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The Office of Information Practices (OIP) is authorized to resolve complaints concerning compliance with or applicability of the Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes (HRS), pursuant to sections 92-1.5 and 92F-42(18), HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

OPINION

Requester: Cynthia Dang
Board: Hawaii State Council on Mental Health
Date: December 12, 2022
Subject: Permitted Interactions; Interactive Conference Technology; Board Packets; and Related Sunshine Law Questions (S APPEAL 20-3) and (S APPEAL 20-8)

REQUEST FOR OPINION

OIP is consolidating these two appeals, as permitted by section 2-73-15(g), HAR, which authorizes consolidation of appeals that have similar issues or facts, or when the parties are similarly situated.

S APPEAL 20-3: Requester seeks a decision as to whether the Hawaii State Council on Mental Health (SCMH), a board administratively attached to the Department of Health (DOH), Adult Mental Health Division (AMHD), violated various Sunshine Law provisions on several occasions as described in more detail in section I.

S APPEAL 20-8: Requester seeks a decision as to whether the SCMH violated the Sunshine Law by not cancelling a meeting held by interactive conference technology (ICT) when a noticed in-person location had a three-minute interruption in connectivity, as discussed in section II.

Unless otherwise indicated, this opinion is based solely upon the facts presented in:

S APPEAL 20-3: An email from Requester to OIP dated February 3, 2019; a letter from OIP to Requester dated December 2, 2019; a letter from AMHD on behalf of the SCMH to OIP with enclosures dated December 6, 2019; and an email from AMHD to Requester with attached email thread dated December 12, 2019; and

S APPEAL 20-8: An email from Requester to OIP dated May 15, 2020; an email from AMHD to Requester with attached email thread dated May 18, 2020; an email from AMHD to Requester with attached email thread dated May 19, 2020; an email from OIP to Requester dated May 21, 2020; an email from Requester to OIP with attached email thread dated July 2, 2020; and a letter from SCMH to OIP with enclosures dated August 12, 2020.

QUESTIONS PRESENTED

1. S APPEAL 20-3: Whether the SCMH followed the Sunshine Law's requirements for an investigative permitted interaction group (PIG) when its PIG formed for planning a retreat (Retreat PIG) continued to work after loss of a member.

2. S APPEAL 20-3: Whether the SCMH followed the Sunshine Law's requirements for an investigative PIG, when it added members and issues to existing PIGs.

3. S APPEAL 20-3: Whether the SCMH followed the Sunshine Law's requirements for an investigative PIG when it allowed the Retreat PIG to continue to work after giving its report.

4. S APPEAL 20-3: Whether the SCMH followed the Sunshine Law's requirements for an investigative PIG when it immediately discussed and took action on a PIG's report without waiting until a subsequent meeting to do so.

5. S APPEAL 20-3: Whether the SCMH followed the Sunshine Law when it both discussed and voted on selection of a retreat facilitator at the same meeting even though its past practice was to discuss agenda items in one meeting and vote on them at a subsequent meeting.

6. S APPEAL 20-3: Whether a board may hold an "informational meeting" at which no action is taken when it fails to achieve or loses quorum for a meeting.

7. S APPEAL 20-3: Whether the SCMh followed the Sunshine Law's requirements for holding ICT meetings on various occasions, including an ICT meeting where a temporarily disabled member attended from home, another ICT meeting that continued after the audio at one noticed location failed, and an ICT meeting that proceeded with a noticed location that had no SCMh member present but was open and operational for the public.

8. S APPEAL 20-3: Whether the SCMh followed the Sunshine Law's board packet requirements when it emailed facilitator proposals but did not circulate paper copies to the members before a meeting, when it allowed a presentation to proceed without distributing the presenter's handouts in advance, and when it discussed a draft SCMh brochure that had not been provided in advance of the meeting.

9. S APPEAL 20-8: Whether the Sunshine Law allowed the SCMh to proceed with its ICT meeting on March 10, 2020, despite the three-minute loss of connection at one remote meeting site.

BRIEF ANSWERS

1. S APPEAL 20-3: Yes. As explained in section I.A.3.a starting on page 13, an investigative PIG formed under section 92-2.5(b)(1), HRS, may continue with its assignment if it loses a member, so the SCMh's Retreat PIG was able to continue work after losing a member whose term on the SCMh ended.

2. S APPEAL 20-3: No. As explained in sections I.A.3.b and c starting on page 14, a board may not add new members or issues to an existing PIG. An investigative PIG must report to the full board, after which it is in effect dissolved, and the board must wait until a subsequent meeting to discuss or act on the matter the PIG was handling, as required by section 92-2.5(b)(1), HRS.

3. S APPEAL 20-3: No. As explained in section I.A.3.d starting on page 16, after the Retreat PIG reported at the June meeting and was effectively dissolved, the SCMh violated the Sunshine Law by not treating the Retreat PIG as dissolved and instead allowing it to continue to work outside of the Sunshine Law's constraints.

4. S APPEAL 20-3: No. As explained in section I.A.3.e starting on page 17, the SCMh violated the Sunshine Law by taking immediate action to add members and issues to the Retreat PIG at the June meeting after the Retreat PIG reported at that same meeting.

5. S APPEAL 20-3: Yes. Except when a board has established an investigative PIG, the Sunshine Law does not prohibit a board from both discussing and taking action on an issue during a single meeting, regardless of a board's normal practice. As explained in section I.B starting on page 18, the SCMH did not violate the Sunshine Law when it discussed and took action on a retreat facilitator at the same meeting.

6. S APPEAL 20-3: No. This issue was not raised by Requester, but the SCMH held what it called an "informational meeting" on more than one occasion when it did not have quorum. As explained in section I.C starting on page 19, if a board does not have a quorum, it cannot hold a meeting, even if the members do not vote to take any actions. There is no permitted interaction in section 92-2.5, HRS, that allows less than a quorum of members to set up an "informational meeting" in lieu of a regular board meeting when a board does not have a quorum present at a meeting. However, when the SCMH failed to achieve or lost quorum, it could have proceeded under the permitted interaction at section 92-2.5(d), HRS. When a meeting must be canceled for lack of quorum, or terminated due to a loss of ICT connections, section 92-2.5(d), HRS, allows board members to receive testimony and presentations on agenda items and to question the testifiers or presenters, but does not allow those members to discuss items on the canceled meeting's agenda among themselves.

7. S APPEAL 20-3: No. The SCMH failed to follow some requirements for holding an ICT meeting under section 92-3.5, HRS, on more than one occasion as described in section I.D starting on page 20. These included ICT meetings where a temporarily disabled member properly attended from home but failed to note his general location or whether anyone else was present, and another ICT meeting that continued after the audio connection at a noticed location failed. However, it was not a violation of section 92-3.5, HRS, when a meeting proceeded with a noticed location that had no SCMH member present but was open and operational for the public.

8. S APPEAL 20-3: Yes. As explained in section I.E starting on page 26, the SCMH did not violate the Sunshine Law's board packet requirements at section 92-7.5, HRS, when it emailed facilitator proposals but did not circulate paper copies to the members before a meeting, when it allowed a presentation to proceed without distributing handouts in advance, or when it discussed a draft brochure that had not been provided in advance of the meeting.

9. S APPEAL 20-8: Yes. The SCMH's ICT meeting on March 10, 2020, did not need to be cancelled due to the loss of connection to a remote meeting site because the meeting minutes show that connectivity was only lost for three minutes, as explained in section II starting on page 33. However, when Requester, who was an SCMH member, left the meeting during the recess while the ICT connection was

being restored, the SCMH lost quorum, which effectively ended the meeting. The subsequent discussion of “for information” agenda items by the remaining SCMH members was in violation of the Sunshine Law for the same reasons explained in question and answer 6 and in section I.C starting on page 19.

FACTS

The SCMH advises AMHD and the DOH’s Child and Adolescent Mental Health Division on various issues relating to mental illness and mental health. HRS § 334-10 (Supp. 2021). Requester was a member of the SCMH at the time these appeals were filed. Due of the number of issues raised in these appeals, specific facts relevant to each issue are described in detail below in corresponding sections.

DISCUSSION

I. APPEAL 20-3

In S APPEAL 20-3, Requester alleged “more than 21 violations and 7 potential violations”¹ of the Sunshine Law by the SCMH and asked several questions. The allegations have been grouped under the categories of PIGs, ICT meetings, and board packets, and some allegations have been combined herein. First, OIP provides an overview of the law and OIP’s precedents to provide the legal context for the analyses of the alleged violations concerning investigative PIGs.

¹ OIP’s Notice of Appeal (NOA) informed the parties that section 2-73-12(a)(3), HAR, requires Sunshine Law appeals to be filed within six months after a board’s alleged violation of the Sunshine Law, and that OIP would not be reviewing Requester’s allegations pertaining to the SCMH’s meeting on February 19, 2019, which occurred more than six months prior to the filing of this appeal.

