

## **QUICK REVIEW: Sunshine Law Options to Address State Legislative Issues and Measures (Revised August 2022)**

Sunshine Law boards that track legislation and submit testimony on legislative issues or measures are faced with the annual question: how can they keep up with the legislative calendar and submit testimony on a timely basis while still following the Sunshine Law? The State Office of Information Practices has prepared this Quick Review to provide several options. This Quick Review was written to address issues boards commonly have in tracking bills and testifying during the Hawaii State Legislature's regular session, but most of the options discussed could be adapted for use with other legislative bodies such as the federal Congress or a county council.

When dealing with legislative matters when legislative committees often give less than six days' notice of their hearings, one major hurdle that boards face is the Sunshine Law's six-day notice requirement before conducting a meeting to discuss a legislative measure. Since most boards typically meet on a monthly or less frequent basis, their meeting schedule together with the six-day notice requirement leave them with limited options to timely notice a meeting and discuss the adoption of its legislative testimony or position before the legislative hearing.

The Sunshine Law, however, allows board members to discuss board business outside a meeting in limited circumstances, as set forth in the "permitted interactions" section of the law. HRS § 92-2.5. These permitted interactions are not considered to be "meetings" of a board or subcommittee subject to the Sunshine Law's six-day advance notice requirements. HRS §92-2.5(i). Note, however, that the Sunshine Law does not allow permitted interactions to "be used to circumvent the spirit or requirements" of the law and thus permitted interactions generally cannot be mixed and matched or used serially because the resulting communication would go beyond the limits of any one permitted interaction. For instance, if four of nine board members are assigned to a permitted interaction group on a bill, the law would not allow one of those members to also talk about the same bill to a member who was not part of the group under the two-person permitted interaction, because doing so would mean the bill was serially discussed by a total of five members, more than allowed by either of those permitted interactions.

Among the various types of permitted interactions authorized under section 92-2.5, HRS, the most useful in developing or adopting positions on legislative measures are the four described in:

(1) **section 92-2.5(a)**, HRS, which allows two members of a board to discuss board business between themselves so long as no commitment to vote is made or sought;

(2) **section 92-2.5(b)(2)**, HRS, which allows a board to create a permitted interaction group (“PIG”) with less than a quorum of its membership to present, discuss, or negotiate any board position that the board had previously adopted at a meeting;

(3) **section 92-2.5 (e)**, HRS, which allows less than a quorum of board members to attend a legislative hearing (or other “informational meeting”) and report their attendance at the next board meeting; and

(4) **section 92-2.5(h)**, HRS, allowing an unlimited number of board members to circulate draft State legislative testimony for members’ review, written comment, and approval, subject to various limitations.

Permitted interactions are discussed in greater detail in OIP’s three-part Quick Review series on “Who Board Members Can Talk To and When,” which may be viewed on OIP’s [Training page at oip.hawaii.gov](https://oip.hawaii.gov/training).

Besides permitted interactions, other options for a board to address legislative matters are by delegation to staff, or through the special limited meeting provision for county councils, or at an emergency meeting of the board. What follows are the various options and practical considerations for a board to discuss and submit timely testimony on legislative issues or measures.

### **First Option: Delegation to Staff**

At the outset of the legislative session, a board may file a notice of a public meeting with an agenda indicating that the board will consider the adoption of a position or the general policy direction it will take on specific legislative topics, subject matters and legislative measures, including the relevant bill numbers, if available, which the board desires to present in testimony during a legislative session. (A board may contact OIP’s Attorney of the Day to discuss whether the notice of an agenda item is legally sufficient.)

The board could then delegate to staff (e.g., executive director) the authority to track legislative measures and draft testimony in accordance with the positions and policy directives previously adopted by the board. The members of a board’s staff (assuming they are not board members) can freely discuss legislative measures the board is tracking among themselves without implicating the Sunshine Law or requiring a permitted interaction. Likewise, discussions involving staff and a single board member would not raise Sunshine Law concerns, unless the discussions comprise a serial communication between staff and individual board members to solicit a commitment to vote on a specific matter.

