



# Office of the Attorney General of Guam

590 S. Marine Corps Drive, Suite 901 ♦ Tamuning, GU 96911  
Phone: 671.475.3324 extension 5015 ♦ Fax: 671.477-4703 ♦ Email: ag@guamg.org ♦ oagguam.org

Hon. Leevin Taitano Camacho  
Attorney General of Guam

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MAR 24 2022

MAYORS' COUNCIL  
OF GUAM

March 23, 2022

## INFORMATION AND GUIDANCE

Ref: MC 22-0100

TO: Executive Director, Mayors' Council of Guam

FROM: Deputy Attorney General, Solicitor Division

SUBJECT: Request for Legal Opinion – Open Government Law and P.L. 36-34

This is in response to your request dated February 18, 2022, for legal guidance on the application of the Open Government Law to meetings of the Mayors' Council of Guam. We reprint the substance of your request taking some editorial license.

### QUESTION:

The Open Government Law defines the term "*Meeting*" to mean "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).

Do meetings of the Mayors' Council of Guam that do not require a quorum have to be publicly noticed as mandated by Section 5 GCA § 8107? Examples of these meetings are Committees set up for seasonal events such as Liberation festivities, Easter, Halloween, and the like.

### ANSWER:

As a general rule, no, meetings of subcommittees do not require that notice of their meetings be published. *See, generally*, this Office's Legal Memorandum addressed to Hon. Rory J. Respicio, Senator, 32<sup>nd</sup> Legislative Session, "Applicability of Open Government (Sunshine) Law to Subcommittees," Ref: LEG 14-0413 (Nov. 14, 2014), attached for your convenience. That general rule is subject, however, to whether "action" takes place during these meetings. "*Action*" is defined as, "a collective decision made by a majority of the members of a public agency, a collective commitment or promise by a majority of the members of a public agency to make a

positive or a negative decision, or an actual vote by a majority of the members of a public agency when sitting as a body or entity, upon a motion, proposal, resolution or order.” 5 GCA § 8104(c).

**QUESTION:**

If these meetings do not require a quorum but actions/decisions are made by a vote of those present, would these meetings fall under Section 8104?

**ANSWER:**

Yes, any meeting of the majority of a public agency, including the Mayors’ Council, where action is taken or decisions requiring a vote are made *must* be in a properly noticed public meeting. Furthermore, any decisions made, or action taken pursuant to a meeting that is not properly noticed are void. *See*, 5 GCA § 8114 (“Action Voided. Any action taken at a meeting in violation of any Section of this Chapter shall be void and of no effect, provided that this nullification of actions taken at such meetings shall not apply to any commitment, otherwise legal, affecting the public debt of the entity concerned.”); and 5 GCA § 8114.1 (“Action Voided–Noncompliance. Any action of a public agency taken at a meeting is void and of no effect if the public agency failed to comply with the public notice of agenda matters to be discussed pursuant to § 8107(d) of this Chapter or failed to comply with the broadcasting requirement pursuant to § 8103(d) of this Chapter.”). The penalties for members of public agencies who knowingly violate the law in this regard are substantial. *See*, 5 GCA § 8115(b) (“Each 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.”).

In order to avoid running afoul of the law, we advise that all public agencies remain mindful that the purpose of subcommittees is not to take action or make final decisions (unless the subcommittee has been expressly delegated the authority to do so), but to conduct research, prepare reports, or make recommendations. Any voting or action taken by a public agency as a consequence of those recommendations may only be made or taken pursuant to a properly noticed public meeting. *Compare*, Memorandum Opinion addressed to the Director, Guam Health Planning and Development Agency, “Sources of Legal Authority for the Guam Health Planning and Development Agency After Enactment of Public Law 20-200,” Ref: GHPDA 92-1244 (Sept. 2, 1992) (“Although the foregoing [definition of the term “action taken” in 5 GCA § 8104(c)] is merely a definition and not substantive law, it seems unlikely that the Legislature would allow circumvention of the Open Government Law by

not addressing action taken by less than a majority. Therefore, it is our conclusion that the Legislature intended that action taken by boards be by a majority of the body.”).