A. Permitted Interaction Groups (PIGs)

1. The Sunshine Law's Relevant PIG Provisions and OIP's Precedents Discussing PIG Requirements

The Sunshine Law generally prohibits board members from discussing “board business”² between themselves outside of a properly noticed meeting. HRS § 92-3 (2012). In limited circumstances, board members may privately discuss “board business” as a permitted interaction,³ and such discussions are not considered meetings for the purpose of the Sunshine Law. HRS § 92-2.5(i) (2012).

The permitted interaction relevant to the first series of allegations is at section 92-2.5(b)(1), HRS. It allows two or more members of a board, but less than the number of members that would constitute a quorum, to be assigned to an investigative PIG.⁴ An investigative PIG can investigate a matter relating to its board’s official business, subject to the following requirements, which must occur in the order listed in three separate, although not necessarily consecutive, meetings that each have distinct purposes:

- (A) The scope of the investigation and the scope of each member’s authority are defined at a meeting of the board;

² At the time this appeal was filed, there was no statutory definition of “board business” so OIP used a definition set forth in OIP opinion letters. See e.g., OIP Op. Ltr. No. F19-03 at 9 n. 9 (defining “board business” as including “discrete matters over which a board has supervision, control, jurisdiction, or advisory power, that are actually pending before the board or that are likely to arise before the board”). In 2022, the Legislature enacted a statutory definition of “board business” as “specific matters over which a board has supervision, control, jurisdiction, or advisory power, that are actually pending before the board, or that can be reasonably anticipated to arise before the board in the foreseeable future.” Act 264 (July 8, 2022), Session Laws of Hawaii 2022 (Act 264), (to be codified at HRS § 92-2). The differences in these definitions are insignificant for purposes of this opinion, and boards should henceforth use the statutory definition.

³ A new permitted interaction not relevant to this discussion was added by the Legislature in 2022. See Act 264 (to be codified at HRS § 92-2.5(h)).

⁴ The Sunshine Law also allows boards to set up what OIP calls “negotiating PIGs.” Section 92-2.5(b)(2), HRS, states that two or more members of a board, but less than the number of members that would constitute a quorum, may be assigned to “[p]resent, discuss, or negotiate any position which the board has adopted at a meeting of the board; provided that the assignment is made and the scope of each member’s authority is defined at a meeting of the board prior to the presentation, discussion or negotiation.” Negotiating PIGs are not at issue here so OIP’s general use herein of the term “PIG” refers only to investigative PIGs.

- (B) All resulting findings and recommendations are presented to the board at a meeting of the board; and
- (C) Deliberation and decisionmaking on the matter investigated, if any, occurs only at a duly noticed meeting of the board held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the board[.]

HRS 92-2.5(b)(1) (2012).⁵

OIP is required, under section 92-1, HRS, to liberally construe the Sunshine Law's provisions requiring open meetings, and to strictly construe against closed meetings the Sunshine Law's provisions on exceptions to its open meeting requirements. See OIP Op. Ltr. No. 06-05 at 6, citing Op. Att'y Gen. No. 85-2 (Haw. 1985) (stating that Sunshine Law provisions must be liberally construed to favor public scrutiny and participation).⁶ PIG members are authorized to discuss the issues assigned to them outside an open meeting, so the PIG provision's requirements must be strictly construed. HRS §§ 92-1, 92-2.5(b)(1). In accordance with the Sunshine Law's own instructions on how to construe its provisions, OIP previously provided these instructions regarding investigative PIGs:

The "investigation" permitted interaction . . . allows a group of board members constituting less than a quorum of a board to investigate a matter relating to the board's official business outside of a meeting. Haw. Rev. Stat. § 92-2.5(b)(1) (Supp. 2005). The statute, however, imposes specific procedural requirements that a board must follow in forming the investigative [PIG] and considering the [PIG]'s findings and recommendations. Id. More specifically, the board members chosen to participate in the investigative [PIG] must be named at a board meeting and the scope of the investigation and each member's authority must be defined at that time. Id. The investigative [PIG] must report back at a second meeting, and the board cannot discuss or act on that report until another meeting "held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the board." Id. The language of the

⁵ Negotiating PIGs formed under section 92-2.5(b)(2), HRS, are not subject to the three-meeting requirement for investigative PIGs formed under section 92-2.5(b)(1), HRS. The other permitted interactions listed in section 92-2.5, HRS, likewise do not contain the three-meeting requirement.

⁶ The Department of the Attorney General was charged with administration of the Sunshine Law until 1998.

statute, in other words, anticipates that an investigative [PIG] will undertake an investigation of defined and limited scope and will make a single report back to its board, after which the board (at a later meeting) may discuss and act on the issue. Because the permitted interaction allows board members to privately discuss board business, an exception to the usual open meeting requirements, OIP must strictly construe the statutory requirements. Haw. Rev. Stat. § 92-1(3) (1993).

OIP Op. Ltr. No. 06-02 at 4.

The statute and OIP's precedent are clear that an investigative PIG requires three separate board meetings, each with a distinct purpose, that can take place over time. The first board meeting is to define the scope of the investigation and each member's authority. Section 92-2.5(b)(1), HRS, anticipates that an investigative PIG will then undertake an investigation of defined and limited scope and will make a single report back to its board at a second meeting following its creation. OIP Op. Ltr. No. 06-02 at 4. Once an investigative PIG has presented its report at the second board meeting, it no longer is authorized to continue acting as a PIG and thus is effectively dissolved, without the need for board action to dissolve it. Indeed, the board is prevented from taking any action on the PIG's report, including dissolving the PIG or even discussing the PIG's report, until a subsequent third meeting, in order to give the public the opportunity to become aware of and testify on the PIG's report as well. HRS § 92-2.5(b)(1).

Strictly following these procedures is necessary to prevent the board from circumventing the Sunshine Law's constraints that favor open meetings. See HRS § 92-2.5(b) (stating, that "[n]o informal gathering, permitted interaction, or electronic communication shall be used to circumvent the spirit or requirements of this part to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power"). Without strict adherence to the requirements for any permitted interaction, the board runs the risk of engaging in improper serial communications, which the Hawaii Intermediate Court of Appeals (ICA) has described as a "series of one-on-one conversations relating to a particular item of [board] business" outside of a meeting. Right to Know Comm. v. City Council, City & County of Honolulu, 117 Haw. 1, 175 P.3d 111, 122. In this case, the ICA found that "the spirit of the open meeting requirement was circumvented and the strong policy of having public bodies deliberate and decide its business in view of the public was thwarted and frustrated" when the Honolulu City Council engaged in serial communications regarding one of its resolutions that it alleged were allowed under the permitted interaction at section 92-2.5(a), HRS, which permits two members of a board, so long as they do not constitute a quorum, to communicate privately regarding board business so long as no commitment to vote is made or

sought. Id. Similarly, OIP previously found that “[s]erial communications could not be a clearer example of the use of a permitted interaction to circumvent both the letter and the spirit of the Sunshine Law in direct contravention to section 92-5(b),]” HRS, which is the section being examined in this appeal. OIP Op. Ltr. No. 05-15 at 6.

To avoid prohibited serial communications with board members who were not part of the membership of a PIG when it was formed and to strictly follow the requirements to establish an investigative PIG, OIP has previously explained that “it would be inconsistent with that explicit requirement [that membership be set at a meeting] for a board to interchange or replace members of [a PIG] once [it] has commenced the ‘investigation’ that it has been charged to perform.” OIP Op. Ltr. No. 06-02 at 5. Thus, if a member of a PIG ceases to be a member of the parent board, the board cannot simply substitute another board member into that vacant PIG position, and a board cannot add additional members to an existing PIG. When a board changes out the membership or the issues assigned to a PIG, the effect is that the PIG

metamorphose[s] into a “standing committee” to which the Board delegate[s] a range of issues . . . and which report[s] back to the Board [repeatedly]. A committee of a board (as distinguished from an investigative task force formed as a permitted interaction), however, is subject to the Sunshine Law and must comply with all of the statute’s requirements. See, e.g., OIP Op. Ltr. No. 03-07.

OIP Op. Ltr. No. 06-02 at 4.

Therefore, members of a PIG cannot communicate with other board members who are not on the PIG as it was originally constituted until the PIG reports at a noticed meeting. HRS § 92-2.5(b)(1). To do otherwise would put the discussion outside the parameters of section 92-2.5(b)(1), HRS, and would violate the spirit of the Sunshine Law. HRS §§ 92-1, 92-5(b). In other words, for a board to add members to an ongoing PIG, or have the PIG report to the board multiple times and continue working, would mean the PIG members’ discussions outside a meeting were no longer authorized under section 92-2.5(b)(1), HRS. Unless some other permitted interaction authorized those discussions, the PIG members’ discussion and action on the parent board’s business would have occurred outside a meeting and without public notice or authorization as a permitted interaction, and would thus be contrary to the Sunshine Law’s requirements.

In this case, Requester made several complaints regarding the PIG created by the SCMh to organize a retreat for its members (Retreat PIG).⁷ OIP is without information as to when the Retreat PIG was created, what its original scope was, and what each member's authority was. The response to this appeal (Response) indicated that the Retreat PIG members were Requester and fellow SCMh members Crozier and Simms. After next summarizing the relevant portions of the SCMh's meeting⁸ minutes,⁹ OIP will discuss Requester's PIG complaints.