If the entire board wanted the opportunity to comment on and approve testimony drafted by staff, the board’s staff could then circulate draft testimony to all board members for their review and written comment and approval under section 92-2.5(h),

HRS, (discussed as the fifth option) so long as (1) the legislative deadline was too soon to allow the board to notice a meeting and (2) the board posts all drafts and communications about the testimony within 48 hours on the board's website or an appropriate state or county website. Alternatively, the staff could submit the testimony without further review or approval by the board, or after running it by one member, such as the board chair. Throughout the legislative session, the board's staff could also report on legislative measures and testimony at board or committee meetings conducted pursuant to the Sunshine Law, at which time the entire board or committee could discuss and deliberate on the measures.

### **Second Option: Delegation to Two Board Members**

A board could delegate to two board members the authority to prepare and submit legislative testimony, talk to legislators, and attend legislative hearings, all in accordance with the position or policy direction the board had previously adopted. Under the permitted interaction authorized in section 92-2.5(a), HRS, two board members may discuss between themselves official board business, including legislative measures of interest to the board, provided that no commitment by the board members to vote on board business is made or sought and the two members do not constitute a quorum of the board.

The two board members working on a legislative issue or measure can provide reports at any meeting of the board when the issue is on the agenda. Moreover, different combinations of members may be assigned to work on different legislative issues or measures. However, the two board members assigned to a legislative measure or issue must be careful to avoid involving additional members in discussions of that matter outside a board meeting because these discussions could constitute a serial discussion among three or more members in violation of the Sunshine Law.

Discussions by all members may take place at duly noticed board meetings. The full board can continue to oversee the implementation of the general policy direction by the two board members and address any new issues that arise during the legislative session at its regularly scheduled meetings. If necessary, the full board may also hold emergency meetings, as described in the sixth option below.

### **Third Option: Permitted Interaction Group under Section 92-2.5(b)(2), HRS**

Some boards may prefer to have more than two members involved in legislative matters. If so, a board may consider the establishment of a PIG under section 92-2.5(b)(2), HRS, which could consist of more than two members, so long as it is less than a quorum of the board.

Initially, the board should adopt its position or establish policy directives at a public meeting duly noticed under the Sunshine Law. The agenda item in the public meeting notice would describe the specific topic, subject matter, or legislative measure,

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including any bill number, if known, that the board desires to adopt a position on or to set a policy directive in response to any legislative measure the board anticipates could be discussed during a legislative session. An additional agenda item for the public meeting should describe the PIG to be established under section 92-2.5(b)(2), HRS, including the assignment of specific board members to the PIG and the establishment of the scope of each member's authority to present, discuss, or negotiate any position that the board had previously adopted.

A legislative PIG established under section 92-2.5(b)(2), HRS, and acting within the scope of each member's previously defined authority, would not be subject to the investigative PIG's requirements under section 92-2.5(b)(1), HRS, to initially report its findings at a public meeting before the full board could discuss or act on the report at a subsequent meeting. Nor would a legislative PIG established under section 92-2.5(b)(2), HRS, be subject to the reporting requirements of section 92-2.5(e), HRS, for attending informational meetings described in the fourth option below.

#### **Fourth Option: Permitted Interaction for Informational Meeting or Presentation**

Section 92-2.5(e), HRS, allows two or more members of a board, but less than a quorum, to attend and participate in discussion at an informational meeting or presentation on matters relating to official board business, including meetings of another entity or a legislative hearing. The meeting or presentation, however, must not be specifically and exclusively organized for or directed toward board members, and a commitment by board members relating to a vote on a matter cannot be made or sought. At the next duly noticed board meeting, the board members must report their attendance at the informational meeting or presentation and the matters relating to official board business that were discussed during the meeting or presentation.

Under this permitted interaction, it would not be necessary for the full board to have previously created a PIG under section 92-2.5(b), HRS, or to have established a position or policy on a legislative measure or issue.

#### **Fifth Option: Permitted Interaction for Board to Draft and Approve Testimony**

If a board has no staff or if its members wish to take a more active role in legislative matters, then a board's own members may prepare and submit any legislative testimony in accordance with the position or policy direction the board had previously adopted. When a legislative deadline is too soon to allow the board to hold a meeting to approve testimony, any number of board members may circulate draft testimony for approval, so long as all drafts and comments are in writing and are posted within 48 hours of the statement's circulation to the board, on the board's website or an appropriate state or county website, pursuant to the legislative permitted interaction found at section 92-2.5(h), HRS.

