who ask. Don't/can't answer all requests. Some may be unanswerable. But public officials may ask.

Kahakalau: For the individual CS, who should we ask? The AG or CSAO?

Bennett: (to AG staff) Are LSBs considered a public agency?

AG staff: CS should use same process as DOE, the CS send their requests through the CSAO, as DOE sends requests through Superintendent. We appreciate there is a difference [between the DOE and the CS]. But the CSAO can act as a clearing house. Other schools may have already asked same/similar questions. Don't want to duplicate effort.

Bennett: This is same process as other state departments use. Funnel requests through heads of agencies. Although we understand CSAO isn't technically the same as other state agency heads. CS more decentralized.

Wise: Should we send SPED inquiries through DOE district superintendent or CSAO?

Bennett: It depends. Hopefully have protocol for operational issues with DOE so that you can work cooperatively.

Wise: Operational issues are the problems, which could lead to noncompliance. Having a hard time, not sure where to go.

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AG staff: CSAO director Shon and Superintendent Hamamoto have begun discussions on SPED. Do need to establish system and process to use.

Wise: And in the interim? Should we go to both?

Bennett: Give Lane Tsuchiyama (Deputy AG for CS) a call and he can give you some advice.

Next issue: land acquisition. AG view: There are two methods by which CS can acquire land. 1) 171-30 HRS – state property acquisition goes through Board of Land and Natural Resources; 2) 302A-1506 HRS DOE acquisition process.

TF may want to suggest a third way. AG doesn't think 171-30 HRS is included in the broad exemptions from certain state laws in CS law.

Thatcher: What if a CS's detailed implementation plan (DIP) states that CS can acquire land?

Bennett: Our view is that the CS can't legally acquire land directly or hold title.

Thatcher: Should such a CS remove this provision from their DIP?

AG staff: We would acknowledge that there are CS who have acquired land. Could have non-profit 501(c)(3) associated with CS as landholder, and name the school as tenant. Second scenario, is the CS holds deed in CS name.

A state agency can only enter into a contract that is consistent with existing laws. If DIP contains an unlawful provision, then the provision is not enforceable.

Thatcher: Wouldn't existing law require BOE/DOE to work with CS to acquire land?

AG staff: If the DIP provision is to obligate the DOE to assist the CS in acquiring land, that is a different question. 302A-1506 would apply; DOE has the authority to acquire land. Then the question is does the CS have the ability to compel the DOE/BOE to acquire the land for them [the CS].

Bennett: If you have the agreement and the DOE has agreed to it then, it seems like there shouldn't be an issue.

Harimoto: (to Thatcher) Is that provision in your DIP?

Thatcher: Yes.

Harimoto: BOE will need to review.

Wise: If a DIP has unlawful provision, is that provision null?

Bennett: Yes.

Shon: Did you say the DOE can acquire land. I thought only the Department of Land and Natural Resources could acquire land?

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Bennett: HRS allows numerous other state agencies to do so (names University of Hawaii and about half-a-dozen other state agencies). But DOE the most relevant one in this case.

Those were the major issues I wanted to cover in my presentation. Any questions?

Keeno: With respect to personnel and CB: the issue that you have identified for the TF is the clarification of whether the LSB are employers for purposes of negotiating with unions, ascertaining exactly what that means – is that the most salient issue from your perspective?

Bennett: Absolutely.

Shon: Apart from how one might interpret it, there is a funding formula. That is in law. This is different from how other things are funded. Is there a special obligation to the CS based on the fact that this formula exists? What happens when there isn't enough money in the pot to fund according to this formula?

Bennett: Let's get back to you in writing. Is it your question that "if the law imposes a particular funding obligation on the state with regard to the CS, and if the CS don't get what they think they ought to under that obligation, what can they do about it?"

Shon: Yes.

Keeno: DOE and CS are in competition for money. Does this rise to level of legislative question? Isn't this something for BOE to arbitrate as the common employer? What is your opinion of the role that the BOE should take in these conflicts?

Bennett: Before we answer we would like to take a look and see if the law provides guidelines.

