LATE TESTIMONY

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To: House Committee on Judiciary

From: Cheryl Kakazu Park, Director

Date: February 10, 2012, 2:00 p.m.
State Capitol, Room 325

Re: Testimony on H.B. No. 2597
Relating to Open Government

Thank you for the opportunity to submit testimony on H.B. No. 2597.

OIP strongly supports this bill, which would require the official meeting notice to be electronically filed and would create three new permitted interactions regarding cancelled meetings, attendance at informational and other meetings, and use of social media. Specifically, this bill would:

(1) 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) 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) 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; and

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or their official calendars; clarify that meeting notices required to be filed under part I of chapter 92, HRS, need not be published in a newspaper of general circulation; and provide housekeeping changes related to untimely filed notice.

The Sunshine Law was originally enacted in 1975, long before the widespread use of the Internet and electronic devices. The intent of this bill is to modernize the Sunshine Law, while enhancing public participation and government transparency.

Meeting Notices to be Electronically Filed

Currently, the Sunshine Law requires public meeting notices to be physically filed with the Office of the Lieutenant Governor, and copies are posted on the bulletin board in the Capitol Chambers. By Executive Order, Governor Abercrombie and the previous administration also required state boards to electronically post their notices on the state calendar.

This bill will require the official meeting notices of state boards to be electronically filed on the State's electronic calendar. The bill will also give counties the option to electronically file board notices on the state's website or on official county websites. The bill further clarifies that the proper electronic filing location for other types of state agency notices is the electronic calendar. The emergency meeting provisions have also been amended to require electronic posting of the emergency meeting agendas and findings justifying the emergency meeting, so as to prevent any confusion that could result from inconsistent filing methods.

The electronic filing provisions of this bill will make it easier for the public to be notified of state and county board meetings as well as emergency meeting notices and findings because all the notices will be centrally located on the state calendar (or the county's official website) where they are easily accessible and searchable over the Internet. For those members of the public who do not have access to the Internet, the proposed bill will continue to provide individuals with the option of receiving notice through mail, or they can use the public library internet facilities. Additionally, for members of the public with internet access, the proposed bill will add the option of receiving notice through electronic transmission.

In addition to cost savings resulting from the near elimination of paper, copying, and delivery costs, use of electronic posting will promote government efficiency by reducing staff resources and duplication of effort spent to maintain and physically post the notices with the Office of the Lieutenant Governor, in the Chambers, and on the state calendar.

There is a built-in safeguard to ensure that only timely filed notices are electronically posted, as the state calendar will automatically reject a notice that is posted with less than six days' advance notice. The board can print out an electronically time-stamped agenda to retain proof that it timely filed the meeting notice.

Permitted Interaction Regarding Cancelled Meetings

OIP has advised boards that the current Sunshine Law does not allow board members to hear testimony or presentations on items on the agenda of a cancelled 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 proposed amendment to the law

is intended to accommodate the public by allowing the receipt of testimony and presentations, even though a meeting must be cancelled.

The bill would create a new permitted interaction to allow board members to hear public testimony and presentations on agenda items when the meeting is cancelled as a matter of law due to the lack of a quorum or videoconference equipment failure. Despite the cancellation of a meeting in such cases, the board members present will be able to receive public testimony or presentations so that people will not have to spend more time and incur additional travel costs in order to give their testimony or presentations at a subsequent meeting. The public can choose to attend the subsequent meeting before a duly constituted board in lieu of, or in addition to, testifying at the cancelled meeting. The reporting requirement – that the board members at the cancelled meeting must report on the testimony and presentations to the full board at its next meeting – will generally ensure that the entire board has access to the information received at the cancelled meeting. A board's deliberation and decisionmaking must still occur at a subsequent duly noticed board meeting.

Permitted Interaction to Attend Other Meetings

The Sunshine Law prohibits members from discussing official board business outside of a meeting of their board, except as specifically permitted. One aspect that has been a source of much frustration for board members is that the Sunshine Law does not generally allow more than two members to discuss board business in the course of attending another board's meeting, a presentation, a legislative hearing, or a seminar, even though that other board's meeting may be open to the public either as a Sunshine Law meeting or for other reasons. Thus, for example, three of seven City Council members who represent districts overlapping with one neighborhood board district cannot all attend and participate in that neighborhood

board's public meeting relating to Council matters, or in a community meeting regarding a proposed development, or in a legislative hearing on a bill of interest to that community. Although the law allows a board to set up a permitted interaction group ("PIG") of less than a quorum to attend such meetings, there often is not sufficient lead time before the other bodies' meetings for the board to hold its own meeting to establish such a PIG.

Consequently, OIP believes that the Sunshine Law, as currently written, deters board members from attending presentations or other meetings, discourages board members from testifying or participating in discussions that are a part of those presentations, lessens the public's ability to interact with board members, makes it difficult for board members to be fully informed of all sides of an issue, and reduces communication and cooperation between various boards on issues of mutual concern. To correct this, the Sunshine bill proposes to create a second new permitted interaction that would allow less than a quorum of board members to attend meetings of other boards, conferences, or community groups.

OIP's proposal is based on the 2008 law creating special provisions for Neighborhood Boards (Part VII of Chapter 92), one of which allows those board members to participate in informational meetings and presentations before other entities. OIP proposes to have a similar provision apply to all Sunshine boards and would allow less than a quorum of board members to participate in other boards' meetings, legislative hearings, seminars, presentations, community meetings, and similar events to enhance board members' knowledge and performance of their duties, increase the public's input into the board's deliberations, and promote cooperation between various boards on matters of common concern.