This testimony permitted interaction, however, may be of limited benefit to boards because it would foreclose the use of other permitted interactions. To comply with specific statutory requirements and to avoid creating a serial use of permitted interactions, the testimony permitted interaction could not be readily used in combination with other permitted interactions, such as a general delegation of legislative authority to two members under section 92-2.5(a), HRS, or to a permitted interaction group (PIG) under section 92-2.5(b)(2), HRS. While these latter two permitted interactions allow in-person or phone communications between board members, the legislative permitted interaction requires all communications to be in writing and posted on the board's website. Additionally, the two other permitted interactions allow only a limited number of board members to communicate with each other, but the testimony permitted interaction allows communication among all board members.

Given these inherent conflicts between the requirements of different permitted interactions, a board that wants its board members to not just prepare and submit testimony but also talk about legislative issues generally outside a meeting, including attending hearings and meeting with legislators, will be better served by delegating the authority to pursue the board's previously adopted legislative positions to a subset of members acting under another permitted interaction, rather than drafting and approving testimony as a board under the testimony permitted interaction of section 92-2.5(h), HRS. Alternatively, the board could delegate that authority to staff as discussed in option one while retaining the option to have the board's members review and approve the testimony drafted by staff under this permitted interaction.

### **Sixth Option: Limited Meeting by County Council as Guests of Another Group**

Any number of county councilmembers may attend a limited meeting that is open to the public, as guests of a board or community group holding its own meeting, provided that the following requirements of section 92-3.1(b), HRS, are met:

(1) six days' advance notice of the limited meeting must be provided to indicate whose board or community group the council is attending, but no agenda is necessary as it is not the council's own meeting;

(2) if the other board or community group is subject to the Sunshine Law, then that board or group must still meet the Sunshine Law's notice requirements;

(3) no more than one limited meeting per month may be held by the County Council involving the same board or community group;

(4) no limited meetings may be held outside the State; and

(5) the limited meeting shall not be used to circumvent the purpose of the Sunshine Law.

Additional requirements under section 92-3.1(c), HRS, for limited meetings apply, such as prior OIP approval and videotaping of the limited meeting, as well as the general meeting requirements, such as keeping minutes.

This option would allow more than a quorum of a county council to meet with constituents or community groups regarding their legislative concerns, but would not be a preferred way for the council itself to address legislative matters. If a quorum or more of a board wanted to attend a specific legislative hearing together, however, this form of limited meeting would be the only option for doing so, other than noticing the hearing as a regular board meeting.

### **Seventh Option: Emergency Meeting**

If an unanticipated legislative issue or measure arises that requires the full board's action, an emergency meeting could be noticed under section 92-8(b), HRS, but this would not be a preferred option. An emergency meeting requires the board to meet the following conditions:

(1) The board must state in writing the reasons for its finding that an unanticipated event has occurred and that an emergency meeting is necessary, and must obtain the Attorney General's concurrence.

(2) Two-thirds of all members to which the board is entitled must agree that the conditions necessary for an emergency meeting exists.

(3) Although six days' advance notice is not required, the written finding that an unanticipated event has occurred and that an emergency meeting is necessary, and an emergency meeting agenda, must be electronically posted in the same way as for a regular meeting notice and agenda, and copies provided to the office of the Lt. Governor or appropriate county clerk's office and made available in the board's office.

(4) Persons requesting notification of board meetings on a regular basis must be contacted by postal mail, email, or telephone as soon as practicable.

(5) The board's action must be limited to only action that must be taken on or before the date that a meeting would have been held, had the board noticed the meeting pursuant to section 92-7, HRS.

Because of the additional requirements for noticing an emergency meeting, as well as the logistical challenges of frequently gathering a quorum of a board's membership on short notice, this option is not one that would be used on a regular basis to deal with legislative issues or measures.

In closing, there are various options available to a Sunshine Law board to deal with legislative matters in a timely fashion. For additional guidance, please feel free to contact OIP's Attorney of the Day at 586-1400 or [oop@hawaii.gov](mailto:oop@hawaii.gov).