2. Facts from the SCMh's Meeting Minutes, and Information Provided in the SCMh's Response to this Appeal

The information from relevant meeting minutes and the Response are summarized here and indicate that the SCMh took various conflicting and confusing actions in establishing and discussing the work of its PIGs created for purposes of retreat planning, some of which resulted in violations of the Sunshine Law as discussed in section I.A.3 starting on page 13:

- June 18, 2019 Meeting Minutes: Requester, on behalf of the Retreat PIG, "updated" the SCMh on potential facilitators, and cost estimates for facilitators and venues. She indicated the Retreat PIG "needs more direction on choosing a facilitator, so as of now, a facilitator was not recommended."

⁷ In January 2020, OIP was informed that the SCMh retreat tentatively scheduled for January 14, 2020, had been "postponed." OIP therefore does not opine as to whether the retreat could have proceeded as scheduled in light of the Sunshine Law violations found herein. OIP also notes that if a board's retreat includes discussion of "board business" as defined in footnote 2 on page 6, then all the Sunshine Law's requirements must be followed for the retreat, including, but not limited to, the posting of notice, allowing the public to attend and testify, and creation of meeting minutes.

⁸ All relevant meetings for S APPEAL 20-3 took place in 2019 so in section I OIP refers to meetings, meeting notices, and minutes by month only.

⁹ OIP was provided with copies of meeting notices and minutes for the relevant meetings. While it was not raised by Requester, OIP notes some agenda items could be improved upon. For example, the July meeting notice's agenda item VII simply read "Retreat Permitted Interaction Group Report," which did not give the public a clear idea of what would be discussed at the meeting. OIP recommends that the SCMh review the Agenda Guidance for Sunshine Law Boards on the Training page of OIP's website at oip.hawaii.gov. The Agenda Guidance notes that when a board expects to hear a report made by board members (including PIG reports), the subject matter of the report must be specifically identified because even without any further discussion, those members' presentation of the report to the rest of the board would constitute board consideration of the issue. All topics that will be included in the report must be described on the agenda with enough detail to allow the public to understand that those topics will be discussed.

Requester also reported that the Retreat PIG received two estimates from “hotels/facilities and needs another estimate to be compliant with Department of Health procurement requirements.”

Because SCMH member Simms’s tenure on the SCMH was ending on June 30, 2019, and Simms was also a member of the Retreat PIG, the SCMH Chair (Chair) “suggested that a new PIG be established for the Retreat PIG. She then asked members who would like to work on the PIG. Members are: C. Dang, N. Crozier, C. Rocchio, and M. Vorsino.”

The SCMH passed a motion that the Retreat PIG get estimates for hotels, facilities, and a facilitator. The members “discussed that the retreat should be on Tuesday, December 10, 2019 or Tuesday, January 14, 2020.”

- June 26, 2019: The SCMH’s Response claimed that a member of AMHD’s staff called OIP’s Attorney of the Day (AOD)¹⁰ to ask what happens when a member leaves a PIG and was advised the Retreat PIG should be dissolved and that a board vote must be taken at a subsequent meeting for selection of new members for a new PIG. AMHD shared its understanding of the AOD advice with SCMH member Rocchio, who led the July 9 SCMH meeting.
- July 9, 2019 Meeting Minutes: Member Rocchio “reported on behalf of the Retreat PIG,” recommending a retreat date and venue, and noting that three individuals were being considered as facilitators.
- August 13, 2019 Meeting Minutes: The minutes stated that “[s]ince quorum was not achieved, this is an informational meeting.” Dissolution of the Retreat PIG and creation of a new PIG were tabled until the next meeting, but the Chair “solicited items for the” retreat agenda.
- September 10, 2019 Meeting Minutes: The SCMH passed a motion to dissolve the Retreat PIG. A new “PIG for Retreat planning” (Retreat Planning PIG) was formed, and the members were established (members Rocchio, Ries, and Vorsino). The minutes stated that “[t]his motion will be heard again at the

¹⁰ OIP provides non-binding, informal advice over the telephone, by email, or in person through its AOD service. Because the AOD response in this case was orally provided over the telephone, the exact advice given by OIP to AMHD in this case cannot be substantiated.

October meeting since there might be absent members who may want to participate on the Retreat [Planning] PIG.”¹¹

The SCMH then approved January 14, 2020, as the retreat date, and approved the suggested venue. Later, the minutes noted that the SCMH discussed and then voted on who to invite as speakers and guests to the retreat. The minutes further noted that a decision on a facilitator would be discussed at the October meeting and voted on at the December meeting.

- October 8, 2019 Meeting Minutes: A new member (Crozier) was added to the Retreat Planning PIG. Later in the meeting the SCMH discussed various topics regarding the retreat including working with the facilitator before the retreat, and the “logistics” of the retreat, which included discussion of an agenda and times for speakers. Under the heading of “New Business” it was noted there was only one proposal to facilitate, and Requester indicated she would contact another individual to submit a proposal. A decision was to be made at the next meeting.

Based on the meeting minutes, it is not clear whether a new Retreat PIG was created at the June meeting, or whether the original Retreat PIG continued to work with different members until the Retreat Planning PIG was formed at the September meeting. Clarification was provided in the Response which stated that several days after the June meeting, AMDH sought and received advice from OIP’s Attorney of the Day, which was shared with SCMH member Rocchio, who was to lead the SCMH’s next meeting in July. Both the Response and the September minutes indicate that member Rocchio reported for the “Retreat PIG” at the July meeting and that the Retreat PIG was later dissolved by vote at the September meeting. Therefore, OIP finds that the original Retreat PIG members continued their retreat planning work to begin soliciting bids from hotels and a facilitator, together with the new members added at the June meeting, until the SCMH took action to dissolve the original Retreat PIG at the September meeting. OIP further finds that a new Retreat Planning PIG was established at the September meeting, and an additional member (Crozier) was added at the October meeting.

¹¹ The new Retreat Planning PIG’s scope, which was required to be set at the meeting by section 92-2.5(b)(1), HRS, was not set forth in the September meeting minutes. The Sunshine Law requires that minutes “shall give a true reflection of the matters discussed at the meeting and the views of the participants.” HRS § 92-9(a) (Supp. 2021). This issue was not raised by Requester, but because it was difficult at times to discern what transpired at the meetings from the meeting minutes, OIP recommends that the SCMH ensure that its minutes contain enough information so as to avoid future complaints.

3. OIP's Analysis of PIG Issues

a. PIGs May Continue Work After Loss of a Member

The Retreat PIG had a change in membership when member Simms “left” because her tenure on the SCMh ended on June 30, 2019. Requester asked whether the Sunshine Law was violated when the Retreat PIG did not dissolve once the membership changed due to loss of a member.

Section 92-2.5(b)(1)(A), HRS, requires PIG membership to be established at a meeting at the time the PIG is created. When a PIG member stops acting as a part of the PIG, whether because that member’s board term has ended or for another reason, the PIG may continue its work and need not be dissolved because it remains the case that no board members other than those originally assigned are involved in the PIG’s discussions of the issues assigned to it. So long as the remaining PIG members are not communicating about the PIG’s assigned task with other current board members who were not assigned to the PIG when it was established, the board member discussions of board business outside a meeting by members of the PIG would remain within the parameters specifically permitted under the law. See HRS § 92-5(b) (stating no permitted interaction or electronic communication 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).

The Sunshine Law did not require the Retreat PIG to dissolve when member Simms’s term on the SCMh expired. The mere fact that the Retreat PIG lost a member did not preclude it from continuing to work until it provided its report to the SCMh, so long as the remaining members of the Retreat PIG were still only communicating outside a meeting with those SCMh members who were also assigned to the Retreat PIG. As the Retreat PIG could continue working with the remaining members originally assigned to it, OIP concludes the SCMh did not violate the Sunshine Law when the Retreat PIG did not replace the member whose term had expired. Moreover, since member Simms was named to the PIG as a board member, her status as a PIG member automatically ended when her term on the SCMh ended, and no action was needed by the board to remove her from the PIG.

OIP notes, however, that it interprets section 92 2.5(b)(1), HRS, as allowing appointees to an investigative PIG to include non-board members such as interested persons or other members of the public. OIP also interprets section 92 2.5(b)(1), HRS, as allowing investigative PIG’s members to consult in the course of its work with any number of individuals who are not members of the board that created the PIG, such as members of the public or board staff. Thus, once member Simms’s term ended, the Retreat PIG was free to continue consulting with her as a member of the public.

b. Boards May Not Add New Members to Existing PIGs

Although an existing PIG is not automatically dissolved and may continue its work if it loses a member, a board cannot add any new members to an existing PIG. As discussed in the preceding section and in section I.A.1 starting on page 5, the members of an investigative PIG are established at the first board meeting and cannot be thereafter changed.