AG staff: The question implicates which state laws apply. Every state agency is subject to fiscal restrictions under Chapter 39 HRS. 302A-1184 HRS limits CS exceptions to state laws. Funding questions still subject to Chapter 39 HRS – all state agencies are subject to funding restrictions. Governor can impose reasonable restrictions, as long as establishes reasons for the restrictions.

Bennett: Are you asking "assuming there is enough money, do CS have some remedy?"

Shon: Yes. It seems like there is an implied equity for CS students in the funding formula. If the funding formula is not followed, could one argue that those CS students are being discriminated against?

Bennett: Will have to get back to you on that.

Higa: One of the potential changes discussed in Act 87 Session Laws of Hawaii 2005 is Chapter 92 exemptions. Issue was never discussed in the course of public hearings. Did AG comment on those possible further exemptions to Chapters 91 and 92. Could you comment?

AG staff: Regarding Chapter 92, think the legislature meant the sunshine laws as it applies to LSB. Chapter 92 means more, including public notice and quorum requirements.

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Bennett: It would be hard to say that this is a typo [in the law] and it only applies to Chapter 92f [the sunshine laws].

AG staff: Chapter 91 is more specific, relates to due process. Could have healthy debate on this issue. Complicated. Even if Chapter 91 is not applicable still need to ensure that CS honor public access and notice goals, as well as any federal obligations.

Also relates to “how do you discipline SPED student?” CS voluntarily adopted DOE Chapter 19 rules. Those had to apply, or else IDEA, case history would.

Higa: State agency, Is the CS a DOE or not? Who is on hook for SPED?

Bennett: The state on the hook.

Higa: Is a CS a DOE school? If not, then CS may need to create their own administrative rules. If chapter 91 HRS exemptions weren't formulated, wouldn't there be a question as to which rules applied to SPED kids?

AG staff: SPED responsibility is at DOE to protect the state. SPED at the CS is subject to the DOE, only that aspect. Even without Chapter 91, CS still need to satisfy due process.

Shon: Terms are important: “policies,” “rules,” “guidelines.” Is there a hierarchy of legal standing for these terms? If BOE adopts “guidelines,” is that the same as “administrative rules?”

Bennett: The question is a little vague without specific cases. Revolves around “who has authority to make rules?” Might be individual LSBs. Law ought to be clearer about where the authority lies to make rules for CS. CSAO, LSB, BOE, all?

Thatcher: Doesn't BOE have to follow chapter 91 rule-making procedures?

Bennett: Yes, but it is unclear as to when a rule is required.

Thatcher: If a procedure taken to make a policy is questioned, who investigates? The lt. governor or AG?

Bennett: If someone makes a complaint to the AG that the DOE promulgates guidelines when there should have been rules, we'll look into it and provide a response.

Shon: Regarding powers and authorities, under HRS, CSAO is to “operate and manage CS,” but CSAO has no real line authority. What language gives power and authority and what doesn't? On its face, the existing HRS seems to provide authoritative powers to CSAO.

Bennett: Act 87, under 302A-1187 says that CS are under the direction of BOE and CSAO. CSAO is to provide oversight and support for administrative matters - not daily operation and management.

We believe you have authority to admin support and oversee CS system. There is legislative history to back this up. And that is qualitatively different from operating a school.

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You're responsibility is to provide administrative support for budgeting, procurement, employment law, compliance, making sure you're monitoring CS [are] organizationally viable. That is the difference. The CSAO is more systemic.

We think that there is authority in 302A-1187. The dividing line is that the CS provide education to its students. The CSAO provides administrative support

Beyond that, general guidance would need to consider specific case. The law needs to be made clearer as to who has rule-making authority.

Wenger: Regarding Board of Land and Natural Resources or DOE acquiring land, is there anything that compels the state to create schools where there is a need?

Bennett: Hawaii State Constitution requires public education system to educate students but there are no specific provisions requiring it to build in a particular location.

Shon: Thank you very much. This was very helpful.
[Applause.]

AG presentation concluded.