**QUESTION:**

Do Public Hearings conducted by individual mayor’s offices but [that] do not require any action or decision to be made but only for the purpose of accepting and/or hearing public input have to be publicly noticed as mandated by 5 GCA Ch. 8?

**ANSWER:**

We are unclear under what circumstances an individual mayor’s office would hold a “public hearing” but not view it as a meeting that should be publicized by the notice required by the Open Government Law, particularly when the mayor may be the sole decision maker for a village on a particular topic. Although the Open Government Law does not break the law down to every conceivable kind of meeting, as a general rule, whenever a decision may be made or action taken *as a consequence* of a public hearing held for the purpose of accepting or hearing public input, we believe that the answer must be yes, it is a public meeting for purposes of 5 GCA Ch. 8 and must be noticed as required by the Open Government Law.

**QUESTION:**

Section 40124 of 5 GCA, Chapter 40 established a Municipal Planning Council in every district in Guam. As provided by 5 GCA § 40128(h), the Municipal Planning Council “shall act as the body politic with the power to make its own rules, establish committees, hold hearings, and to prepare, pass, and adopt resolutions.”

Is the Open Government Law applicable to the meetings of the Municipal Planning Council? What sections of the Open Government Law apply?

**ANSWER:**

The answer to this question depends on whether the Municipal Planning Council is a “public agency” within the meaning of the Open Government Law. “Public agency” is defined as follows:

- (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'lahaen 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(a)(1), (2) (emphasis in bold added). Once a particular entity is determined to be a “public agency,” and the Municipal Planning Council clearly is, the conclusion is inescapable that the entirety of the Open Government Law applies, including the requirement in 5 GCA § 8107(d) that “Notices must contain the agenda of matters to be discussed at the respective meeting. Agenda items must be in sufficient detail to put the public on notice as to what is to be discussed.”

#### QUESTION:

The Open Government Law defines “Public Notice” to mean “a publication by newspaper of general circulation or by radio or television which is reasonably calculated to provide notice of the facts it announces to the public at large, and by electronic publication on the Guam Public Notice Website.” 5 GCA § 8104(a)(5).

Does this definition mean that our Public Notices be in either a newspaper or radio or television ad **and** (emphasis added) by electronic publication on the Guam Public Notice Website to be compliant with the Open Government Law?

#### ANSWER:

Applying the “plain meaning” rule of statutory construction, *see People v. Quenga*, 2015 Guam 39 ¶ 36 (“Absent clear legislative intent to the contrary, the plain meaning prevails.”) (quoting *People v. Flores*, 2004 Guam 18 ¶ 8); the answer is yes, public notice for purposes of the Open Government Law requires publication in *both* the newspaper or on radio or tv *and* publication on the Guam Public Notice Website.

**QUESTION:**

Section 8107, 5 GCA Ch. 8 requires a public agency to give five (5) working days public notice, and a second public notice at least forty-eight (48) hours prior to the start of the meeting.

Does the forty-eight (48) hour notice have to be placed on a working day as well if the meeting is scheduled on a Monday or Tuesday?

**ANSWER:**

While the five (5) working days for the first publication of notice is exact and requires counting backwards on the calendar from the date of the meeting, including only working days, and excluding weekends and Government of Guam holidays, the second public notice must be published “*at least* forty-eight (48) hour notice prior to the start of the meeting.” 5 GCA § 8107(a), (b). That means that more than 48 hours is acceptable notice. Unlike the five *working* days notice requirement, we see nothing in the law that requires that the 48-hour notice must also be published on a working day.

**QUESTION:**

Section 8107, 5 GCA, Ch. 8 also requires agencies to comply with the Title II of the American Disabilities Act (ADA) for effective communication for people with disabilities and include information in the notice that individuals requiring special accommodations, auxiliary aids or services shall contact and submit their request to the designated agency.

Do our meeting places such as community centers or senior citizen centers have to be equipped with auxiliary aids or capable of providing special accommodations, as these are the locations where Municipal Planning Council meetings, Public Hearings and Town Hall meetings are held?

