November 14, 2014

LEGAL MEMORANDUM

TO: Honorable Rory J. Respicio
Senator, 32nd Guam Legislature

FROM: Attorney General

SUBJECT: Applicability of Open Government (Sunshine) Law to Subcommittees

INTRODUCTION

This is to acknowledge receipt of your request for a legal opinion on the question whether the work of subcommittees of boards, councils, and commissions created by the government of Guam as agencies and instrumentalities of the government are subject to the Open Government Law. We have decided to address your question in general terms without focusing on any one particular public agency, board, council, or commission or fact scenario.

DISCUSSION

"[I]t is the policy of this Territory that the formation of public policy and decisions is public and shall not be conducted in secret," 5 GCA § 8102. The Legislature has as a general rule determined that “[e]very meeting of a public agency shall be open and public, and any person shall be permitted to attend any public agency meeting, except as otherwise provided in this Chapter,” 5 GCA § 8103(a) (emphasis in original). The question presented here is whether or under what circumstances meetings of subcommittees or work groups comprised of fewer members than the whole of a commission, board, council, or other publicly created entity must also observe the notice and publication requirements of the Open Government Law.

With only certain limited statutory exceptions, all regular or special meetings of any "public agency" must be conducted in public or in the "sunshine." The term "public agency" is defined very broadly.

(a) (1) Public agency includes any board, commission or comparable unit of government, any of whose members are elected, appointed by I Maga'lahen
Guåhan or appointed by I Liheslatura; any non-profit corporation created by one (1) or more public agencies or I Liheslatura, and whose board of directors is appointed by such public agencies or by I Maga’lahen Guåhan or I Liheslatura, and which is formed to acquire, construct, reconstruct, maintain or operate any public work project, or any board, commission, committee or other body on which officers of a public agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency, whether such board, commission, committee or other body is organized and operated by such local agency or by a private corporation.

(2) **Public agency** also includes any advisory commission, advisory committee or advisory body of a public agency, created by law, resolution or any similar formal action of a public agency.

5 GCA § 8104.

Regular meetings of public agencies, i.e., meetings that the board, commission or agency schedules by rule and holds on a regular basis, e.g., once a month, require public notice five working days prior to the scheduled meeting, and another public notice at least forty-eight hours prior to the start of the meeting. See 5 GCA § 8107(a). Special meetings of public agencies “not previously scheduled by statute, regulation or resolution, or for which notice is not already provided by law” require “five (5) working days public notice of such meeting, and a second notice at least forty-eight (48) hours, prior to the start of such meeting.” 5 GCA § 8107(b). And publication requirements for notice of specific types of meetings, regular or special, must be strictly observed. See, generally, Information and Guidance, “Open Government Law,” Ref: AG 08-0164 (August 12, 2008).

When a violation of the Open Government Law has occurred or is threatened, any interested person may bring an action in the Superior Court for the purpose of stopping or preventing a violation or a threatened violation. 5 GCA § 8115(a), (c). “Any action taken at a meeting in violation of any Section of this Chapter shall be void and of no effect.” 5 GCA § 8114. See, generally, Sule v. Guam Bd. of Examiners for Dentistry, 2011 Guam 5 ¶ 14. Further, “[e]ach member of a public agency who attends a meeting of a public agency where action is taken in violation of any provision of this Chapter, with knowledge of the fact that the meeting is in violation thereof, is guilty of a misdemeanor. 5 GCA § 8115(b).

“Meeting means the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter. Meeting does not include any on-site inspection of any project or program.” 5 GCA § 8104(b) (second emphasis added). “A chance meeting of two or more members of a public agency shall not be considered a public meeting. No chance meeting, informal assemblage or electronic communication shall be used to decide or deliberate public business in circumvention of the spirit or requirements of this Chapter.” 5 GCA § 8105 (emphasis added). Guam law does not expressly address the work of subcommittees, however this office has informally advised government agencies and instrumentalities that subcommittees need not comply with the notice
and publication requirements of Guam’s Open Government law provided that no substantive deliberations resulting in final administrative action take place.