Here, the facts show that the Retreat PIG had already been established at a previous meeting and was presenting its report at its June meeting when the SCMH assigned it new members, Rocchio and Vorsino.¹² The SCMH's addition of new members after the initial establishment of the Retreat PIG was a clear violation of section 92-2.5(b)(1), HRS, and OIP must therefore conclude that the Retreat PIG's discussions were not authorized by that section or any other permitted interaction and were thus in violation of the Sunshine Law.¹³

The SCMH created a new Retreat Planning PIG at the September meeting and added another member to it at the October meeting. The addition of a new member to the Retreat Planning PIG in October violated section 92-2.5(b)(1), HRS, and thus that PIG's discussions outside a meeting also violated the Sunshine Law. Again, after establishing the Retreat Planning PIG at the September meeting, the SCMH

¹² Requester alleged that member Ries "may also have been included in the meetings and solicitation of venues and a facilitator" after the June meeting. The Response asserted that only member Rocchio had volunteered to obtain hotel estimates, and member Ries did not participate in solicitation of venues or a facilitator. Because Requester stated that member Ries "may have" participated, not that she had certain knowledge that he did so, OIP accepts the SCMH's assertion that member Ries was not part of the Retreat PIG's work at that time.

¹³ Requester also alleged the volunteers from the June meeting did not request recommendations from the SCMH while they were soliciting facilitators and asked if this was a separate Sunshine Law violation. Members of a PIG cannot discuss their still ongoing PIG's work with members of the parent board (here, the SCMH) who are not on the PIG, so it was not an additional violation for the PIG members to exclude the other SCMH members from the PIG's work, and indeed, it would have been a violation for them to do otherwise. HRS § 92-2.5(b)(1).

could not add a new member at a subsequent meeting without first dissolving the Retreat Planning PIG and establishing a completely new PIG.¹⁴

c. Boards May Not Add New Issues to Existing PIGs

Just as a board is not allowed to add new members to an existing PIG, a board cannot add new issues to an existing PIG's previously assigned duties. As discussed in section I.A.1 starting on page 5, the scope of the PIG's investigation must be established at the first board meeting and cannot be thereafter changed. Here, however, as described in section I.A.2 starting on page 10, the SCMh continued to treat the Retreat PIG as being in existence after the Retreat PIG reported in June. At the June meeting, the SCMh assigned the Retreat PIG new authority and allowed it to continue working. These actions were in violation of section 92-2.5(b)(1), HRS, so the Retreat PIG's discussions outside a meeting were not covered by that section or any other permitted interaction and were in violation of the Sunshine Law.

Given the SCMh's wish to provide additional direction and feedback to the assigned members throughout the retreat planning process, a better option may have been to establish a temporary committee for the purpose of planning the retreat. A committee is subject to all the same notice, minutes, and other Sunshine Law requirements as its parent board. OIP Op. Ltr. No. 08-01. However, formation of a committee would have provided its members with the ability to regularly report back to the SCMh at a meeting without having to satisfy the requirements in section 92-2.5(b)(1), HRS, that the parent board not take action on a report until a subsequent meeting, and a committee would not have to automatically dissolve after reporting. In addition, committee membership may be freely changed, and new issues may be assigned without requiring that the committee first dissolve and a new one be formed at a subsequent meeting as an investigative PIG would have to do.

Alternatively, the SCMh could also have delegated authority to one member to research venues, facilitators, dates, and other aspects of the retreat. The authorized member could then work outside of a meeting on retreat planning without discussing

¹⁴ A limited exception to this requirement would be the rare instance where an investigative PIG was formed at a meeting but the PIG members did no work and had no discussions about the PIG assignment. If PIG members never discussed their assigned task amongst themselves outside of a meeting, then there would be no need to authorize those non-existent discussions outside a meeting under the PIG permitted interaction. Thus, the parent board could dissolve the investigative PIG at a meeting without a PIG report and form a new PIG on the same or similar subject matter with different members without having to wait to act at a subsequent meeting.

the assignment with any other board members outside of a meeting¹⁵ and report back. Because it would not be relying on section 92-2.5(b)(1), HRS, to justify members' discussions outside a meeting, the SCMh could have discussed the retreat at the same meeting where the assigned member reported, without waiting until a subsequent meeting, assuming the matter was properly listed as an agenda item.

In this case, however, the board did not use either alternative, and instead, violated section 92-2.5(b)(1), HRS, by improperly adding new issues to an existing PIG.

d. PIGS Automatically Dissolve After Reporting Once and Cannot Continue to Work

As discussed in section I.A.1 starting on page 5, the Sunshine Law imposes procedural requirements that a board must follow for an investigative PIG. After the parent board has initially established the PIG's members and the scope of their authority at a meeting, section 92-2.5(b)(1), HRS, anticipates that an investigative PIG will undertake an investigation of defined and limited scope before it makes a single report back to its board at a second meeting. OIP Op. Ltr. No. 06-02 at 4. Following its report at the second meeting, the investigative PIG is automatically dissolved, and the board cannot discuss or act on the PIG's report until a third meeting that must be "held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the board." *Id.*, citing HRS § 92-2.5(b)(1). This statutorily required delay in board action gives the public the opportunity to hear the PIG's report at the second meeting and then testify on it at the third meeting before the full board may discuss and act on the PIG's findings and recommendations. *Id.* And because the investigative PIG has concluded its responsibilities by providing its report and the board is unable to act at the second meeting, the effect is that the investigative PIG is automatically dissolved without the need for specific board action.

¹⁵ The permitted interaction at section 92-2.5(a), HRS, allows two members of a board, so long as they do not constitute a quorum, to communicate privately regarding board business to enable them to perform their duties faithfully so long as no commitment to vote is made or sought. If only one member is delegated authority to perform a task for the board, that authorized member could speak with one other board member but cannot serially communicate one at a time with additional individual members. All members should be mindful of section 92-5(b), HRS, which 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."

Here, OIP finds that while the original Retreat PIG could properly continue to work after it lost a member (see section I.A.3.a starting on page 13), it was automatically dissolved after it made its report at the SCMH meeting in June. Although the Retreat PIG had already made its single authorized report and no board action was needed for the PIG's dissolution, the SCMH allowed the Retreat PIG to continue working outside of SCMH meetings until it moved to dissolve the PIG in September. OIP must therefore conclude the SCMH did not follow the requirements of section 92-2.5(b)(1), HRS, when the SCMH did not treat the Retreat PIG as automatically dissolved after it reported in June and instead allowed it to continue working until the September meeting. Because no other permitted interaction applied, the SCMH violated the Sunshine Law through the Retreat PIG's discussions outside SCMH meetings.

e. Boards May Not Discuss or Take Action Immediately After a PIG Reports, But Must Wait Until a Future Meeting

The facts are clear that immediately after the Retreat PIG presented its report to the SCMH at the June meeting, the SCMH discussed matters raised in the PIG report and took action.¹⁶ As discussed in the preceding section I.A.1 starting on page 5, after a PIG reports, the board must wait until a future meeting to discuss and take action on the now-dissolved PIG's report and recommendations.¹⁷ OIP Op. Ltr. No. 06-02 at 4.

Here, the SCMH should have waited until a subsequent meeting to take any action on the Retreat PIG's report, including the Retreat PIG's request for additional direction to select a facilitator and the need to obtain estimates for hotels and facilities. Instead, immediately after the Retreat PIG's report was presented at the June meeting, the SCMH Chair asked for volunteers for a new Retreat PIG and the SCMH discussed the Retreat PIG's work and took action by assigning the original Retreat PIG to obtain estimates for hotels, facilities, and facilitators.

By immediately discussing and acting on the Retreat PIG's report at the June meeting, the SCMH did not follow the Sunshine Law's requirement that its members only discuss SCMH business outside a meeting in accordance with a permitted interaction, here, the one authorized under section 92-2.5(b)(1), HRS.

¹⁶ The issue of taking action on the PIG report in the same meeting was not raised by Requester.

¹⁷ However, if there were aspects of its retreat that had not been delegated to the Retreat PIG or the Retreat Planning PIG, the SCMH remained free to discuss agenda items relating to those issues at any time.

The SCMH's discussion of and action on the Retreat PIG's report at the same June meeting where the Retreat PIG reported did not comply with section 92-2.5(b)(1), HRS. Because no other permitted interaction applied, the SCMH violated the Sunshine Law through the Retreat PIG's discussions outside SCMH meetings.

To conclude this discussion on investigative PIGs, despite the many Sunshine Law violations, OIP does not find that the SCMH willfully intended to violate or circumvent the law as it had sought OIP's advice, albeit belatedly, and attempted to implement what it thought were the correct procedures regarding the dissolution and addition of members to PIGs. Moreover, due to the passage of time and the fact that many members who were on the SCMH at the time this appeal was filed are no longer SCMH members, OIP does not believe the SCMH could effectively take action to mitigate the public harm from the Sunshine Law violations stemming from the SCMH's past failure to follow the requirements for a PIG. Therefore, OIP instead recommends that the current SCMH members and staff carefully review this opinion and OIP's extensive Sunshine Law online training materials to prevent future violations.

B. Discussion and Action by a Board on an Item Unrelated to PIG Reports at the Same Meeting

This section discusses deliberation and decision making by boards generally, and not subsequent to a PIG report. Unlike the three-meeting requirement for an investigative PIG established under section 92-2.5(b)(1), HRS, discussed in section I.A starting on page 5, there is no general Sunshine Law requirement that a board wait until the meeting after its initial discussion of an issue to act on it.

