

S.B. NO. 2859

JAN 25 2012

A BILL FOR AN ACT

RELATING TO OPEN GOVERNMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 92-2.5, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "**§92-2.5 Permitted interactions of members.** (a) Two
4 members of a board may discuss between themselves matters
5 relating to official board business to enable them to perform
6 their duties faithfully, as long as no commitment to vote is
7 made or sought and the two members do not constitute a quorum of
8 their board.

9 (b) Two or more members of a board, but less than the
10 number of members which would constitute a quorum for the board,
11 may be assigned to:

12 (1) Investigate a matter relating to the official business
13 of their board; provided that:

14 (A) The scope of the investigation and the scope of
15 each member's authority are defined at a meeting
16 of the board;

S.B. NO. 2859

1 (B) All resulting findings and recommendations are
2 presented to the board at a meeting of the board;
3 and

4 (C) Deliberation and decisionmaking on the matter
5 investigated, if any, occurs only at a duly
6 noticed meeting of the board held subsequent to
7 the meeting at which the findings and
8 recommendations of the investigation were
9 presented to the board; or

10 (2) Present, discuss, or negotiate any position which the
11 board has adopted at a meeting of the board; provided
12 that the assignment is made and the scope of each
13 member's authority is defined at a meeting of the
14 board prior to the presentation, discussion, or
15 negotiation.

16 (c) Discussions between two or more members of a board,
17 but less than the number of members which would constitute a
18 quorum for the board, concerning the selection of the board's
19 officers may be conducted in private without limitation or
20 subsequent reporting.

21 (d) Board members present at a meeting that must be
22 canceled for lack of quorum or terminated pursuant to section

S.B. NO. 2859

1 92-3.5(c) may nonetheless receive testimony and presentations on
2 items on the agenda and question the testifiers or presenters;
3 provided that:

4 (1) Deliberation or decisionmaking on any item, for which
5 testimony or presentations are received, occurs only
6 at a duly noticed meeting of the board held subsequent
7 to the receipt of the testimony and presentations;

8 (2) The members present shall create a record of the oral
9 testimony or presentations in the same manner as would
10 be required by section 92-9 for testimony or
11 presentations heard during a meeting of the board; and

12 (3) Before its deliberation or decisionmaking at a
13 subsequent meeting, the board shall:

14 (i) Provide copies of the testimony and presentations
15 received at the canceled meeting to all members
16 of the board; and

17 (ii) Receive a report by the members that were present
18 at the canceled meeting about the testimony and
19 presentations received.

20 (e) Two or more members of a board, but fewer than the
21 number of members necessary to constitute a quorum for the
22 board, may attend an informational meeting or presentation on

S.B. NO. 2859

1 matters relating to official board business, including a meeting
2 of another entity, legislative hearing, convention, seminar, or
3 community meeting; provided that the meeting or presentation is
4 not specifically and exclusively organized for or directed
5 toward members of the board. The board members in attendance
6 may participate in discussions, including discussions among
7 themselves; provided that the discussions occur during and as
8 part of the informational meeting or presentation; and provided
9 further that there is no commitment made relating to a vote on
10 the matter. The board members, at the next duly noticed meeting
11 of the board, shall report their attendance and the matters
12 presented and discussed that related to official board business
13 at the informational meeting or presentation.

14 (f) Two or more members of a board, but fewer than the
15 number of members necessary to constitute a quorum for the
16 board, may participate in a discussion on a social media website
17 about matters relating to official board business; provided that
18 no commitment to vote is made or sought and the discussion on
19 the social media website:

20 (1) Is accessible at any time to any member of the public
21 with an Internet connection,

S.B. NO. 2859

1 (2) Allows participation by interested members of the
2 public, and

3 (3) Remains available for public viewing for a reasonable
4 period of time on the social media website.

5 Upon request by any person, the board shall provide a list of
6 all board members using social media and their social media
7 addresses or identifications. For the purpose of this
8 subsection, "social media website" means a website that
9 facilitates social interaction among unlimited numbers of
10 persons for the purposes of friendship, meeting other persons,
11 or information exchanges, and allows persons using the website
12 to communicate with other users.

13 ~~(d)~~ (g) Discussions between the governor and one or more
14 members of a board may be conducted in private without
15 limitation or subsequent reporting; provided that the discussion
16 does not relate to a matter over which a board is exercising its
17 adjudicatory function.

18 ~~(e)~~ (h) Discussions between two or more members of a
19 board and the head of a department to which the board is
20 administratively assigned may be conducted in private without
21 limitation; provided that the discussion is limited to matters
22 specified in section 26-35.

