

From: [OIP](#)
To: ["Carol Ho"omanawanui](#)
Bcc: [Brooks, Jennifer Z](#)
Subject: RE: Request for Guidance on the Sunshine Law as it applies to a Complaint Against a Trustee
Date: Monday, April 29, 2019 8:01:00 AM

Ms. Ho'omanawanui,

I'm responding as today's AOD.

The total number of board members involved in the discussions that are part of the PIG's work should be less than a quorum. While (as Liza Canady mentioned earlier) we are inclined to think that the Trustee who is the subject of the complaint probably does not count toward quorum and thus wouldn't count toward the PIG's maximum membership for an issue on which that Trustee has recused himself or herself from discussion or voting, any other Trustees who are part of the discussion, including a Trustee who is the complainant, would count toward the "less than a quorum" maximum number who can be part of the PIG while remaining in compliance with the Sunshine Law.

In other words, assuming the complainant Trustee has not also recused himself or herself from voting and discussion on the matter, then if the PIG wants to talk to the complainant Trustee that Trustee should be part of the PIG's membership and will be counted in determining if the PIG's membership is less than a quorum.

In response to the question in your other email, I agree with you that the various procedures you highlighted seem likely to give rise to a Sunshine Law violation. Whether following those procedures has in fact created a Sunshine Law violation in a specific case is something OIP could determine only with the facts (including the board's position) before it, i.e. as part of an appeal file.

Aloha,
Jennifer Brooks

Jennifer Z. Brooks
Staff Attorney

Office of Information Practices
State of Hawaii
No. 1 Capitol District Building
250 S. Hotel Street, #107
Honolulu, HI 96813
Ph (808) 586-1400
Facsimile: (808) 586-1412
Email: oiip@hawaii.gov
Website: <http://oiip.hawaii.gov>

From: Carol Ho'omanawanui <carolh@oha.org>

Sent: Friday, April 26, 2019 2:58 PM

To: OIP <oip@hawaii.gov>

Subject: RE: Request for Guidance on the Sunshine Law as it applies to a Complaint Against a Trustee

Aloha Ms. Canady,

This is my separate email relating to the potential violations of the Sunshine Law we identified in OHA's policy and process of addressing possible violations of the Trustee Code of Conduct. Attached is a pdf document with an excerpt of Part II – Sanctions for Violations of the Trustee Code of Conduct. If you open this document, the areas we have identified as potential violations of the Sunshine Law is highlighted in yellow. To the right of the highlighted areas should be a quotation box which is a comment to the document which contains notes on why we feel there is a violation. If you double click on the comment, you will see the explanation on why we feel there is a sunshine law violation. These sections are contained on pages 9 and 10.

If you are unable to access the comments/notes contained in the document, please let me know and I will see if I can send you the information in another format.

Please let me know if you need any further information.

Mahalo,

Carol

From: OIP <oip@hawaii.gov>

Sent: Friday, April 26, 2019 9:41 AM

To: Carol Ho'omanawanui <carolh@oha.org>

Subject: RE: Request for Guidance on the Sunshine Law as it applies to a Complaint Against a Trustee

Dear Ms. Ho'omanawanui,

The Office of Information Practices (OIP) received your email dated April 25, 2019, asking the below five questions. Please see my below responses in red.

1. A properly noticed meeting would allow the Trustees to discuss this complaint as well as the process to address the complaint, which may include a hearing. Could this matter be discussed in an executive meeting closed to the public? If so, which exception would apply under HRS § 92-5? Also, could HRS § 92-5(a)(2) apply to discussions relating to complaints against a Trustee (Board member) with the possibility of sanctions against a Trustee?

The trustees may discuss this complaint against Respondent Trustee, the process to address this complaint, and hold discussions relating to the complaints received with the possibility of sanctions in an executive meeting under section 92-5(a)(2), Hawaii Revised Statutes (HRS). However, please be advised that section 92-5(a)(2), HRS, permits the "individual concerned" to request and be granted an open meeting to discuss the issues regarding this individual.

2. Can the BOT utilize HRS § 92-2.5 to create a Permitted Interaction Group (PIG) to investigate

the CEO's complaint against a Trustee, given that the CEO and the Respondent Trustee will be interviewed by the members of the PIG in connection with the Report the PIG will present to the BOT at the second stage meeting? We seek clarification on whether or not the PIG members, who will not consist of the Respondent Trustee (the Trustee who the complaint was made against), can interview, speak with, and question the Respondent Trustee as part of the PIG's investigation of the complaint. We are cognizant that a PIG cannot consist of a sufficient number of Trustees to constitute a quorum of the BOT (5), so we wish to keep the investigative PIG to a maximum of four Trustees. This will insure that there are a sufficient number of Trustees who have not participated in the investigation and who can therefore vote on the recommendations of the PIG without conflict. The board may create a permitted interaction group (PIG) under section 92-2.5 (b), HRS, to investigate the complaint. Please note that while OIP has not issued a formal opinion as to this matter, if Respondent Trustee openly recuses himself from all discussion and voting, the PIG may proceed with four trustees. The four trustees then would investigate the matter, which would include interviewing and questioning Respondent Trustee. Otherwise, OIP advises that the PIG only have three trustees because with three trustees investigating and Respondent Trustee responding, it is clear that there are only four trustees participating in the process and there likely would not be any question as to five board members engaging in conduct in violation of the Sunshine Law.

3. Does the Respondent Trustee's potential interview/meeting with the PIG members add to the number of PIG members such that the quorum restriction may be implicated? So, if there were four Trustee-members of the PIG investigating another Trustee (Respondent Trustee) would the Respondent Trustee become the fifth Trustee member of the PIG thereby invalidating the PIG? Please see my response to Question 2.

