

QUICK REVIEW: EXECUTIVE MEETINGS CLOSED TO THE PUBLIC (August 2023)

This Quick Review provides questions and answers on how executive meetings work under the Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes (HRS), for meetings in general and for remote meetings specifically.

What is an executive meeting?

An executive meeting (also called an executive session) is a meeting of the board that is closed to the public. Because an executive meeting is a narrowly construed exception to the Sunshine Law's presumption that all government board meetings will be open to the public, board members are advised to carefully weigh the interests at stake before voting to exercise their discretion to close a meeting. The "final action" taken by the board in an executive meeting may be voided by the courts if the board has violated the procedural requirements for going into such a closed meeting, so boards must be careful to follow all requirements.

Must a board give notice that it intends to convene an executive meeting?

Yes, if the executive meeting is anticipated in advance.

What must the agenda contain when the board anticipates convening an executive meeting?

In addition to listing the topic the board will be considering (as is required for all items the board will consider, whether in public or executive session), the agenda for the open meeting generally must indicate that an executive meeting is anticipated and cite the statutory authority for convening the anticipated executive meeting. For an executive meeting, the listing of the topic should describe the subject of the executive meeting with as much detail as possible without compromising the executive meeting's purpose. For instance, if the board will consider a proposed settlement of a lawsuit in an executive meeting, the agenda should note that the purpose of the executive session is to consult with the board's attorney on questions or issues regarding the board's powers, duties, privileges, immunities, and liabilities, and cite section 92-5(a)(4), HRS. The agenda in such a case should also describe the topic of the meeting as, at a minimum, the lawsuit identified by case name and civil number, and unless such description would compromise the purpose of closing the meeting from the public, that the board will consider a proposed settlement.

Can a board convene an executive meeting when it is not anticipated in advance?

With significant restrictions, the Sunshine Law allows the board to convene an

executive meeting when the need for excluding the general public from the meeting was not anticipated in advance. If, for example, during the discussion of an open meeting agenda item, the board determines that there are legal issues that need to be addressed by its attorney, the board may announce and vote to immediately convene an executive meeting to discuss those matters pursuant to section 92-5(a)(4), HRS.

The board, however, cannot convene an executive meeting to discuss an item that is not already on its meeting agenda without first amending the agenda to add the item in accordance with the Sunshine Law's requirements. No item can be added to an agenda if it is of reasonably major importance and the board's action will affect a significant number of persons. At least two-thirds of the board's total members (present or absent) must vote in favor of amending the agenda.

How does a board convene an executive meeting?

To convene an executive meeting, a board must vote to do so in an open meeting and must publicly announce the purpose of the executive meeting. The minutes of the open meeting must reflect the vote of each board member on the question of closing the meeting to the public. Two-thirds of the board members present must vote in favor of holding the executive meeting, and the members voting in favor must also make up a majority of all board members, including members not present at the meeting or vacant membership positions. Note that the 2/3 vote of all members present that is required to convene an executive meeting is different from the 2/3 vote of a board's total membership (including vacant positions) that is required to amend an agenda.

Is a board required to report to the public what happened in an executive meeting?

When a board reconvenes in public session, it must report its discussion and any final action it took during the executive session. The board is not required to disclose any information that would be inconsistent with the purpose of the executive session. If disclosure would frustrate the purpose of the executive session, the board can keep the information confidential for as long as that continues to be true. Instead, a board should briefly summarize what happened in the executive session, without disclosing any sensitive details, and give the public an idea of what topic the board discussed during the session. In the limited instances where a board can and did properly vote during an executive session, it must also inform the public what action it took.

What are the eight purposes for which an executive meeting can be convened?

Section 92-5(a), HRS, gives the board the discretion to go into an executive meeting only for the following eight specific reasons:

(1) Licensee Information. A board is authorized to meet in an executive meeting to evaluate personal information of applicants for professional and vocational licenses.