S.B. NO. 2859

1 ~~[+]~~ (i) Communications, interactions, discussions,
2 investigations, and presentations described in this section are
3 not meetings for purposes of this part."

4 SECTION 2. Section 92-7, Hawaii Revised Statutes, is
5 amended to read as follows:

6 "**§92-7 Notice.** (a) The board shall give written public
7 notice of any regular, special, emergency, or rescheduled
8 meeting, or any executive meeting when anticipated in advance.
9 The notice shall include an agenda which lists all of the items
10 to be considered at the forthcoming meeting, the date, time, and
11 place of the meeting, and in the case of an executive meeting
12 the purpose shall be stated. The means specified by this
13 section shall be the only means required for giving notice under
14 this part notwithstanding any law to the contrary.

15 (b) ~~[The]~~ At least six calendar days before the meeting,
16 the board shall file the notice in the [office of the lieutenant
17 governor or the appropriate county clerk's office, and in the]
18 board's office for public inspection, [at least six calendar
19 days before the meeting. The notice shall also be posted] and
20 shall also post the notice at the site of the meeting whenever
21 feasible. At least six calendar days before the meeting, a
22 state board shall post the notice on the electronic calendar

S.B. NO. 2859

1 maintained on the State of Hawaii's Internet website, and a
2 county board shall file the notice either by posting on the
3 electronic calendar maintained on the State of Hawaii's or
4 county's Internet website or in the appropriate county clerk's
5 office. In the event that a board is unable to post its notice
6 on an electronic calendar because of an interruption in service
7 that prevents access to the electronic calendar, the board shall
8 file the notice in the office of the lieutenant governor if a
9 state board, or in the appropriate county clerk's office if a
10 county board. The office of the lieutenant governor or the
11 appropriate county clerk's office shall then post the notice on
12 the state or county electronic calendar as soon as service is
13 restored.

14 (c) If the [~~written public~~] notice is [~~filed in the office~~
15 ~~of the lieutenant governor or~~] posted on the state or county
16 calendar or filed in the appropriate county clerk's office less
17 than six calendar days before the meeting, the [~~lieutenant~~
18 ~~governor]~~ board's electronic notice shall be rejected by the
19 electronic calendar or the appropriate county clerk shall
20 immediately notify the chairperson of the board, or the director
21 of the department within which the board is established or
22 placed, of the tardy filing of the meeting notice. If there is

S.B. NO. 2859

1 a dispute as to whether a notice was timely filed on an
2 electronic calendar, a printout of the electronically time-
3 stamped agenda shall be conclusive evidence of the filing date.
4 [~~The~~] If a meeting notice is filed late, the meeting shall be
5 canceled as a matter of law, and the chairperson of the board or
6 the department director shall ensure that a notice canceling the
7 meeting is posted in the board's office and at the place of the
8 meeting, and no meeting shall be held.

9 (d) No board shall change the agenda, once filed, by
10 adding items thereto without a two-thirds recorded vote of all
11 members to which the board is entitled; provided that no item
12 shall be added to the agenda if it is of reasonably major
13 importance and action thereon by the board will affect a
14 significant number of persons. Items of reasonably major
15 importance not decided at a scheduled meeting shall be
16 considered only at a meeting continued to a reasonable day and
17 time.

18 (e) The board shall maintain a list of names and addresses
19 of persons who request notification of meetings and shall mail
20 or electronically transmit a copy of the notice to such persons
21 at their last recorded address no later than the time the agenda
22 is [~~filed~~] posted under subsection (b)."

S.B. NO. 2859

1 SECTION 3. Section 92-8, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "**§92-8 Emergency meetings.** (a) If a board finds that an
4 imminent peril to the public health, safety, or welfare requires
5 a meeting in less time than is provided for in section 92-7, the
6 board may hold an emergency meeting provided that:

7 (1) The board states in writing the reasons for its
8 findings;

9 (2) Two-thirds of all members to which the board is
10 entitled agree that the findings are correct and an
11 emergency exists;

12 (3) An emergency agenda and the findings are posted or
13 filed [~~with the office of the lieutenant governor or~~
14 ~~the appropriate county clerk's office, and in the~~
15 ~~board's office, and] as required for notices by
16 section 92-7; and~~

17 (4) Persons requesting notification on a regular basis are
18 contacted by mail, [~~or~~] telephone, or electronically
19 as soon as practicable.

