

Quick Review: Who Board Members Can Talk To and When (Part 3) (Revised December 2022)

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(b), 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 separate board meetings must occur** in the order described below. At the **FIRST** meeting of the full board, the investigative PIG is formed and the scope of the investigation and the scope of each member's authority are defined. No new members or issues can be added to the PIG after the first board meeting. The PIG may then conduct its investigation outside of open meetings, which may take months to complete.

At a **SECOND** meeting of the full board, the 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 boards to enter executive meetings to consider the discipline of an employee. In such a situation, OIP generally recommends

that the PIG also present a “sanitized” report during the public session that omits the confidential information but informs the public of the general nature of the PIG’s findings and recommendations, so the public is at least generally informed of the PIG’s work and has something upon which to base testimony at the subsequent meeting where the board will discuss and perhaps act on the report.

After the PIG makes its report to the board at the second meeting, the PIG is automatically dissolved and should not continue working. The Sunshine Law does not allow a PIG to make more than one report or to continue working on its assignment after its report, so a PIG should not be providing “updates” on its work or more than one report. See [OIP Op. Ltr. No. F23-01](#) on OIP’s [Opinions page](#) for an in-depth discussion on investigative PIGs.

The board cannot discuss, deliberate, or make any decisions regarding the PIG’s report until a THIRD meeting held separately and after the meeting at which the findings and recommendations of the investigation were presented by the PIG.

Waiting until a subsequent board meeting to discuss and act on the PIG’s report gives the public the opportunity to present informed testimony at the meeting where the board will discuss and act on the report.

Some Practical Considerations for Investigative PIGs

- A PIG is fundamentally a permitted interaction with detailed reporting requirements, not a special type of committee.
- Because they are a permitted interaction rather than a type of committee, 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 email, 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, stakeholders, etc.) 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 or be included in PIG communications.
- 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, including reporting back to the committee that created them.
- Sometimes, it may be better for a board to establish a temporary committee instead of a PIG, or to delegate authority to one member to perform a task and report back to the board. See OIP Op. Ltr. No. F23-01 at 15-16 for more information.
- A PIG may continue its work after the loss of a PIG member. For example, if a PIG's member's term on the board ends, that member also ceases to be a PIG member, but the PIG can continue working with the remaining original members. 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 and new members cannot be added. The PIG can continue without the now-departed member, but if a board wants to change the PIG's membership, it should first allow the current PIG to report back and automatically dissolve. After hearing the investigative PIG's report and waiting until a subsequent board meeting to discuss and act on the report, the board can then create a new PIG to carry on the now-dissolved PIG's work.
- Similarly, once a PIG is formed, the board may not add new assigned tasks to an existing PIG.

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. Similarly, some boards are subject to confidentiality provisions outside the Sunshine Law, and if a board is involved in a procurement, it must follow procurement laws. Boards should consult with their own attorneys on the application of such laws and rules.