(2) Personnel Decisions. A board may hold an executive meeting to “consider the hire, evaluation, dismissal or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved.” However, if the person who is the subject of the board’s meeting requests that the board conduct its business about him or her in an open meeting, the request must be granted and an open meeting must be held.

(3) Labor Negotiations/Public Property Acquisition. A board is allowed to deliberate in an executive meeting concerning the authority of people designated by the board to conduct labor negotiations or to negotiate the acquisition of public property, or during the conduct of such negotiations.

(4) Consult with Board’s Attorney. A board is authorized to consult in an executive meeting with its attorneys concerning the board’s powers, duties, immunities, privileges, and liabilities.

(5) Investigate Criminal Misconduct. A board with the power to investigate criminal misconduct is authorized to do so in an executive meeting.

(6) Public Safety/Security. A board may hold an executive meeting to consider sensitive matters related to public safety or security.

(7) Private Donations. A board may consider matters relating to the solicitation and acceptance of private donations in an executive meeting.

(8) State/Federal Law or Court Order. A board may hold an executive meeting to consider information that a State or federal law or a court order requires be kept confidential.

Does “embarrassing” or “highly personal” information allow a board to hold an executive meeting?

A board may not hold such discussions in an executive meeting unless the discussion falls within one of the eight purposes listed in the statute and discussed above for which an executive meeting is allowed.

Can confidential or proprietary information be considered in an executive meeting?

Again, unless there is an exception that permits the board to convene an executive meeting, a board cannot consider such information in a closed meeting, no matter how sensitive the information may be. In such a case, a board may be better served by using an applicable permitted interaction governed by section 92-2.5, HRS, to allow less than a quorum of board members to investigate the sensitive information so that it can be discussed in more general terms at the board's meeting.

Does the Sunshine Law require an executive meeting when one of the eight purposes is applicable?

No. A board may, but is not required to, convene an executive meeting when one of the eight purposes listed above is applicable.

Is a board subject to the Sunshine Law's criminal penalties for holding an open meeting, even if one of the eight purposes is applicable?

No. Although section 92-13, HRS, provides for the criminal prosecution of board members who willfully violate the Sunshine Law, the Hawaii Supreme Court has held that holding an open meeting does not violate the Sunshine Law. Consequently, board members are not subject to criminal prosecution under section 92-13, HRS, for holding an open meeting.

When personnel matters concerning an individual will be discussed, can an open meeting be held only upon the subject employee's request?

No. Section 92-5(a)(2), HRS, gives the subject employee the right to request an open meeting, but does not require the employee's consent to hold an open meeting. Because the Sunshine Law presumptively requires open meetings, the board may choose to discuss personnel matters in the open. Meetings related to personnel matters are not required to be closed to the public.

Must all personnel matters be discussed in a closed executive meeting?

No. Certain personnel matters must be discussed in an open meeting. Under the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA), certain types of government employment information must be disclosed upon request, such as employee names, job titles, and salary information. HRS § 92F-12(a)(4). Consequently, government employees do not have a legitimate expectation of privacy in such information, and the board cannot justify closing a meeting simply to discuss those types of personnel matters. Additionally, if the discussion is about personnel policies,

and not about an individual, then there is no legitimate expectation of privacy at stake and the meeting cannot be closed to discuss such policies. To the extent possible, policy-making must be conducted in public meetings.

The personnel matters that may be discussed in an executive meeting under section 92-5(a)(2), HRS, must relate to “the hire, evaluation, dismissal or discipline” of an individual officer or employee, or to “charges brought against” such an individual, and also requires a showing that “consideration of matters affecting privacy will be involved.” Just because a matter involves an employee’s personnel status does not necessarily mean that a legitimate privacy interest will be impacted. If no legitimate privacy interest will be involved in the board’s discussion, then the board cannot properly close the meeting to the public.

How do you determine if there is a legitimate privacy interest under the personnel exception allowing closed executive meetings?