Requester stated that previously, SCMH decisions were conducted in two meetings: the first meeting would include discussion, and any decision would be made at the next meeting. The November meeting agenda included an item under "Old Business" that read "Discuss a Facilitator for the State Council Retreat." Requester alleged that, contrary to established procedure, one facilitator was discussed at the October meeting, but a new facilitator was introduced for discussion at the November meeting, and the Chair called for a vote at the November meeting instead of waiting for the next meeting after that. Requester did not allege that the SCMH failed to provide proper notice that the board would consider the issue at its November meeting; her complaint appeared instead to be that the discussion and vote on the issue occurred at the same meeting, which was contrary to past procedure.

Regardless of the SCMH's usual procedure for considering an issue, the Sunshine Law does not prohibit a board from both discussing and taking action on an issue during a single meeting. The Sunshine Law requires a board's notice to

list all items “to be considered” at a forthcoming meeting, and as OIP has previously observed, “the term ‘consider’ must ordinarily be interpreted to include possible decision-making on the item.” OIP Op. Ltr. No. 07-06 at 4; HRS § 92-7(a). Thus, under the Sunshine Law, so long as a board has provided sufficient notice allowing it to discuss an agenda item, it is able to also take action on that item. Here, OIP concludes that no Sunshine Law violation resulted when, regardless of its past practice, the SCMH board discussed and took action on a properly noticed item at the same meeting.

C. “Informational Meeting” Without Quorum Is Not Allowed Under Sunshine Law

This issue was not raised by Requester, but the SCMH apparently proceeded with its August meeting without quorum. The August minutes show that the SCMH held an “informational meeting” because it failed to achieve quorum. It allowed testimony and reports, followed by discussions but no voting.

The Sunshine Law does not have any provisions allowing an “informational meeting” in which members of a board that fails to meet quorum for a noticed meeting can nonetheless discuss the agenda items without taking action. If a board does not have a quorum, it cannot hold a meeting regardless of whether the members vote to take any actions. Further, there is no permitted interaction that allows less than a quorum of members to set up an “informational meeting”¹⁸ in lieu of a regular board meeting.

Instead, the permitted interaction at section 92-2.5(d), HRS, specifically addresses what board members in attendance can do when a meeting must be canceled for lack of quorum. It states:

(d) Board members present at a meeting that must be canceled for lack of quorum . . . may nonetheless receive testimony and presentations on items on the agenda and question the testifiers or presenters; provided that:

- (1) Deliberation or decisionmaking on any item, for which testimony or presentations are received, occurs only at a duly noticed meeting of the board held subsequent to the

¹⁸ The permitted interaction at section 92-2.5(e), HRS, allows less than a quorum of a board’s members to attend an “informational meeting or presentation” organized by a different board or entity, with certain restrictions. This permitted interaction requires that the meeting in question not be “specifically and exclusively organized for or directed toward members of the board,” and is thus clearly inapplicable to a board’s own meeting.

- meeting at which the testimony and presentations were received;
- (2) The members present shall create a record of the oral testimony or presentations in the same manner as would be required by section 92-9 for testimony or presentations heard during a meeting of the board; and
 - (3) Before its deliberation or decisionmaking at a subsequent meeting, the board shall:
 - (A) Provide copies of the testimony and presentations received at the canceled meeting to all members of the board; and
 - (B) Receive a report by the members who were present at the canceled or terminated meeting about the testimony and presentations received.

HRS § 92-2.5(d).

This permitted interaction allows board members present at a meeting that must be canceled for lack of quorum, or terminated due to a loss of ICT connections, to receive testimony and presentations on agenda items and to question the testifiers or presenters. Deliberation and decisionmaking may occur only at a future noticed meeting, and the reporting and other requirements of this permitted interaction must be followed.

OIP therefore cautions the SCMh not to proceed with so-called “informational meetings” when it cannot attain or loses quorum, because the members’ discussions beyond receiving testimony and presentations as permitted under section 92-2.5(d), HRS, are not authorized under the Sunshine Law. OIP recommends that SCMh members and staff review OIP’s three-part Quick Review series “Who Board Members Can Talk to And When” available on OIP’s training page at <https://oip.hawaii.gov/training/>.

D. Meetings by Interactive Conference Technology (ICT)

At the time this appeal was filed, the Sunshine Law’s ICT provisions read:

§92-3.5 Meeting by interactive conference technology; notice; quorum. (a) A board may hold a meeting by interactive conference technology; provided that the interactive conference technology used by the board allows interaction among all members of the board participating in the meeting and all members of the public attending the meeting, and the notice required by section 92-7 identifies all of the locations where participating board members will

be physically present and indicates that members of the public may join board members at any of the identified locations.

(b) Any board member participating in a meeting by interactive conference technology shall be considered present at the meeting for the purpose of determining compliance with the quorum and voting requirements of the board.

(c) A meeting held by interactive conference technology shall be terminated when audio communication cannot be maintained with all locations where the meeting by interactive conference technology is being held, even if a quorum of the board is physically present in one location. If copies of visual aids required by, or brought to the meeting by board members or members of the public, are not available to all meeting participants, at all locations where audio-only interactive conference technology is being used, within fifteen minutes after audio-only communication is used, those agenda items for which visual aids are not available for all participants at all meeting locations cannot be acted upon at the meeting.

(d) Notwithstanding the other provisions of this section to the contrary, a board member with a disability that limits or impairs the member's ability to physically attend the meeting may participate in a board meeting from a location not accessible to the public; provided that the member with a disability is connected to other members of the board and the public by both visual and audio means, and the member identifies where the member is located and who, if anyone, is present at that location with the member.

HRS § 92-3.5 (2012).¹⁹

¹⁹ The Sunshine Law's provisions on the use of ICT to link multiple in-person meeting sites were amended in 2021. See HRS § 92-3.5 (Supp. 2021); see also Act 220, Session Laws of Hawaii 2021 (Act 220), and OIP's Sunshine Law training materials available at: <https://oip.hawaii.gov/training/>. Section 92-3.5, HRS, is now titled "[i]n-person meeting at multiple sites by interactive conference technology; notice; quorum." Act 220 also made permanent a modified version of the temporary remote meetings provisions used by boards during the COVID-19 pandemic under emergency periods declared by the Governor (see footnote 35 on page 34).

1. Member Attendance at Non-Noticed Locations

a. October Meeting, Attendance by Member Rocchio

Requester alleged that member Rocchio attended the October meeting by ICT from his home, a location not listed on the meeting notice. She asked whether this was a Sunshine Law violation. The Response explained that member Rocchio had contacted AMHD stating he had an undisclosed illness and asked if he could attend from home. His request was approved by the SCMHC Chair prior to the meeting.

For an ICT meeting, “a board member with a disability that limits or impairs the member’s ability to physically attend the meeting” may attend via a connection by audio and video means (e.g., by videoconference, Skype, Zoom, etc.) from a private location not open to the public, such as a home or hospital room. HRS § 92-3.5(d). The disability need not be permanent. For example, a board member who has a broken leg or influenza may participate from home. Because members of the public are not able to participate from the private location, the meeting notice does not have to state that a disabled board member will be participating from home or another location. OIP finds credible AMHD’s account of what happened and finds that member Rocchio’s illness limited or impaired his ability to physically attend the meeting. OIP further concludes that member Rocchio’s attendance from a location not listed on the meeting notice did not violate section 92-3.5, HRS.²⁰ Requester’s question as to whether, assuming member Rocchio was not properly attending the meeting, the votes he cast were valid or amounted to another Sunshine law violation is moot because Rocchio did have a temporary disability which allowed him to attend the meeting from home, a non-noticed location.

Requester also alleged that, while attending the October meeting remotely, member Rocchio failed to announce his location and did not identify other persons who may have been present. The Response did not address Requester’s allegations. The October meeting minutes are likewise silent.

Although the meeting notice need not include the address of the private location from where a disabled board member will be attending a meeting, section 92-3.5(d), HRS, does require that during the meeting, the disabled board member

²⁰ Requester also asked (1) whether member Rocchio’s participation and voting from home during the October meeting was a violation of the Sunshine Law; (2) “[w]as the action [at the October meeting] to approve the September minutes a violation since quorum may have been based upon attendance from non noticed [sic] locations;” and (3) whether member Rocchio’s attendance in the October meeting minutes should be changed to “unexcused.” Because OIP concludes that member Rocchio’s temporary disability qualified him to attend from home, these questions are moot.

generally identify the location and any persons who are present at that location with the member. To protect the disabled member's privacy and because the public is not able to participate from the private location, the disabled member's location during a meeting may be generally identified, such as "home" or "hospital," without providing an exact address.