20 (b) If an unanticipated event requires a board to take
21 action on a matter over which it has supervision, control,
22 jurisdiction, or advisory power, within less time than is

S.B. NO. 2859

1 provided for in section 92-7 to notice and convene a meeting of
2 the board, the board may hold an emergency meeting to deliberate
3 and decide whether and how to act in response to the
4 unanticipated event; provided that:

5 (1) The board states in writing the reasons for its
6 finding that an unanticipated event has occurred and
7 that an emergency meeting is necessary and the
8 attorney general if a state board, or the county
9 counsel if a county board, concurs that the conditions
10 necessary for an emergency meeting under this
11 subsection exist;

12 (2) Two-thirds of all members to which the board is
13 entitled agree that the conditions necessary for an
14 emergency meeting under this subsection exist;

15 (3) [~~The finding that an unanticipated event has occurred~~
16 ~~and that an emergency meeting is necessary and the~~
17 ~~agenda for the emergency meeting under this subsection~~
18 ~~are filed with the office of the lieutenant governor~~
19 ~~or the appropriate county clerk's office, and in the~~
20 ~~board's office;] An emergency agenda and the findings
21 are posted or filed as required for notices by section
22 92-7;~~

S.B. NO. 2859

1 (4) Persons requesting notification on a regular basis are
2 contacted by mail, [~~or~~] telephone, or electronically
3 as soon as practicable; and

4 (5) The board limits its action to only that action which
5 must be taken on or before the date that a meeting
6 would have been held, had the board noticed the
7 meeting pursuant to section 92-7.

8 (c) For purposes of this part, an "unanticipated event"
9 means:

10 (1) An event which members of the board did not have
11 sufficient advance knowledge of or reasonably could
12 not have known about from information published by the
13 media or information generally available in the
14 community;

15 (2) A deadline established by a legislative body, a court,
16 or a federal, state, or county agency beyond the
17 control of a board; or

18 (3) A consequence of an event for which reasonably
19 informed and knowledgeable board members could not
20 have taken all necessary action."

21 SECTION 4. Statutory material to be repealed is bracketed
22 and stricken. New statutory material is underscored.

S.B. NO. 2859

Report Title:

Sunshine Law; Testimony; Quorum; Meetings; Community Meetings; Conferences; Social Media; Permitted Interaction; Notice; State Calendar; Lieutenant Governor; Uniform Information Practices Act

Description:

Allows board members to hear testimony for a meeting canceled for lack of quorum, to attend informational meetings, and to discuss board business via social media; provides for electronic meeting notices.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

JUSTIFICATION SHEET

DEPARTMENT: Office of the Lieutenant Governor,
Office of Information Practices.

TITLE: A BILL FOR AN ACT RELATING TO OPEN GOVERNMENT.

PURPOSE:

(1) To allow members of a board or commission to hear public testimony and presentations on items listed on a filed agenda at the time and place stated in the notice where the meeting, as noticed, is canceled as a matter of law due to a lack of quorum.

(2) To allow less than a quorum of members of a board or commission to attend informational meetings or presentations on matters relating to official board business, provided that the meeting is not specifically organized for board members and that the members report back at the next board meeting.

(3) To allow less than a quorum of members of a board or commission to discuss board or commission business via social media, provided that the discussion is continuously accessible for public viewing and participation.

(4) To require state boards to electronically file their meeting notices under part I of chapter 92, Hawaii Revised Statutes (HRS) (Sunshine Law), on the State's electronic calendar, and to allow counties to electronically file such notices on the State's calendar or their official calendars; to clarify that meeting notices required to be filed under part I of chapter 92, HRS, need not be published in a newspaper of general circulation; and to provide housekeeping changes related to untimely filed notice.

MEANS: Amend sections 92-2.5, 92-7, and 92-8, Hawaii Revised Statutes.

JUSTIFICATION: (1) The new permitted interaction for noticed meetings where quorum is not achieved would utilize the time of board members and members of the public who do attend a meeting where the full board fails to meet quorum requirements at

the time of a meeting or the meeting must be terminated due to videoconference equipment failure, and members of the public that came to testify or individuals scheduled to make a presentation to the board want the option to give the testimony or presentation to the members then present, instead of having to testify or make the presentation at the next scheduled meeting. Under current law, however, OIP has advised boards that the Sunshine Law does not allow board members to hear testimony or presentations on items on the agenda of a canceled meeting because the board members would be doing so outside a meeting, even though a notice and agenda had been filed and members of the public may not want to have to return for a rescheduled meeting. This amendment is intended to accommodate the public by permitting those board members who are present when a noticed meeting must be canceled or terminated to receive testimony and presentations.