Unlike the test balancing private interests against the public interest that is set forth in the UIPA at section 92F-14(a), HRS, to determine if disclosure of a record would constitute a clearly unwarranted invasion of personal privacy, the Sunshine Law requires a case-by-case analysis of the specific person and information at issue to see whether the person being discussed has a legitimate expectation of privacy. Only people, not companies or entities, can have an expectation of privacy. There is a legitimate expectation of privacy in ‘highly personal and intimate’ information, which may include medical, financial, education, or employment records. Some circumstances, however, may reduce or entirely defeat the legitimacy of a person’s expectation of privacy, as in the case of government officials with high levels of discretionary and fiscal authority, like the University’s president or a head coach. Moreover, if the information must be disclosed by law, rule or regulation, or if it has already been disclosed, then there is no legitimate expectation of privacy that would warrant holding an executive meeting to discuss such information.

Is the attorney-client exception allowing executive meetings under section 92-5(a)(4), HRS, the same as the attorney-client privilege recognized in Rule 503(b) of the Hawaii Rules of Evidence?

No. The Hawaii Supreme Court has unequivocally stated that “a board’s authority to meet in executive session to consult with its attorney pursuant to section 92-5(a)(4), HRS, is narrower in scope than the attorney-client privilege.” Civil Beat Law Ctr. For the Pub. Interest v. City & Cty. Of Honolulu, 144 Haw. 466, 488, 445 P.3d 47, 69 (CBLC). “The attorney-client privilege protects ‘confidential communications’ between a client and the client’s attorney ‘made for the purpose of facilitating the rendition of professional legal services to the client[.]’” Id. “[T]he Sunshine Law’s attorney-client exception protects communications relating only to ‘questions and

issues pertaining to the board's powers, duties, privileges, immunities, and liabilities.” Id., quoting section 92-5(a)(4), HRS.

If the board's attorney is in an executive meeting, will that be sufficient to establish the exception under section 92-5(a)(4), HRS?

No. Simply having an attorney present is insufficient to qualify for an executive meeting exception under section 92-5(a)(4), HRS. At the same time, a board can properly have its attorney present while it is in executive session for one of the other executive session purposes: the Hawaii Supreme Court has cited with approval OIP's advice that “a board is authorized to consult with its attorney in an executive meeting convened for any of the purposes listed in section 92-5(a), HRS, so long as the consultation is necessary to achieve the authorized purpose of the executive meeting.” CBLC at 144 Haw. 489, 445 P.3d 70, quoting OIP Op. Ltr. No. 03-17, at 4. “[A] board may need its attorney's assistance to explain the legal ramifications of various courses of conduct available to the board” or to ensure compliance with section 92-5, HRS, by limiting the board's discussion to publicly noticed items on the agenda and keeping the board from “inadvertently straying into discussion[s] or deliberation[s] of a topic not directly related to the executive meeting's purpose.” Id.

The Hawaii Supreme Court has admonished reviewing courts, as well as boards and commissions, to “understand that an attorney is not a talisman, and consultation in executive sessions must be purposeful and unclouded by pretext.” CBLC at 144 Haw. 489, 445 P.3d 70. Once the board receives the benefit of the attorney's advice, it should discuss the courses of action in public, and vote in public, unless to do otherwise would defeat the lawful purpose of having the executive meeting.” Id., quoting OIP Op. Ltr. No. 03-12 at 10. “If a non-board member, including the board's attorney remains in an executive meeting after his or her presence is no longer required for the meeting's purpose, the executive meeting may lose its ‘executive’ character.” Id., quoting OIP Op. Ltr. No. 03-12 at 6.

Can non-board members participate in an executive meeting?

The board is entitled to invite into an executive meeting any non-board member whose presence is either necessary or helpful to the board in its discussion, deliberation, and decision-making regarding the topic of the executive meeting. Once the non-board member's presence is no longer needed, however, the non-board member must be excused from the executive meeting. Because the meeting is closed to the general public, the board should allow the non-board members to be present during the executive meeting only for the portions of the meeting for which their presence is necessary or helpful, such as when a board staff member is there to address a particular issue.

