

## Quick Review: Who Board Members Can Talk To and When (Part 3) (August 8, 2013)

OIP often is asked whether board members can talk to one another in various situations when not in a meeting. To help board members understand what they can talk about when they are not in a meeting, OIP put together a three-part Quick Review. The entire series can be found online on OIP's Sunshine Law training webpage at [oip.hawaii.gov](http://oip.hawaii.gov).

Boards subject to the Sunshine Law, Part I of Chapter 92, Hawaii Revised Statutes (HRS), are generally required to conduct all business in open meetings that have been properly noticed to allow for public participation. This Quick Review discusses an exception to the open meeting requirement for "permitted interaction groups" or "PIGs," as set forth in section 92-2.5, HRS. While other types of permitted interactions were previously discussed in Part 2 of this Quick Review series, this article explains how members of a board may form a PIG to investigate or to negotiate a matter.

### PIGs Established to Investigate

Two or more members of a board, but less than the number of members which would constitute a quorum, may be assigned to investigate a matter relating to the official business of their board.

In order for a board to take action on a matter investigated by a PIG, **three meetings must occur**. At the **FIRST** meeting of the full board, the scope of the investigation and the scope of each member's authority are defined. The PIG may then conduct its investigation.

At a **SECOND** meeting of the full board, findings and recommendations of the PIG are presented to the board, but the board cannot discuss or act on the report at this meeting.

- A PIG may present its findings to the full board in an executive session *if* the reason for entering into the executive meeting is one of those set forth in section 92-5(a), HRS, or other law. For example, if a PIG was created to investigate whether to take certain disciplinary action against an employee, it may present its findings to the full board in accordance with section 92-5(a)(2), HRS, which allows board to enter executive meetings to consider the discipline of an employee.

If the board would like to discuss, deliberate, or make any decisions regarding the PIG's report, it must do so only at a **THIRD** meeting held separately and after the meeting at which the findings and recommendations of the investigation were presented by the PIG.

- The public must be allowed to testify on any agenda item of the board, including those concerning PIGs and reports by PIGs.

### Some Practical Considerations for Investigative PIGs

- PIGs are not subject to the Sunshine Law's requirements for giving notice, holding open meetings, or keeping minutes.

- PIG members may communicate by interactive technology (Skype, teleconference, etc.), and by e-mail, telephone, etc., on matters within the scope of the PIG's authority without violating the Sunshine Law.
- Although a PIG is not required to hold public meetings, it can choose to do so if it wishes.
- PIGs may solicit input from the public as part of an investigation without the need of filing a meeting agenda in accordance with the Sunshine Law.
- A PIG may include among its members people who are not members of the board that created the PIG. A PIG may also consult with others (i.e., staff, members of the public, individuals with expertise in a field) in furtherance of its investigation, but should NOT consult with other members of its parent board.
- Members of a board who are not part of the PIG may NOT attend PIG meetings.
- Before the PIG reports to the board, PIG members should not discuss the status of their investigation with other board members who are not part of the PIG.
- A standing committee of a board may create a PIG, and such PIGs must follow all the requirements of section 92-2.5(b), HRS.
- If a member of a PIG ceases to be a member of the parent board, the board should not substitute another board member into that vacant PIG position. The PIG's membership was previously established at the initial meeting that created the PIG. If a board wants to change the PIG's membership, it should dissolve the PIG and create a new one.

### **PIGs Established to Negotiate**

Another less common type of PIG can be formed when two or more members of a board, but less than a quorum, are assigned to present, discuss, or negotiate any position adopted by the board at a meeting. The assignment of members to a PIG for the purpose of negotiation, and the scope of each member's authority, must be defined at a board meeting prior to the presentation, discussion, or negotiation. The three-meeting requirement for investigative PIGs does not apply to PIGs established to negotiate.

As a final note, boards should keep in mind that they may be subject to other laws or rules in addition to the Sunshine Law, which could affect members' ability to discuss pending matters. This may be particularly relevant for boards that exercise adjudicatory functions (which are not subject to the Sunshine Law), as they must generally avoid *ex parte* communications. Boards should consult with their own attorneys on the application of such laws and rules.