4. At the second meeting to present the PIG's findings and recommendations and the third meeting where the Trustees discuss and deliberate the PIG Report, can both of those meetings be held in Executive Session (ES)? The closest HRS section we can find to support an ES is § 92-5 (a) (2). We see no reason why the privacy rights of a Respondent Trustee are not protected as much as an officer or employee of OHA.

At the second meeting of the full board, the PIG's findings must be presented during the open portion of the meeting. If the PIG wishes, it may present a sanitized version of its findings. However, the deliberation and decision-making of the PIG may be done in an executive meeting under section 92-5(a)(2), HRS, at the third meeting of the full board. If, during the executive session, the board discusses and votes, the board must immediately thereafter announce in open session the board's decision along with the votes cast by individual members. See OIP Op. Ltr. No. 06-07 (finding that the votes cast by individual members in executive session were not protected from disclosure).

5. If the PIG recommends a hearing be held as provided for in the Trustee Code of Conduct Policy, can the hearing, in which the CEO (as Complainant) and the Respondent Trustee present their respective cases, also be held in ES under §92-5(a)(2)?

If the purpose of the hearing is to provide both Complainant and Respondent Trustee an opportunity to present their respective cases, it is not clear as to why an open hearing under section 92-5(a)(2), HRS, is necessary, as both parties may relay their respective cases to the PIG as part of the PIG's investigation, which would be conducted outside of a Sunshine Law Meeting.

Lastly, regarding your request to identify procedures within OHA's policy that could raise possible Sunshine Law violations, please identify the exact sections and page numbers you would like OIP to review, and explain the concerns that those specific sections raise.

I hope this information is helpful.

Liza Onuma Canady

Staff Attorney
Office of Information Practices
State of Hawaii
No. 1 Capitol District Building
250 South Hotel Street, Room 107
Honolulu, Hawaii 96813
Phone (808) 586-1400
Fax (808) 586-1412

From: Carol Ho'omanawanui <carolh@oha.org>

Sent: Thursday, April 25, 2019 10:37 AM

To: OIP <oip@hawaii.gov>

Cc: Colette Machado <colettem@oha.org>; rgk@kleinlg.com; Raina Gushiken <rainag@oha.org>

Subject: Request for Guidance on the Sunshine Law as it applies to a Complaint Against a Trustee

Aloha OIP,

We write for guidance on the following issues confronting the Office of Hawaiian Affairs (OHA) Board of Trustees (BOT). We would appreciate your guidance not later than this Friday April 26th morning inasmuch as the BOT must file its next agenda by that time for a meeting scheduled for May 2nd. Sorry for any inconvenience this may cause and thank you for your timely assistance.

The OHA-BOT has an internal policy covering complaints made against a Trustee levelled by another Trustee or the CEO of OHA—see the attached policy. Presently, the CEO has complained about actions taken by one of the Trustees that appear to violate the Trustee Code of Conduct.

The policy, which covers the distribution of the complaint, investigation, and potential hearing process, may have several Sunshine Law violations and feel free to point them out. However, we seek guidance on the following issues:

1. A properly noticed meeting would allow the Trustees to discuss this complaint as well as the process to address the complaint, which may include a hearing. Could this matter be discussed in an executive meeting closed to the public? If so, which exception would apply under HRS § 92-5? Also, could HRS § 92-5(a)(2) apply to discussions relating to complaints against a Trustee (Board member) with the possibility of sanctions against a Trustee?
2. Can the BOT utilize HRS § 92-2.5 to create a Permitted Interaction Group (PIG) to

investigate the CEO's complaint against a Trustee, given that the CEO and the Respondent Trustee will be interviewed by the members of the PIG in connection with the Report the PIG will present to the BOT at the second stage meeting? We seek clarification on whether or not the PIG members, who will not consist of the Respondent Trustee (the Trustee who the complaint was made against), can interview, speak with, and question the Respondent Trustee as part of the PIG's investigation of the complaint. We are cognizant that a PIG cannot consist of a sufficient number of Trustees to constitute a quorum of the BOT (5), so we wish to keep the investigative PIG to a maximum of four Trustees. This will insure that there are a sufficient number of Trustees who have not participated in the investigation and who can therefore vote on the recommendations of the PIG without conflict.

3. Does the Respondent Trustee's potential interview/meeting with the PIG members add to the number of PIG members such that the quorum restriction may be implicated? So, if there were four Trustee-members of the PIG investigating another Trustee (Respondent Trustee) would the Respondent Trustee become the fifth Trustee member of the PIG thereby invalidating the PIG?
4. At the second meeting to present the PIG's findings and recommendations and the third meeting where the Trustees discuss and deliberate the PIG Report, can both of those meetings be held in Executive Session (ES)? The closest HRS section we can find to support an ES is § 92-5 (a) (2). We see no reason why the privacy rights of a Respondent Trustee are not protected as much as an officer or employee of OHA.
5. If the PIG recommends a hearing be held as provided for in the Trustee Code of Conduct Policy, can the hearing, in which the CEO (as Complainant) and the Respondent Trustee present their respective cases, also be held in ES under §92-5(a)(2)?

Please let me know if you have any questions or need further information.

Mahalo,

Carol Hoomanawanui
Chief of Staff
Office of Chair Colette Y. Machado
Office of Hawaiian Affairs
560 N. Nimitz Highway, Suite 200
Honolulu, HI 96817
Phone: (808) 594-1887
Email: carolh@oha.org

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by e-mail or telephone, and return the original message. MAHALO!