(2) The new permitted interaction for less than a quorum of board members attending meetings of other boards, conferences, or community groups seeks to eliminate a source of frustration for board members where more than two members of one board wish to attend and discuss their individual positions relating to their official board business at a public meeting of a different board (e.g., three City Council members who represent districts overlapping within one neighborhood board district and want to participate in that neighborhood board's meeting), or at a hearing of the Legislature, or to attend presentations (including seminars, conventions, and community meetings) at which official business of their board is or may be discussed. The Sunshine Law prohibits members from discussing official board business outside of a meeting of their board except as specifically permitted, and at present there is no permitted interaction that would allow a discussion of more than two members' individual positions at another board's meeting or a presentation or seminar. OIP believes that the law as currently written deters board members

from attending presentations or other meetings and from testifying or participating in discussions that are a part of those presentations.

The proposed amendment is intended to improve the performance of the board members and their boards by allowing for a more thorough gathering of information and fuller understanding of various perspectives, which would promote better discussion and deliberation before the full board. OIP believes that the amendment will also improve coordination between boards on issues that affect multiple boards and provide for better communication with, and responsiveness to, the Legislature. Safeguards have been included in the amendment to effectively balance the needs of boards and the rights of the public by limiting the number of members who may participate to less than a quorum; allowing discussion only during and as part of the presentation; and requiring subsequent reporting at a duly noticed open meeting. Board members will be able to acquire both general and specific knowledge about board issues that will enhance their performance on the board and likely lead to more informed board decisions. The public's right to know will generally be protected by the reporting requirements and the fact that the reporting will need to be sufficiently detailed to influence the quorum of the board.

(3) The new permitted interaction for discussion of board business through social media would allow board members to better reach out to constituents who prefer that form of participation or have difficulty in participating in the board's decisionmaking process through the traditional means of attending and testifying at board meetings. These might include younger people more comfortable with social media, those whose work or school obligations conflict with typical meeting times, or those who find it difficult to attend meetings due to distance, disability, or other responsibilities.

At present, there is no permitted interaction that would allow more than two board members to participate in a social media discussion, even though board members' intent in doing so is typically to promote greater public access. The Sunshine Law prohibits board members from discussing official board business outside of a meeting of their board except as specifically permitted. This prohibition could apply to board members who, for instance, directed "tweets" about board business to one another via Twitter or even "followed" one another's Twitter accounts, or who used Facebook to comment on each other's posts about board business or to post on each other's "walls" about board business. Depending on the specific situation, even board members' status as Facebook "friends" could be considered participation in a serial discussion if the members were writing posts about board business and those posts automatically showed up in the other members' news feeds as posts by "friends." The proposed amendment would permit less than a quorum of board members to openly participate in a social media discussion while retaining OIP's ability to examine specific cases to determine whether the spirit and intent of the Sunshine Law has been violated through surreptitious means of utilizing social media.

OIP believes that the nature of social media, as defined in this amendment, provides the following additional safeguards for the public: any discussions taking place will be accessible for review and participation by the public-at-large, and the discussions will be in a written, continuously accessible form that allows members of the public to review what has been said and to add their own comments according to their own schedule.

As a further safeguard, this permitted interaction would be limited to participation by less than a quorum of a board's membership. This limitation ensures that the social media discussion will not result in a board decision

that is crystallized to a point just short of formal acceptance, as a majority of the board will not be part of the discussion. This safeguard is particularly important given that, although a social media discussion must be readily available in the short term to meet the terms of the permitted interaction, there is no guarantee that a social media discussion (which is housed on third-party servers and thus is not automatically a government record) will be retained for the long term in the same way that a board's minutes would typically be.

(4) Present and prior Executive Memoranda direct all state boards to post their meeting notices on the State's electronic calendar. This amendment requires postings on the electronic calendar in lieu of the present requirement to file meeting notices in the Office of the Lieutenant Governor six days prior to a meeting.

Meeting notices currently filed with the Office of the Lieutenant Governor are posted in the chambers of the State Capitol Building. The proposed amendment will provide easier and greater accessibility because it will allow the public to access the notices over the Internet at a single site.

Use of electronic posting will also promote government efficiency by reducing staff resources spent to maintain and physically post the notices. It will also eliminate the current duplication of effort wherein board staff must both post the notice on the State's electronic calendar and file a hard copy with the Office of the Lieutenant Governor.

Amending the emergency meeting provisions to require electronic posting of the emergency meeting agendas and findings justifying the emergency meeting would similarly provide more efficiency and better public access to the notices while preventing any confusion that could result if the filing methods were inconsistent.