OIP finds that Requester's assertion stands un rebutted and concludes that the SCMh violated section 92-3.5, HRS, through member Rocchio's failure to announce during the meeting where he was participating from, even in general terms as his "home," and who else, if anyone, was present.²¹ OIP notes, however, that this relatively minor violation does not appear to have caused discernable public harm, particularly as there were sufficient board members in attendance to meet quorum and take action without him.

b. October Meeting, Attendance by Member Crozier

Requester alleged that member Crozier may not have attended the October meeting from a noticed location. The Response stated that member Crozier attended the October meeting from the Maui Community Mental Health Center, which was listed on the notice as a meeting location. The Response explained that the host of the meeting site had been using an iPad to connect for previous meetings, but for the October meeting, she used a laptop computer. The Response suggested that "[t]his difference in quality might have caused Dr. Dang's concern." OIP finds credible SCMh's representation that member Crozier attended from the Maui Community Mental Health Center, a noticed location, and there is no evidence to the contrary.

²¹ Requester asked whether (1) the Chair's decision to include member Rocchio's participation from a non-noticed location as counting towards quorum was a Sunshine Law violation, and (2) the Chair's allowing of member Rocchio to participate in the meeting was a separate violation. Section 92-1.5, HRS, requires OIP to respond to complaints "concerning the failure of any board to comply" with the Sunshine Law. To the extent that Requester asked OIP whether the actions of an individual member of the SCMh violated the Sunshine Law, those questions are outside of OIP's jurisdiction. Under section 92-1.5, HRS, OIP's jurisdiction is limited to responding to complaints against boards. However, section 92-13, HRS, states that any person who wilfully violates any Sunshine Law provision shall be guilty of a misdemeanor and may be summarily removed from the board unless otherwise provided by law. Although OIP does not have jurisdiction to enforce these criminal provisions of the Sunshine Law, it does not appear that there were willful violations by the Chair in allowing member Rocchio to participate in the October meeting.

OIP therefore concludes that member Crozier's attendance at the October meeting was not in violation of the Sunshine Law.²²

c. November Meeting, Attendance by Member Rocchio

Requester alleged that member Rocchio participated in the November meeting from home and failed to disclose whether there were other people present. Requester stated that it was not until she "voiced opposition" and identified it as a potential Sunshine Law violation that member Rocchio disconnected his home location from the meeting.²³ The Response stated that member Rocchio did not have transportation to the DOH meeting location, but after Requester voiced concern, he arranged for transportation to the noticed location, and although he was late, he attended from there.

OIP finds that member Rocchio did indeed initially attempt to attend the meeting from home, which was a non-noticed location, and that he did not have a disability that limited or impaired his ability to physically attend the meeting. OIP therefore concludes that the SCMHS violated section 92-3.5, HRS, by member Rocchio's initial attendance from his home, but once he ceased attending the meeting from home there was no further violation, and his physical attendance at the noticed location was in compliance with the Sunshine Law.²⁴

²² Requester asked whether (1) there was a Sunshine Law violation if member Crozier attended from an unnoticed location; (2) the motions member Crozier made would be in violation of the Sunshine Law if her location was not noticed; and (3) listing member Crozier's participation in the minutes as counting towards quorum was a violation. Having found that member Crozier properly attended the meeting from a noticed location, these additional questions are moot.

²³ Requester asked whether this was another violation by member Rocchio, and whether the Chair's repeated approval of member Rocchio's participation from a non-noticed location was another repeat violation. Per section 92-1.5, HRS, to the extent that Requester asked OIP whether the actions of an individual member violated the Sunshine Law, those questions are outside of OIP's jurisdiction. See footnote 21 on page 23.

²⁴ While lack of quorum was not raised as an issue for the November meeting, OIP notes the SCMHS is entitled to twenty-one members under section 334-10, HRS. Quorum would therefore be 11, and even if member Rocchio is not counted, the November minutes show there were twelve other members present. See § 92-15, HRS (setting quorum at a majority of members to which a board is entitled where a board's creating law or ordinance does not otherwise specify).

2. No SCMH Member at Noticed Location

Requester alleged that for the November meeting, it did “not appear that the Hawaii Island location had a member who participated from a noticed location which identified where a member would be physically present.” The Response stated that SCMH member Matayoshi usually attended from the Hawaii island site but was absent from the November meeting. The meeting location was open throughout the meeting and non-members of the SCMH attended from there. Section 92-3.5, HRS, allows for in-person meetings held at multiple sites connected by ICT, and requires “the notice required by section 92-7 [to] identif[y] all of the locations where participating board members will be physically present.” Apart from the limited ability of a disabled member to attend from a private location as discussed above in I.D.1 starting at page 22, the law allows board members to attend and participate in an in-person meeting only at one of the physical locations listed on the notice as a public meeting site.

However, the law does not require every noticed location to have a board member in attendance.²⁵ HRS § 92-3.5. It restricts board members’ ability to attend an in-person meeting from a non-noticed location, but does not mandate a minimum number of board members to be present at each noticed location. So long as every noticed location is open for public participation for the duration of the meeting, as was the case here, there is no violation. Id.

3. November Meeting: Loss of Audio Connection

Requester alleged that the outgoing audio from the Kauai location could not be maintained for the SCMH’s November meeting but the Chair did not cancel the meeting. The Response stated that the hosts of the Kauai meeting site could hear and see all other meeting locations, but the Kauai site had a malfunctioning microphone. The SCMH member on Kauai used the Zoom chat function to communicate, and the Chair read each chat out loud.

²⁵ Section 92-3.5(a), HRS, as it now reads, allows a board to provide “additional locations” open for public participation but where no participating board members will be physically present, which OIP previously referred to as “curtesy locations.” The meeting notice must list any additional locations open for public participation but where no participating board members will be physically present and must specify that, if an additional location loses its audio connection to the meeting, whether the meeting will continue without that location or will be automatically recessed to restore communication. HRS § 92-3.5(a). This meeting involved only noticed locations, with no additional locations listed.

At the time this appeal was filed, section 92-3.5(c), HRS, stated that an ICT meeting “shall be terminated when audio communication cannot be maintained with all locations where the meeting by interactive conference technology is being held, even if a quorum of the board is physically present in one location.”²⁶ Based on the fact that the Kauai site could not establish or maintain audio communication, OIP concludes that the SCMh should have terminated the ICT meeting at all locations, and its failure to do so violated the Sunshine Law. Nonetheless, OIP finds that given the mitigating actions taken by the SCMh at the time, *i.e.*, using Zoom chat to communicate and having the Chair read each chat out loud, the public harm from this violation was minimal.²⁷

E. Board Packets

At the time this appeal was filed, the Sunshine Law’s provisions on board packets read:

[§92-7.5] Board packet; filing; public inspection; notice.

At the time the board packet is distributed to the board members, the board shall also make the board packet available for public inspection in the board’s office. The board shall provide notice to persons requesting notification of meetings pursuant to section 92-7(e) that the board packet is available for inspection in the board’s office and shall provide reasonably prompt access to the board packet to any person upon request. The board is not required to mail board packets. As soon as practicable, the board shall accommodate requests for electronic access to the board packet.

For purposes of this section, “board packet” means documents that are compiled by the board and distributed to board members before a meeting for use at that meeting, to the extent the documents

²⁶ Section 92-3.5(c), HRS, was amended effective January 1, 2022, and now states that an in-person meeting at multiple sites held by ICT shall be automatically recessed for up to thirty minutes to restore communication when audio communication cannot be maintained with all locations where the ICT meeting is being held, even if a quorum is physically present in one location. The meeting may reconvene when audio or audiovisual communication is restored, but if it is not possible to reconvene the meeting within thirty minutes and the board has not provided reasonable notice as to how the meeting will be continued at an alternative date and time, then the meeting is automatically terminated. HRS § 92-3.5(c).

²⁷ Section 92-3.5, HRS, requires ICT meetings to maintain an audio connection between all noticed locations, so this finding should not be read as contradicting OIP’s conclusion that not terminating the meeting in this case was a violation or as allowing chat features on ICT platforms to substitute for audio connections.

are public under chapter 92F; provided that this section shall not require disclosure of executive session minutes, license applications, or other records for which the board cannot reasonably complete its redaction of nonpublic information in the time available before the public inspection required by this section.

HRS § 92-7.5 (Supp. 2021).²⁸

1. No Violation of Board Packet Law When All Members Were Sent Electronic Copies, But Not Given Hard Copies at the Meeting

Requester stated that at the November meeting there was a discussion about two facilitators based on proposals that were included in handouts. Requester alleged that the Chair limited distribution of hard copies of the handouts to only “a select group which constituted the majority[.]” Requester asserted that the SCMh then discussed and voted on the proposals although not all members appeared to have access to the hard copies, which may have impacted their vote. Requester asked whether the Chair violated the Sunshine Law by restricting access to the handouts and when she acted on this agenda item.²⁹

The Response stated it is AMHD’s practice to provide hard copies of handouts at ICT meeting sites for the use of SCMh members and the public. The SCMh provided evidence that the two facilitator proposals were sent to all members by email two days before the meeting.

