

Quick Review: Who Board Members Can Talk To and When (Part 2) (Revised August 2022)

Hawaii's Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes (HRS), generally requires board members to discuss all board business in open meetings that have been properly noticed to allow for public participation. 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 when they can talk to each other outside a meeting, OIP put together a three-part Quick Review. This Quick Review is the second in the series. Part 1 concerned discussions of matters that are not board business, and Part 3 will follow and explain "permitted interaction groups" ("PIGs"). The entire series, along with other educational materials, is posted on the [training page](https://oip.hawaii.gov/training-page) of OIP's website at oip.hawaii.gov.

What constitutes board business was discussed in Part I. There are, however, a number of exceptions and "permitted interactions" that allow board members to have discussions outside of a meeting, even on matters that constitute board business. A few of these exceptions and permitted interactions are described below.

Members should note that the **Sunshine Law expressly states that no permitted interaction shall be used to circumvent the spirit or requirements of the Sunshine Law** to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power. For this reason, permitted interactions generally may not be mixed and matched or used serially, as doing so can result in a discussion of board business outside a meeting that does not fit within the limits of any one of the permitted interactions and thus is not authorized under the Sunshine Law.

1. Selection of Board Officers (HRS § 92-2.5(c))

The selection of the board's officers may be discussed between two or more board members, but less than a quorum, in private without limitation or subsequent reporting.

2. Members May Continue to Accept Testimony When a Multi-site Meeting Must be Cancelled or Terminated (HRS §§ 92-2.5(d) and 92-3.5(c))

The Sunshine Law defines a "meeting" at HRS § 92-2 as the convening of a board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power. When a meeting must be **cancelled for lack of quorum or terminated when quorum is lost** during the meeting, the board members present may

nevertheless receive testimony and presentations on agenda items and may question testifiers or presenters under HRS § 92-2.5(d).

Under HRS § 92-3.5(c), when a board is holding a **multi-site meeting by interactive conference technology (ICT) and an audio connection to all meeting locations is interrupted for more than 30 minutes, the meeting must be terminated**, even if a quorum of the board is physically present in one location. However, under HRS § 92-2.5(d), members present at one location may continue to receive testimony and presentations on agenda items and may question testifiers or presenters, but cannot discuss, deliberate, or decide such matters. **Note that the permitted interaction under HRS § 92-2.5(d) specifically applies to HRS § 92-3.5(c) regarding multi-site meetings, and not when remote meetings held by ICT under HRS § 92-3.7 lose their audio or video connection.** Also note that this permitted interaction does not address Sunshine Law requirements to **continue** a meeting, instead of terminating it, which are addressed in a different training document posted on OIP's website at oip.hawaii.gov/training, "[Quick Review: Continuance of a Meeting Under the Sunshine Law.](#)"

For both cancelled and terminated meetings, HRS § 92-2.5(d) requires that board members' discussion, deliberation and decision-making on agenda items for which testimony or presentations are received must occur only at a subsequent, properly noticed meeting held after the cancelled or terminated meeting at which the testimony and presentations were received.

And, members who received the testimony at a cancelled or terminated meeting are required to create a record of the oral testimony or presentations in the same manner as would be required for testimony or presentations heard during a meeting of the board. In other words, the members must keep notes of the receipt of testimony and presentations in the same manner that the board would keep minutes of testimony and presentations received at a meeting.

Before deliberation or decision-making at a subsequent meeting, the board must provide copies of the testimony and presentations received at the cancelled meeting to all members. The members who were present at the cancelled or terminated meeting must also report about the testimony and presentations received.

3. Informational Meetings (HRS § 92-2.5(e))

Two or more members of a board, but less than a quorum, may attend an **informational meeting or presentation** on matters relating to official board business, **including a meeting of another entity, legislative hearing, convention, seminar, or community meeting**; provided that the meeting or presentation is **not specifically and exclusively organized for or directed toward members** of the board.

The board members in attendance may participate in discussions, including discussions among themselves, provided that the discussions occur during and as part of the informational meeting or presentation and that no commitment relating to a vote on the matter is made or sought.

At the next board meeting, the members who attended the informational meeting are required to report their attendance and the matters presented and discussed that related to official board business at the informational meeting.

4. Circulation of Proposed Legislative Testimony (HRS § 92-2.5(h))

A board that has previously adopted a position on a legislative measure may circulate its proposed testimony among board members for review and written comment when it does not have enough time to notice a meeting before a legislative deadline, so long as all proposed testimony drafts and board member communications about the testimony are publicly posted online within 48 hours of the testimony's circulation to the board. This permitted interaction is best used for proposed testimony drafted by board staff or a single member, rather than by multiple board members using another permitted interaction to confer, in order to avoid conflicts with other permitted interactions as discussed in OIP's Quick Review on Sunshine Law Options to Address State Legislative Issues and Measures, which is posted on the [Training page at oip.hawaii.gov](https://oip.hawaii.gov).

5. Discussions with the Governor (HRS § 92-2.5(f))

Discussions between the Governor and one or more board members may be conducted in private without limitation or subsequent reporting; provided that the discussion does not relate to a matter over which a board is exercising its adjudicatory function.

Some boards that have adjudicatory powers include the: Hawaii Labor Relations Board; Labor and Industrial Relations Board; Hawaii Paroling Authority; Civil Service Commission; Employees' Retirement System Board of Trustees; Crime Victim Compensation; and State Ethics Commission.

6. Discussions with Department Head (HRS § 92-2.5(g))

Discussions between two or more members of a board and the head of a department to which the board is administratively attached may be conducted in private without limitation; provided that the discussion is limited to matters specified in section 26-35, HRS.

Section 26-35, HRS, provides that:

- department heads shall represent attached boards in communications with the Governor and the Legislature, unless otherwise requested by the Legislature;
- a board's financial requirements from state funds shall be submitted through the department head and included in the department's budget;
- rules adopted by the board are subject to approval of the Governor;
- employment, appointment, promotion, transfer, demotion, discharge, and job descriptions of officers and employees of or under a board must be determined by the board subject to approval of the department head, and subject to applicable personnel laws;
- purchases of supplies, equipment, or furniture by a board are subject to approval by the department head;
- the department head has the power to allocate the spaces available for the board to occupy;
- quasi-judicial functions of a board are not be subject to the approval, review, or control of the department head; and
- the department head shall not have the power to supervise or control the board in the exercise of its functions, duties, and powers.