

Quick Review: Who Board Members Can Talk To and When (Part 1) (Revised July 2018)

OIP often is asked whether board members can talk to the board's staff, members of the public, or one another in various situations when not in a meeting. To help board members understand what they can talk about outside a meeting, and with whom, OIP has put together a three-part Quick Review.

1. Topics that Are Not 'Board Business'

The Sunshine Law applies whenever board members are discussing board business, i.e., specific matters within the board's authority that are on a board's upcoming agenda or reasonably likely to appear on an agenda in the foreseeable future. When board members are discussing matters that are **not board business**, the **Sunshine Law does not apply** to restrict the discussion. Thus, board members could discuss with one another, or with anyone else:

- Matters **unrelated** to what the board does, such as the weather, sports teams, personal news, vacation plans, world events, or similar topics beyond the scope of the board's responsibilities;
- Matters related to what the board does, but that are **not being considered by the board** as a whole or a committee of the board at a meeting because they are ministerial (i.e., handled by staff) or within the Chair's sole purview, such as scheduling of meetings, including which items will appear on which meeting's agenda, members' travel arrangements, logistical arrangements for an award ceremony, or similar topics; or
- Matters that the board considered in the past but **does not expect to reconsider** in the foreseeable future because the **matter has concluded**, such as dedication of a completed baseball field that the board gave approval to at an earlier stage, or a report that the board was required to and did submit to a legislative body by a now-past date.

These sorts of matters can be discussed by board members in any number, and need not be discussed in a meeting, because they are **not board business** at the time they are being discussed and, thus, the discussion is not controlled by the Sunshine Law.

Board members may also attend lunches, social and ceremonial events, or board retreats, without violating the Sunshine Law, **so long as board business is not discussed, deliberated, or decided upon.**

2. Staff, Lobbyists, and the General Public

The Sunshine Law only applies to boards and their discussions, deliberations, decisions, and actions. Because the Sunshine Law does not apply to a board member's communications with people who are not members of the covered board, **a member may discuss board business with people who are not board members** outside of a meeting, without needing to fall into one of the permitted interactions. Board members, therefore, can freely talk or otherwise communicate with:

- Citizens concerned about a particular issue
- Reporters
- Lobbyists
- Board or agency staff
- Other government officials, and
- The general public.

It is possible that in some of those cases, the information from one board member will be transmitted to other board members. For instance, a lobbyist may be going from one county council member's office to the next to talk about a piece of board business and may carry information over, as in, "Councilmember A said she'd be willing to support us on this if the bill is amended to cover frogs as well. Could you support that?" However, this would not be considered a discussion directly between the council members. Similarly, a reporter might speak to multiple council members and say something like, "Member B told me that the Board expects to reconsider the motion next month. Can you confirm that?" Again, even though information was passed on, **because the actual communication was through a third party, it would not be considered a discussion between the board members.**

Note: If board members would like to discuss board business with individuals who are not board members, **members should be mindful not to improperly disclose information that was part of an executive meeting closed to the public**, and may wish to consult with the board's attorney in such situations.

Information and materials provided by members to the staff may be incorporated into the staff's own analysis or report on a board matter and may be distributed by staff to the board members in advance of a meeting. The staff's report should not identify individual board members' positions on an issue, but can recognize and discuss the various viewpoints in general and provide recommendations for actions.

Board members should also refrain from using staffers as mere go-betweens to carry messages between board members, as that could be found to be a discussion directly between board members, depending on the circumstances. Telling a staffer, "I have concerns about the direction we're taking on this issue and I'd like you to do some research on this aspect of it," is fine, even if the staffer tells other members, "Member C asked me to research this topic because of her concerns about the way the board is handling the issue." But telling a staffer, "Please go tell Members D and E that I have

concerns about the way we're handling this issue," would be inadvisable, as it could be construed as a serial communication with members D and E.

3. Other Board Members

As discussed above, the Sunshine Law applies whenever board members are discussing board business. **When board members communicate to one another about board business, they need to do so either in (1) a properly noticed meeting, or (2) in circumstances where the discussion is specifically permitted by one of the Sunshine Law's exceptions.** When board members are prohibited by the Sunshine Law from discussing or communicating about board business face to face, they also cannot do so by telephone, e-mail, letters or memoranda, social media such as Facebook and Twitter, or any other means of communication.

Before communicating with other board members outside a meeting, a board member should check whether one of the Sunshine Law's permitted interactions applies. **Permitted interactions are specific circumstances in which the law permits board members to discuss board business outside a meeting, so long as the statutory requirements are met.**

The most frequently used permitted interaction, section 92-2.5(a), HRS, allows **two board members to discuss any board business, without limitation, so long as they do not make or seek a commitment to vote and do not constitute a quorum of their board.** This limitation on making a commitment to vote does allow discussion of the two board members' views and inclinations on an issue, but prohibits, for example, horse-trading of votes such as, "If you'll agree to vote my way on this issue, I'll give you my vote on your pet project next month."

The two-person permitted interaction does not require any prior arrangement on the part of the two members using it; they can run into each other on the street, e-mail each other, or telephone each other, so long as only two members are part of the discussion. Other people who are not members of the board can be present, as their discussions with board members are not regulated by the Sunshine Law.

Permitted interactions cannot be used to circumvent the requirements or the spirit of the law to make a decision or to deliberate towards a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power. Specifically, where two members have discussed an issue using the two-person permitted interaction, they cannot then extend the discussion out to other board members through **serial use** of the permitted interaction. If Member X called Member Y to talk about the feral cat issue on the upcoming agenda, Member Y cannot then stop in the hallway to talk to Member Z about it, as there would then be three members who were privy to the discussion. Both Member X and Member Y must refrain from discussing the feral cat issue with other members until after the board has next discussed it at a meeting, which essentially clears the slate as to members' previous discussions.

The other permitted interactions listed in section 92-2.5, HRS, generally require prior planning, or apply only in certain circumstances, or both. OIP will discuss them in the forthcoming Parts 2 and 3 of this Quick Review series.