Section 92-7.5, HRS, does not require the board packet to be provided specifically in hard copy as physical paper documents. Indeed, the Sunshine Law does not require a board to distribute materials to members in advance of a meeting at all. Rather, it requires that if a board does choose to create a board packet by distributing materials to members in advance of a meeting, it must also make those materials available to the public as described in the law. HRS § 92-7.5. In other words, the focus of the board packet law is to ensure public access to those materials sent by a board to its members in preparation for a meeting. There is no requirement

²⁸ Section 92-7.5, HRS, as amended in 2022, now requires that board packets be available no less than 48 hours before any meeting, but also clarifies that boards are not required to create board packets. See Act 264.

²⁹ Per section 92-1.5, HRS, to the extent that Requester asked OIP whether actions of an individual SCMh member violated the Sunshine Law, such questions are outside of OIP’s jurisdiction. See footnote 21 on page 23.

for boards to send materials to its members in the first place or to ensure materials are sent to members in a certain format.

Here, OIP finds that all SCMH members received emailed copies of the facilitators' proposals in advance of the November meeting. While there is disagreement between Requester and the SCMH as to whether all members also were provided hard copies at the meeting itself as is AMHD's normal practice, it is not a question of any legal significance because the Sunshine Law did not require the SCMH to provide board members with a hard copy of materials in the first place. OIP therefore concludes that any failure by the SCMH to provide every board member with a hard copy of the facilitator proposals did not violate the board packet requirements.

2. No Violation of Sunshine Law When SCMH Did Not Receive and Was Unable to Distribute Presenter's Materials Prior to Meeting

Requester stated that the November meeting included a presentation by a speaker from the Healthcare Association. The speaker had not sent the SCMH a copy of her presentation for distribution prior to the meeting, and according to Requester only one meeting location had copies of her presentation. Requester asked whether the Chair violated the Sunshine Law by acting on this agenda item and allowing the presentation with the limited distribution of handouts. The Response stated that the presentation was for information only, and that the SCMH took no action on it.³⁰

With regard to SCMH's obligations, as previously discussed, the Sunshine Law does not require a board to distribute materials to its members in advance of a meeting in the first place, and the focus of the board packet law is instead to ensure the public's access to those materials that a board does distribute. Indeed, when an item a board would otherwise have distributed as part of its board packet reaches the

³⁰ Regarding the allegations made specifically against the Chair, the Response stated the Chair did not ask for the presenter's materials to be distributed at the meeting site where the presenter was attending. The Response also stated the SCMH secretary did distribute copies of the PowerPoint, and all members received a copy of the PowerPoint by email and a booklet by mail after the meeting. Per section 92-1.5, HRS, to the extent that Requester asked OIP whether the actions of an individual SCMH member violated the Sunshine Law, this question is outside of OIP's jurisdiction. See footnote 21 on page 23.

board too late to include it in the board packet,³¹ OIP routinely advises that a board may wait and distribute the item at the board's meeting instead. See HRS § 92-7.5 (containing no requirement for a board packet to be sent or to include particular materials; limiting the definition of "board packet" to items distributed in advance of a meeting).

Here, OIP finds that the SCMh did not distribute the presenter's materials to its members or the public attending the meeting. While it may have been helpful for board members and the public to have the presenter's materials in front of them during the presentation, OIP nonetheless concludes that the Sunshine Law was not violated by the SCMh's inability or failure to distribute the presenter's materials in the board packet prior to or even during the meeting.

As an alternative argument, the Sunshine Law's ICT provisions prohibit a board from acting on agenda items when the ICT connection is lost and necessary visual aids are not provided. The provision in effect at the time of the November meeting stated:

If copies of visual aids required by, or brought to the meeting by board members or members of the public, are not available to all meeting participants, at all locations where audio-only interactive conference technology is being used, within fifteen minutes after audio-only communication is used, those agenda items for which visual aids are

³¹ As noted in footnote 28 on page 27, section 92-7.5, HRS, now includes a deadline of at least 48 hours before the relevant meeting by which the board packet must be made available, which as a practical matter means no materials may be distributed to board members between that deadline and the meeting itself, and thus increases the likelihood that a board may receive written public testimony and other materials too late to distribute them in advance of the meeting as part of a board packet. Thus, boards must rely on distribution of such materials at the meeting itself in order to allow board members to review them without violating the board packet requirements.

not available for all participants at all meeting locations cannot be acted upon at the meeting.

HRS § 92-3.5(c) (2012).³²

Here, even if the November meeting was held via audio-only ICT (which has not been established), OIP finds that the SCMH did not take action on the presentation, and therefore concludes that there was no violation of the ICT meeting requirements with regard to visual aids.

3. Brochure

The November meeting agenda included “Review Draft of Brochure by C. Knightsbridge” and “Continue Discussion on the SCMH Brochure.” Requester alleged the brochure draft was not made available to all members and asked whether it was a Sunshine Law violation when the Chair “approved acting on this item.”³³ The Response stated that SCMH member Knightsbridge had previously been tasked with drafting a brochure and was supposed to have provided AMHD with the draft for distribution prior to the meeting. Requester asserted, and the Response agreed, that the discussion stopped after Requester sought a deferral until all members received the brochure to review and comment. The meeting minutes indicate that Knightsbridge described the work he had done on the draft and then the Chair asked that the draft be distributed for discussion at a future meeting.

The Sunshine Law requires that boards only discuss items properly listed on a meeting agenda. HRS § 92-7. However, the notice and board packet provisions of the Sunshine Law do not require that discussions of agenda items be limited to items for which there are written materials. HRS §§ 92-7; 92-7.5. OIP concludes the SCMH did not violate the Sunshine Law by commencing discussion on the draft

³² Section 92-3.5(c), HRS, was amended effective January 1, 2022, and now requires, in relevant part, that a meeting held by ICT which lost connectivity may reconvene when either audio or audiovisual communication is restored, and copies of nonconfidential visual aids as part of a scheduled presentation shall be made available by posting on the internet or other means to all meeting participants, and those agenda items for which visual aids are not available for all participants at all meeting locations shall not be acted upon at the meeting. Because the SCMH took no action on the relevant agenda item, OIP would not have found a violation under the current ICT requirements either.

³³ Per section 92-1.5, HRS, to the extent that Requester asked OIP whether the actions of an individual member violated the Sunshine Law, those questions are outside of OIP’s jurisdiction. See footnote 21 on page 23.

brochure listed on the agenda, even though a copy of the draft had not been distributed.

The essence of Requester's complaint, however, is that she as a member had not been given enough information about the brochure to meaningfully consider it, and OIP questions whether the SCMH's description of the agenda items was sufficient to reasonably notify not just Requester but also the public of what the board intended to consider under that item, as they gave no information about the topic to be covered by or the prospective content of the brochure. OIP advises the SCMH that although the Sunshine Law did not require it to circulate a copy of the proposed brochure prior to the meeting, its description of the brochure agenda items should have at least included the topic to be addressed by the proposed brochure. See footnote 9 on page 10.

F. Additional Concerns and Potential Violations

The end of Requester's appeal was labeled as "additional concerns" and "potential violations." She first noted that the Chair failed to schedule elections every twelve months in accordance with the bylaws, and asked whether: (1) SCMH is required to hold elections every twelve months from the last election; (2) the elected position expires after twelve months; (3) the failure by the Chair to schedule elections every twelve months is a Sunshine Law violation; (4) the Chair "willfully" delaying elections and continuing to act as the Chair is a Sunshine Law violation; and (5) the Chair's changes to the election cycle in the bylaws from fiscal year to calendar year and request that SCMH vote on it is a Sunshine Law violation. All these questions are outside the scope of the Sunshine Law as they deal instead with the powers and governance of the SCMH. As such, they are outside OIP's jurisdiction and OIP is unable to address them.

Requester next explained that member Ries had been acting in an official capacity representing the SCMH and providing updates about it at the Mental Health Task Force (MHTF) meetings, which she described as a "legislative group." She also stated that member Ries was not approved to act on behalf of SCMH at the MHTF meetings and asked if this was a violation. The Response noted member Ries attended MHTF meetings "as a member of the community" and not as a member of the SCMH's Legislative PIG. Regardless of whether member Ries considered himself to be acting as a member of the community or a member of the SCMH, if he had been discussing SCMH business with other SCMH members at the MHTF meetings that would raise a question as to whether such discussions were authorized under the Sunshine Law. In this case, however, Requester's complaint raises the question of whether member Ries was authorized to speak for the SCMH, which is a question of the SCMH's powers and governance and is not a Sunshine Law issue. Requester has not alleged that member Ries discussed SCMH business with one or more other

SCMH members at the MHTF meetings, and indeed, Requester's complaint appears instead to be that he was the only SCMH member present and wrongly presented himself as representing the SCMH. As such, it is outside OIP's jurisdiction.

Regarding ICT meetings, Requester asked the following:

- whether the Chair or other member convening the meeting must ensure that all attendees are participating from noticed locations, which are those that have been identified as a location where a member will be physically present;
- whether there must be verification that all locations attended by members via ICT have maintained audio at the start and throughout the meeting as a requirement to conduct meetings;
- if a request is made of the Chair or other member conducting the meeting to poll the sites participating by ICT to ensure they are participating from a noticed site, *i.e.*, a site that indicates that a member will be physically present and that at a minimum they have audio maintained at the start and throughout the meeting, whether the request must be acted on; and
- whether the person conducting the meetings must inform members that they are to provide notice if their location cannot maintain audio communication.