TF adopted minutes from previous meeting by unanimous consent. Shon led TF in an overview of the proposed timeline and performance benchmarks needed to deliver report 20 days prior to start of legislature. Shon noted that on December 12, 2005 the state charter school conference will be held, a good opportunity to receive the collective feedback of the CS community, freeing TF to create other public input opportunities for different stakeholders.

Higa: During the proposed December 1-12, 2005 public review period, will meetings be conducted out in the public?

Shon: Yes, but TF still needs to adopt a specific public review plan. Maybe one meeting on each major island, a few on Oahu? Great flexibility exists in how to approach this, how to schedule meetings, where/when to hold them, which stakeholders to address. CSAO will try to come up with a public review plan for next TF meeting.

As TF gets closer to providing recommendations, TF members, as representatives of specific constituencies and stakeholders, may want to share progress with them.

(Shon also discussed proposed subcommittee proposal format, as indicated on a handout.)
Subcommittees should balance their concerns with broader TF mandates. Frame proposals in such a way as to give TF a few options. Try to be specific. If can, look at the law and suggest changes. The closer to that, the better. Don't necessarily need to draft legislation, but specificity will be very helpful. From AG's presentation seems they may be willing to assist TF in drafting potential legislation. Really need the pros and cons. This might be the most important thing for the legislature, to help them think through the issues. Schedule getting tight. Subcommittee ideally would start developing 2-4 proposals to bring to TF. Could be alternative proposals for the same issue.

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Kahakalau: We need finalized copy of proposed rules of procedure.

Cornejo (CSAO staff): We will provide within a work week.

Young: We need way to identify the constituencies who have had input into proposals.

Keeno: Report from personnel subcommittee. Met September 2 after TF meeting. Not planning to meet today, but September 28 after TF meeting.

Discussed possible legislative remedies. Wanted to wait for AG's presentation before becoming more specific. Subcommittee members are requested to provide him with areas of the law they want clarified by Monday, September 19. Let him know so subcommittee can determine what it wants to focus on. Will pass input on to subcommittee members by email. Will put "LSB as employer" issue on subcommittee's next agenda as a priority. Will recommend that to be one proposal of the subcommittee to the TF.

Bob Roberts (CFO of CSAO) has scheduled meeting on Wednesday, October 5 at the Department of Budget and Finance to hear department's position on the mechanics of CS fringe benefits.

Wise: Will other members be able to see the videotape of today's presentation?

Cornejo: We have contract for video post-production services to edit video slightly to eliminate pauses and distribute copies to all the CS. Will be as prompt as possible in getting the copies out.

Wise: Will there be minutes of this meeting?

Clerk: Yes.

Keeno: Members, please come to the personnel subcommittee prepared to discuss pros and cons of proposals.

Thatcher: Regarding the agreement between the unions and DOE, what basic administrative services are provided by the DOE?

Keeno: I haven't gotten feedback from DOE on what that means yet. AG mentioned opinion on generally applicable laws that don't apply to CS.

Shon: I will ask for it.

Kahakalau: The authorizers subcommittee is meeting today and on September 28.

Absent a timeline, which was provided today, subcommittee has spent time researching other state's authorizer models. Now that we have a clearer timeline, will move more expeditiously. Timeline only allows two more meetings to develop proposals. Act 87 Session Laws of Hawaii alignment sheet was helpful in guiding the process of the subcommittee, assisting them in knowing what the legislature expected.

Higa: General application of other laws, Chapters 91 and 92?

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Shon: Liam Skilling (CSAO contractor) has done research on Chapter 92.

Skilling: The research was on potential impact of applying Chapter 92 as written now to LSB.

Shon: Some generally applicable laws that are uncontestable may need to be massaged because they are tied to DOE specifically. An LRB study was related to this. May bring OIP in for briefing.

Wise: If AG and Office of Information Practices (OIP) opinions contradict, which one has legal priority?

Harimoto: The way the BOE handles this question is that AG is legislatively-mandated legal counsel for state agencies, while the OIP issues opinions.

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