Are there special requirements for an executive session held during a remote meeting?

Yes. Boards are allowed to conduct remote meetings using interactive conference technology (ICT), so board members can participate from their private homes, offices, and other locations not open to the public. While board members must generally still be visible and audible during the public portion of remote meetings, the law only requires them to be audible to the other authorized participants during the executive sessions, which are closed to the public. Therefore, a board member could participate in an executive session via telephone conference, rather than online.

To preserve the executive nature of the session that is being conducted remotely, the presiding officer must publicly state the names and titles of all participants authorized to be in the executive session. Upon convening the executive session, all participants must confirm that no one unauthorized is present or can hear them either in person or via another connection, and when the remote meeting platform allows seeing a list of participants, the person hosting the ICT must confirm that no unauthorized person has access.

Note that these safeguards are not required for in-person meetings held in multiple locations and connected to each other via ICT, because the board members at such meetings are physically present at one of the official meeting locations. However, a disabled member participating in a multi-site meeting via ICT from a private location must still identify anyone else there with the member during the meeting (not limited to the executive meeting portion). Although the new provisions of the Sunshine Law do not specifically address executive sessions, a disabled member attending remotely cannot have unauthorized persons with them during the executive session, any more than the members physically present at a noticed location could have unauthorized persons remain in the room for the executive session.

May a board vote in an executive meeting?

Generally, no. In most instances, the board must vote in an open meeting on the matters considered in an executive meeting. In rare instances, the Sunshine Law allows the board to vote in the executive meeting when the vote, if conducted in an open meeting, would defeat the purpose of the executive meeting, such as by revealing the matter for which confidentiality may be needed. In those rare instances where a board can and does vote in an executive meeting, it must report any action taken when it returns to public session and summarize what happened in the executive session.

If a board is challenged for having improperly entered into an executive meeting, must the meeting minutes be disclosed to the public?

Yes, if the challenge is upheld. Section 92-9(a), HRS, requires written or recorded minutes to be kept of all meetings, including executive meetings. Executive meeting minutes may be withheld from public disclosure only for so long as their publication would defeat the lawful purpose of the executive meeting. HRS § 92- 9(b). When a board’s executive session has been challenged, OIP or the court will confidentially review the executive meeting minutes *in camera* to determine if the board’s discussion fell within the stated purpose of the closed meeting. See CBLC at 144 Haw. 486, 445 P.3d 47 (recognizing the need for *in camera* review). Executive meeting minutes must be disclosed *in camera* to OIP or the reviewing court, and if OIP or the reviewing court finds that the discussion should have been done in public session, the board may be required to disclose the minutes of the improper executive session to the public.

Even when a board lawfully met in executive session, a member of the public can request a copy of its executive session minutes and all or portions of those minutes may still be subject to disclosure, if their publication would no longer defeat the purpose of the executive session.

Note that because the meeting minutes also constitute a government record, the UIPA’s provisions may be applicable, including the balancing test for a clearly unwarranted invasion of personal privacy under section 92F-14(a), HRS. See CBLC n. 18 at 144 Haw. 490, 445 P.3d 47 (recognizing that it is proper to analyze an issue concerning disclosure of executive meeting minutes under both the Sunshine Law and the UIPA).

If a board is found to have improperly entered into an executive meeting, can the final action taken by the board be voided?

Yes. The Hawaii Supreme Court has held that a violation of the executive meeting provisions in section 92-5, HRS, is equivalent to a violation of the open meeting requirement of section 92-3, HRS, thus subjecting any final action taken by the board to being potentially voided under section 92-11, HRS. Therefore, if the executive meeting discussions and deliberations are not “directly related” to a permissible exception under section 92-5(b), HRS, a court has the discretion to void any final action taken by the board. Pursuant to section 92-11, HRS, a suit to void any final action must be commenced within ninety days of the action.