The Response stated that AMHD staff contacts each meeting site prior to the start of an ICT meeting to ensure each noticed meeting site is connected.

The Sunshine Law imposes mandates on boards as a whole, not on individual members of boards. Insofar as Requester is asking whether the Sunshine Law requires a board to take each of the listed actions, OIP advises that each board is generally responsible for following the Sunshine Law's requirements, which includes ensuring that its ICT meetings are properly held, but the Sunshine Law does not require the specific actions raised by Requester. In other words, a board holding an ICT meeting is not specifically required to ask all participating members whether they are at a noticed meeting location, check their connectivity, or otherwise take particular steps to check whether the requirements for an ICT meeting are being met. A board's failure to take those specific actions does not violate the Sunshine Law.

If, however, a board's ICT meeting does not follow the requirements set out in the Sunshine Law, such as if non-disabled members attend from non-noticed sites or a noticed meeting site is disconnected without the rest of the meeting being aware of the loss of connectivity, that would constitute a violation of the Sunshine Law by the board as a whole. It is thus up to the board as a whole to be aware of the requirements for holding an ICT meeting and recognize when they are not being

met, even though the Sunshine Law does not require the board to take specific steps to verify that those requirements are being met.³⁴

Requester also asked whether the SCMH Chair, vice chairs, and secretary must act before the next scheduled meeting on a formal request from a member to have suspected violations investigated. The Sunshine Law does not require a board to take action upon request to have suspected Sunshine Law violations investigated. A person seeking to pursue an alleged violation of the Sunshine Law has the option to appeal the issue to OIP or to appeal the issue to the court. HRS §§ 92-1.5, -11, and -12; and 92F-42(18).

Finally, Requester asked whether the SCMH's votes on a retreat venue and facilitator are invalid if the solicitations for bids acted on by the Chair and first vice chair are determined to be Sunshine Law violations. Improper board actions are not automatically invalid, and board actions cannot be voided by OIP, but section 92-11, HRS, allows a board's final action taken in violation of sections 92-3 and 92-7, HRS, to be voided by a court. A lawsuit seeking to void a final action must be brought within ninety days of the action. See also footnote 7 on page 10.

II. S APPEAL 20-8

This appeal alleged a violation of the requirements for holding a meeting via ICT. Section 92-3.5(a), HRS, as it read when this appeal was filed, allowed boards to hold ICT meetings provided that the ICT allowed interaction among all members of the board and all members of the public attending the meeting, and the notice identified all locations where participating board members would be physically present. Section 92-3.5(c), HRS, required that an ICT meeting be terminated when audio communication could not be maintained with all locations where the meeting by ICT was being held, even if a quorum of the board was physically present in one location.

³⁴ Requester also asked, when a violation of the Sunshine Law occurs at a meeting attended by the Chair, vice chairs, and secretary, whether they are each in violation for not having stopped the violation. As noted earlier, violations of the Sunshine Law are committed by the board as a whole. Per section 92-1.5, HRS, OIP is unable to address the question of individual board members' liability because it is outside of OIP's jurisdiction. See footnote 21 on page 23.

The SCMH held an ICT meeting on March 10, 2020 (March 2020 Meeting), with five meeting sites listed on its meeting notice.³⁵ Requester attended as a board member at the Waimano site. The minutes of the March 2020 Meeting reflect that she was making statements regarding the Oahu Area Service Board when the Waimano site lost its audio and visual connection with the rest of the meeting. Requester complained that the March 2020 Meeting was not cancelled or converted to an informational meeting³⁶ after connectivity with the Waimano site was lost.³⁷ Requester left the meeting after the Waimano site lost connectivity as she believed the meeting would have to be cancelled.

In its reply to this appeal, SCMH characterized the incident as a “brief technical connection issue” during the meeting and asserted that staff was able to reestablish the connection. The March 2020 Meeting minutes state, in relevant part:

At 11:15 a.m. the Waimano computer site froze. Chair Ries asked that the Council meeting PAUSE until the Waimano site was fixed.

At 11:18 a.m. the Waimano site was restored. Staff reported that C. Dang left the meeting. As a result, the Council meeting lost quorum.

Chair Ries then asked members to inform the Council if they need to leave the meeting prior to adjournment.

The meeting apparently then continued with “for information” items only and the agenda items requiring action by SCMH were “tabled” until the next meeting. The SCMH briefly discussed the status of a PIG, an announcement was made about a conference the following month, a future agenda item was briefly discussed, and other agenda items were “tabled” until the next meeting with quorum. The meeting was adjourned at 11:33 a.m.

³⁵ The March 2020 Meeting occurred a few days before Governor David Ige issued, on March 16, 2020, the first in a series of emergency proclamations that, among other things, partially suspended the Sunshine Law during the COVID-19 pandemic to the extent necessary to allow boards to conduct meetings through remote technology prior to the enactment of Act 220.

³⁶ As explained in section I.C starting on page 19, boards may not hold an “informational meeting” if they lose quorum or if an ICT meeting must be cancelled due to loss of connectivity.

³⁷ Requester made two additional allegations that were withdrawn shortly after U APPEAL 20-8 opened.

When the meeting was held in 2020, section 92-3.5, HRS, was silent as to how long a board could recess and try to restore ICT connection. During that time, OIP routinely advised that a reasonable interpretation of the ICT provisions was that if both audio and visual communication was lost, the meeting could proceed if at least an audio connection could be restored within fifteen minutes. If audio connection could not be restored within fifteen minutes, the meeting had to be canceled. Because the connection was restored after only three minutes, OIP finds the cancellation of the March 2020 Meeting was not required due to loss of connection to a noticed meeting site.

However, the SCMH lost quorum when Requester left the meeting during the three-minute recess while the ICT connection was being restored. By definition, a meeting under the Sunshine Law requires the presence of a quorum of a board to deliberate or make a decision. See HRS § 92-2 (defining “meeting” as the “convening of a board **for which quorum is required** to make a decision or to deliberate toward a decision” (emphasis added)). The Sunshine Law separately addresses what the remaining board members at a meeting canceled for lack of quorum are authorized to do. HRS § 92-2.5(d) (see section I.C starting on page 19). Thus, although the meeting was not required to be cancelled due to the brief loss of connection, it was required to end due to a loss of quorum.

After a meeting ends due to lack of quorum, the remaining board members in attendance are no longer in a meeting and may only discuss items on the agenda to the extent a permitted interaction in section 92-2.5, HRS, applies to allow it. Again, Requester’s complaint was that the March 2020 Meeting was not cancelled or converted to an informational meeting after connectivity to the Waimano site was lost. As discussed in section I. C starting on page 19, the “informational meeting” permitted interaction clearly did not apply when the SCMH lost connectivity and then lost quorum for its own meeting since section 92-2.5(e), HRS, requires, among other things, that the “meeting or presentation is not specifically and exclusively organized for or directed toward members of the board.” The SCMH should not have proceeded to take up agenda items under the informational meeting permitted interaction.

Instead, after Requester left and quorum was lost, section 92-2.5(d), HRS, allowed the remaining members present to receive testimony and presentations on items on the agenda and question the testifiers or presenters. OIP therefore concludes that the SCMH could have properly proceeded with taking testimony and presentations on the remaining agenda items after it lost quorum, but to the extent its discussion of the agenda items went beyond that, the board violated the Sunshine Law.

Finally, the SCMH noted it has taken measures to ensure compliance with the Sunshine Law. These include explaining remote meeting guidelines at the start of each meeting, and asking members to indicate when they are leaving the meeting to step away for a break or to address another obligation where they will be away from their audio and visual meeting connection. The SCMH asserted that its Chair has also made clear, and the minutes are to reflect, when during remote meetings the SCMH has achieved quorum, when the meeting is “for information” only (as explained in section I.C starting on page 19, a board is not allowed to hold an informational meeting after loss of quorum or connectivity), when new members have joined, and when members have left.

Finally, most of the membership of the SCMH has changed since these appeals were filed, and some AMHD staff members have left. Therefore, OIP again recommends that the SCMH’s current members and staff review the training materials available on OIP’s website at oip.hawaii.gov.

RIGHT TO BRING SUIT

Any person may file a lawsuit to require compliance with or to prevent a violation of the Sunshine Law or to determine the applicability of the Sunshine Law to discussions or decisions of a government board. HRS § 92-12 (2012). The court may order payment of reasonable attorney fees and costs to the prevailing party in such a lawsuit. Id.

Where a final action of a board was taken in violation of the open meeting and notice requirements of the Sunshine Law, that action may be voided by the court. HRS § 92-11 (2012). A suit to void any final action must be commenced within ninety days of the action. Id.

This opinion constitutes an appealable decision under section 92F-43, HRS. A board may appeal an OIP decision by filing a complaint with the circuit court within thirty days of the date of an OIP decision in accordance with section 92F-43. HRS §§ 92-1.5, 92F-43 (2012). The board shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court’s review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-43(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR. This rule does not allow for extensions of time to file a reconsideration with OIP.

This letter also serves as notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES

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