**ANSWER:**

Both subsections (a) applicable to regular meetings and (b) applicable to special meetings of 5 GCA § 8107 require, “The public agency must comply with the Title II of the Americans with Disabilities Act (‘ADA’) requirements for effective communication for people with disabilities and include information in the notice that individuals requiring special accommodations, auxiliary aids or services shall contact and submit their request to the designated agency or department



representative or ADA Coordinator. The public agency shall make available the name, office address and telephone number, including Telecommunications Device for the Deaf (“TDD”), of the designated ADA Coordinator.” This is a recognition if not adoption of federal law made applicable to all meetings by a public agency of Guam. Whereas federal and Guam law may not *require* that every public meeting place be equipped with all conceivable accommodations and auxiliary aids, both do require that the public agency have a designated representative or ADA Coordinator and be *prepared* to make reasonable accommodations upon request by those who may require it in order to take full advantage of attending a public meeting.

**QUESTION:**

What constitutes a “special accommodations”? Are we non-compliant if these facilities do not have the capability to provide such accommodations or auxiliary aids?

**ANSWER:**

Whether “special accommodations” are needed in any given circumstance must often be decided on a case-by-case basis. As noted in our answer to the preceding question, federal and Guam law may not *require* a public agency to have every conceivable accommodation or auxiliary aid installed or immediately available on location, however, the agency’s designated representative or ADA Coordinator must be *prepared* to make them available upon reasonable notice. Failure to do so constitutes non-compliance with the Open Government Law which may in turn result in a declaration that any decision made or action taken at the meeting is void. *See, again*, 5 GCA § 8114 (“Any action taken at a meeting in violation of any Section of this Chapter shall be void and of no effect...”).

**QUESTION:**

There are instances where a Public Hearing is mandated to be held at a facility or jurisdiction under the mayor’s control to comply with an applicant’s request for zone change or variance or as part of an application package to be submitted to a decision-making authority. The hearing is being conducted by the Office of the Mayor, but the hearing is a requirement of another agency. The mayor’s office is just a conduit to complete the application process.

Whose responsibility is it to give Public Notice for the meeting or hearing? Is the agency/department that requires the hearing responsible for giving notice at their

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expense? Is it the applicant? Is it the mayor of the district affected by the application?

**ANSWER:**

It is the public agency on whose behalf the meeting is being held that is responsible for the publication of notice.

**CONCLUSION:**

We trust we have sufficiently addressed your inquiries. For further information concerning this matter, please use the reference number shown above.

  
KARL P. ESPALDON  
Deputy Attorney General

Attachments

LEONARDO M. RAPADAS  
*Attorney General*



PHILLIP J. TYDINGCO  
*Chief Deputy Attorney General*

OFFICE OF THE ATTORNEY GENERAL

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November 14, 2014

LEGAL MEMORANDUM

Ref: LEG 14-0413

RECEIVED

MAR 26 2014

MAYORS COUNCIL  
OF GUAM

TO: Honorable Rory J. Respicio  
Senator, 32<sup>nd</sup> 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'laha*

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*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'lahaen 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.

  
**ROBERT M. WEINBERG**  
Assistant Attorney General



GOVERNMENT OF GUAM  
AGANA, GUAM 96910

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OF GUAM

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September 2, 1992

Memorandum (Opinion)

Ref: GHPDA 92-1244

To: Director, Guam Health Planning and Development Agency

From: Attorney General *EPD*

Subject: Sources of Legal Authority for Guam Health Planning and Development Agency After Enactment of Public Law 20-200

We are in receipt of your memorandum dated July 13, 1992, in which you requested information on the following:

REQUEST NO. 1: May the Guam Health Planning and Development Agency (GHPDA) implement a certificate of need requirement?

ANSWER: Yes. GHPDA has all the powers and responsibilities granted that agency by P.L. 14-150, as amended by P.L. 16-120. GC §9852(3) (as amended by P.L. 16-120) requires the GHPDA to administer a Territorial Certificate of Need Program.