Impact on the public: (1) Members of the public or presenters may be able to give their testimony and presentations at the time and place of a noticed meeting that is canceled, and avoid spending more time and incur more travel costs in order to give their testimony or presentations at a subsequent meeting. Because this bill is limited to situations where the public has been given notice of a meeting and has the right to attend, this bill will not impede public access to board members' discussions. A board's deliberation and decisionmaking must still occur at a subsequent duly noticed board meeting.

(2) The public may have greater access to information about a board's current business, and greater ability to interact with board members, as board members will be able to discuss official board business at meetings of other boards and the Legislature and they will have greater freedom to attend and participate in a broader range of events in which the public may be able to express its views and hear the discussions of the board members. The amendment protects those members of the public who do not attend the other board's meeting, the legislative hearing, the community meeting, the seminar, or a similar event, by limiting participation to less than a quorum and requiring the board members to report on their discussions and testimony at their next board meeting.

(3) The public will have greater access to and ability to interact with board members regarding board business, as members of the public using social media will be able to discuss board business with board members on their own preferred schedule, while still being able to see all the prior comments and discussion between the participating board members and other members of the public on that same topic. This permitted interaction will not impact boards' current obligation to keep a record of their decisionmaking process in the form of

minutes, as the social media discussions permitted by this amendment would be limited to less than a quorum of board members' participation and thus would not be the forum in which a board's decisions were actually made or minutes were required.

(4) This bill will make it easier for the public to access state and county board meeting notices and emergency meeting notices and findings because all the notices will be accessible and easily searchable over the Internet and centrally located on the state calendar or the county's official website. The statute as amended will still provide alternative means of receiving notice through mail or electronic transmission for those members of the public who do not have access to the Internet.

Impact on the department and other agencies:

(1) Boards will be able to accommodate those members of the public who have come to a scheduled meeting to testify or give a presentation by having those board members present hear the testimony or presentation and report back to the board. This reporting requirement will generally ensure that the full board has access to the information given in testimony and presentations. This amendment also specifies that deliberations and decisionmaking on a matter for which testimony or a presentation is received without a quorum must take place only at a subsequent duly noticed board meeting.

(2) Board members will be able to participate in other boards' meetings, legislative hearings, seminars, presentations, community meetings, and similar events where they believe it to be necessary to the performance of their roles or to be beneficial to their board. It should result in better and more effective communication and coordination between boards on issues that affect multiple boards, and better board communication with, and responsiveness to, the Legislature. It will also free boards in

many instances from having to designate in advance which board members may attend seminars, presentations, or meetings, and will avoid the need of board members to refrain from participating in the discussions held as part of the presentations or to leave the presentations.

This bill will likely increase the workload of the Office of Information Practices.

(3) Board members will be able to use social media, such as Facebook or Twitter, to reach out to their constituents regarding issues before their board, without requiring other board members to refrain from following and participating in such social media communications, unless the number of board members participating in a discussion of board business is so great as to constitute a quorum. The proposed bill should result in more effective public communication by board members and greater access to current public policy decisionmaking for members of the public.

This bill will likely increase the workload of the Office of Information Practices.

(4) This bill will simplify the filing process for state boards and will save staff resources of boards and the Office of the Lieutenant Governor in receiving, maintaining, and posting the official filings. Currently, board notices must be physically filed with the Office of the Lieutenant Governor and boards must also electronically post their notices on the state calendar per the Governor's directive. This bill will require the notices to be electronically filed on the State's electronic calendar, which provides cost savings as paper copy and delivery costs will be nearly eliminated. The bill will also allow counties the option to electronically file board notices on official county websites. This bill also clarifies that the proper electronic filing location for other types of state agency notices is the electronic calendar, rather than the defunct Hawaii FYI system.

This bill will have minimal effects on the current practices of the Department of Accounting and General Services, which oversees maintenance of the state Internet portal and website.

Impact on the New Day Plan: (1), (2), and (3)
The permitted interactions proposed by this bill promote the New Day Plan's goal to improve government transparency and to rebuild public confidence in government.

(4) Electronic filing as proposed by this bill promotes the New Day Plan's goal to improve government efficiency through the use of technology. By making meeting notices more readily available to the public, electronic filing also promotes the goal to improve government transparency and to rebuild confidence in government.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM
DESIGNATION: None.

OTHER AFFECTED
AGENCIES: All state and county agencies subject to the Uniform Information Practices Act, all state and county boards subject to the Sunshine Law, Office of the Lieutenant Governor, and Department of Accounting and General Services.

EFFECTIVE DATE: July 1, 2012.