In some jurisdictions such as Alabama meetings of subcommittees or working groups of an agency comprised of fewer members than necessary to deliberate or make a decision for which a quorum is required may not require strict adherence to the Open Government Law. See, e.g., Slagle v. Ross, 125 So.2d 117 ( Ala. 2012) (the term “meeting” within the meaning of state open government law depends upon the presence of a quorum). Montana appears to be in accord with Alabama. See, Boulder Monitor v. Jefferson High School Dist. No. 1, 373 Mont. 212, 218-19, 316 P.3d 848, 853 (Mont. 2014) (applying Montana law) (“a meeting exists only when a quorum has been convened. In the present case the mere presence of the fourth Board member in the room to observe the budget subcommittee did not transform that meeting into a meeting of the full School Board”).

On the other hand, under Nevada’s interpretation of its Open Government Law, “a meeting is a gathering of a public body quorum at which it acquires information, discusses the information, or makes decisions regarding that information within its jurisdiction.” Chanos v. Nevada Tax Com’n, 124 Nev. 232, 238-39, 181 P.3d 675, 679-80 ( Nev. 2008) (emphasis added). Hawaii takes a similarly expansive approach to the definition of the term “meeting.” See, Offices of the Information Practices, State of Hawaii, OIP Op. Ltr. No. 04-01, 2004 WL 232019 at *1 (Jan. 13, 2004) (“Generally speaking[, absent a specific statutory exception], discussion among board members concerning matters over which the board has supervision, control, jurisdiction or advisory power and that are before or are reasonably expected to come before the board, outside of a duly noticed meeting, violates the Sunshine Law.”). See, generally, Kanahele v. Maui County Council, 130 Hawai‘i 228, 252-60, 307 P.3d 1174, 1198-1206 (Hawai‘i 2013); compare, Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawai‘i 1, 12, 175 P.3d 111, 122 (Hawai‘i App. 2007) (“When Council members engaged in a series of one-on-one conversations relating to a particular item of Council business (the council resolution in this case), 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.”).

Section 8105 of Title 5 of the Guam Code Annotated cited above appears to be modeled after Hawaii law and makes clear that chance encounters and informal meetings may not be utilized to circumvent the overriding intent of the broader general rule that substantive deliberations of the public’s business should be conducted in the sunshine. This interpretation is bolstered by other provisions of Guam law. See, e.g., 5 GCA § 8111(d) (“Under no circumstances shall a public agency vote on any matter before it during an executive or closed meeting. All voting must be held in a public meeting and minutes shall be kept and opened to the public.”). Thus, while this office has informally opined that standing or ad hoc subcommittees may meet – for example for purposes of drafting and discussing pre-decisional documents, including budgets, opinions and memoranda, proposed legislation and rules – it is advisable to always remember that subcommittee or working session meetings must be conducted in public when engaged in substantive deliberation. The distinction may not always be clear and has yet to be addressed by the Guam Supreme Court; and it therefore wise to err on the side of open discussion wherever possible.
Finally, we observe from a practical standpoint that substantive communications between members of a public agency conducted by electronic means, e.g., electronic mail or text messaging are presumed to be subject to Freedom of Information Act requests. See, generally, 5 GCA § 10101 et seq.; see esp., 5 GCA § 10103(a) (“Every person has the right to inspect and take a copy of any public document on Guam, except as otherwise expressly prohibited in law, and except as provided in § 10108 of this Chapter.”); and § 10103(d) (“Public records includes any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency in any format, including an electronic format.”) (emphasis added). Therefore, members of public agencies, boards, commissions and advisory councils who communicate electronically should take care to remember that their communications are presumed to be public and are subject to Sunshine Act requests.

CONCLUSION

As a general rule the work of subcommittees or work groups of public agencies does not have to comply with the notice and publication requirements of Guam’s Open Government Law. However because Guam’s Sunshine Law mandates that “the formation of public policy and decisions is public and shall not be conducted in secret,” 5 GCA § 8102, the work of subcommittees and work groups of public agencies and instrumentalities should be conducted in public wherever practicable.

We hope this addresses your inquiry. For further information concerning this matter, please use the reference number shown above.

[Signature]

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