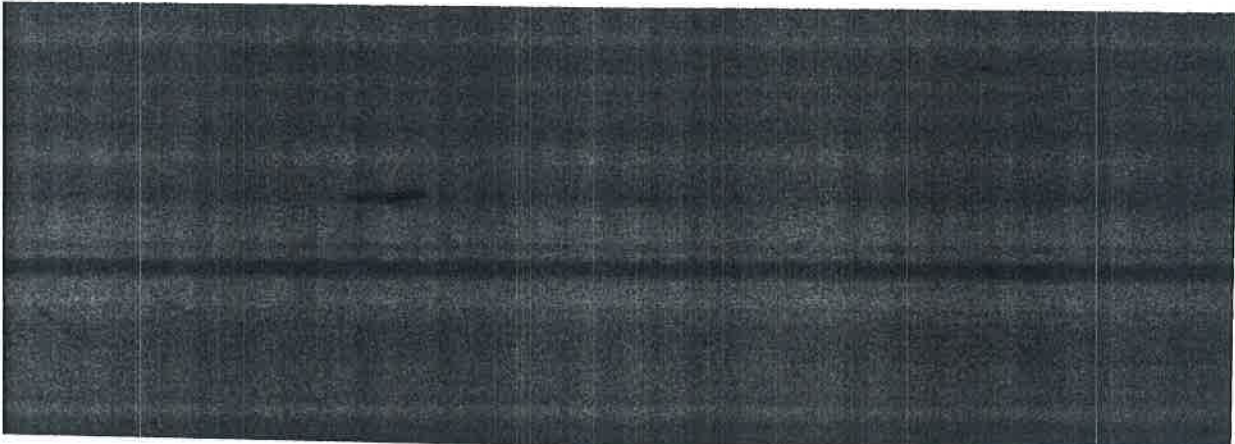
REQUEST NO. 2: Do P.L. 14-150, P.L. 16-120 and P.L. 20-200 provide answers to the following questions, and if not, how should Executive Order 92-07 be interpreted in light of the following:

- a) Must GHPDA staff involvement in governmental bodies be approved by the Governor or the Guam Health Coordinating Council?
- b) Does Council approval require a majority vote?
- c) Does the Council exercise supervision or oversight over GHPDA?
- d) Is the Governor/Lt. Governor the immediate supervisor of the Director?
- e) Is GHPDA a line agency or a staff agency?

ANSWER: See Discussion.



Commonwealth of the Northern Mariana Islands





STATEMENT OF FACTS:

Public Law 14-150 added a new Chapter VIII to Title X of the Government Code, resulting in the establishment of the Territorial Health Planning Program. These provisions were later amended by P.L. 16-120. The program was one hundred percent federally funded. The federal funding terminated on January 1, 1987 with the repeal of Title XV of the Public Health Services Act by U.S. P.L. 99-660. The Bureau of Planning assumed many of the planning functions of GHPDA after the loss of federal funds, but was precluded from continuing the certificate of need program by Attorney General's Opinion BOP 88-2136. That opinion pointed out that under the terms of §9853(3) GGC, only the GHPDA "may issue, deny, or withdraw certificates of need...."

Subsequently, P.L. 20-200 was enacted. Section 3 provides:

Two hundred fifty thousand dollars (\$250,000) are appropriated from the Fiscal Year 1991 revenues of the General Fund to the Guam Health Planning and Development Agency for personnel services, operating expenses, and utilities, and for the miscellaneous expenses of the Guam Health Coordinating Council. Such funds shall remain available until expended.

Subsequently, Executive Order 92-02 was promulgated, creating a Guam Health Planning and Development Council and assigning functions to both the Council and the Agency.

DISCUSSION of Request No. 1

Neither P.L. 14-150, nor the amendments thereto by P.L. 16-120, have ever been repealed. P.L. 14-150 and P.L. 16-120 remain in effect even though federal laws incorporated by reference in P.L. 14-150 and P.L. 16-120 (U.S. P.L. 93-641), as amended by U.S. P.L. 96-79 and P.L. 96-538, have since been repealed by Congress. Indeed, the federal statutes incorporated by reference in the aforementioned Guam statutes, but since repealed by federal law remain a part of Guam law. Consequently, GC Section 9852(3) (as amended by P.L. 16-120) requires that GHPDA administer a Territorial Certificate of Need program, and the locally funded GHPDA may implement a certificate of need program.

The repeal of Title XX of the Public Health Services Act by U.S. P.L. 99-660 did not affect the validity of the Guam law. Rather, those federal statutes, once made a part of the Guam statutes by reference, continue to be the law of Guam even after their repeal by U.S. Congress.