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 a fuller understanding of various perspectives, which would

promote better discussion and deliberation before the full board. So long as there is no quorum to make decisions, board members would be able to attend other entities' meetings (e.g., legislative hearings; neighborhood board meetings) on short notice and they will no longer have to leave or refrain from participating in the discussions held as part of the presentations. The proposal is also intended to foster better and more effective communication and coordination between boards and other entities on issues of common concern.

By giving board members greater freedom to attend and participate in meetings other than their own board meetings, the proposal will also increase the public's ability to engage with board members on matters of public concern. Board members can now go to the public, and not simply wait for the public to come to their board meetings. Thus, the proposal will give the public increased access to information about a board's current business and greater ability to interact and express their views with board members.

The bill contains safeguards for the public by limiting the number of board members who may participate to less than a quorum, allowing discussion only during and as part of the presentation, and requiring subsequent reporting by the board members at a duly noticed open meeting. The reporting requirement protects the public's interest, as the report by the minority of members to the full board will need to be sufficiently detailed if they wish to influence any decision on issues discussed under this permitted interaction.

Permitted Interaction to use Social Media

The Sunshine Law prohibits board members from discussing official board business outside of a meeting of their board, except as specifically permitted. Presently, 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 make current policy discussions more accessible to more people. 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, even if the discussion was open to anyone with internet access. 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 bill would create a new permitted interaction that would allow less than a quorum of board members to openly participate in a social media discussion, while ensuring public access to those discussions and 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. Limiting participation to less than a quorum of a board's membership ensures that the social media discussion will not result in a board decision being essentially made online, as a majority of the board will not be part of the discussion and, thus, would not be part of any consensus reached in the course of the discussion.

As an additional safeguard, any social media discussions taking place must be accessible for review and participation by the public-at-large, and the discussions must be in a written, continuously accessible form that allows members of the public to review what has been said and to add their comments according to their own schedule. In other words, Twitter, Facebook, or similar accounts used to discuss board business must be set as public, and the discussions of board business must be left online and available, to meet the terms of the permitted interaction. To ensure that the public can readily find and access the social media sites being used

by board members, the proposed bill further requires the board to provide a list of all board members using social media and their social media addresses or identifications.

Unlike more private means of communicating via personal meetings, letters, e-mails, or telephone calls, the social media discussions permitted by this proposal would provide greater transparency and enhance OIP's ability to determine the content and context of board members' communications, because all social media comments can be viewed and examined. For example, in contrast to a conversation in the hallway or a phone call, a written record of tweets or postings could be downloaded by a member of the public who believed board members' discussions violated the Sunshine Law. Given the inherently open and transparent nature of the social media discussions being permitted by this amendment, it would be foolish for someone to intentionally violate the Sunshine Law using this method of communication.

Instead, the proposed bill should be viewed as a means for board members to engage in more effective communication with the public and to enhance public participation in the decisionmaking process. OIP recognizes that a significant segment of the public enjoys communicating through social media or may have difficulty participating in the board's decisionmaking process through the traditional means of personally attending and testifying at board meetings. For example, people of all ages and economic backgrounds may have work, school, or family obligations that conflict with typical meeting times, and many people find it difficult to attend meetings due to distance, disability, or other responsibilities. Social media encourages public participation in governance by providing members of the public with additional and more convenient access to and interaction with board members regarding board business. In addition to allowing board members to communicate with their constituents, social media also provides a means for the

public to read and respond to different views and perspectives from other people's comments on various board issues. All of the social media communication can take place according to individuals' preferred schedules throughout the day or week, rather than being limited to the time, date, and place set by a board. Thus, OIP views social media as a means to greatly enhance openness, transparency, and public participation in government.

OIP strongly recommends that boards adopt their own social media policies that will address important constitutional, legal, or practical concerns, and notes that the state Office of Information Management and Technology and the Attorney General's Office have been developing a model social media policy for the state. By proposing this amendment, OIP is not setting out a policy on how board members should best use social media, but simply intends to ensure that the Sunshine Law does not present an impediment to social media usage while still providing safeguards to protect against Sunshine Law abuse.

Senate Amendments to Companion Bill, S.B. 2859, S.D. 1

On February 9, 2012, the Senate Committee on Judiciary and Labor voted to pass the companion to this bill, S.B. 2859, with amendments to clarify that only the social media addresses that board members use to discuss board business are subject to disclosure on request under the social media permitted interaction; to require that boards adopt a social media policy prior to carrying out discussions under the social media permitted interaction; and to create a sunset date in four years for the social media permitted interaction. OIP supports these amendments. Specifically, the proposed amendments to the social media permitted interaction, beginning at bill page 4, line 14, are highlighted and would read:

> (f) From July 1, 2012, to June 30, 2016 only, two or more members of a board, but fewer than the number of members

necessary to constitute a quorum for the board, may participate in a discussion on a social media website about matters relating to official board business; provided that the board has previously adopted a policy on the use of social media and that no commitment to vote is made or sought and the discussion on the social media website:

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

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

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

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

The Senate Committee on Judiciary and Labor also proposed removing the electronic notice provisions of the bill to allow them to be considered separately in S.B. 2234, Relating to Electronic Information. OIP has no objection, providing that S.B. 2234 is passed out of the Senate with OIP's recommendations to amend the electronic notice provisions and that S.B. 2859's amendments to the general

provisions of HRS § 92-7(a) would be retained to make clear that the notice required by the Sunshine Law is governed by Part I of HRS Chapter 92, notwithstanding any other law to the contrary. At the time this testimony was submitted, OIP did not yet know whether S.B. 2234 is moving forward or the amendments that would be made to it. Given this uncertainty, OIP would prefer to see the electronic notice requirements maintained in H.B. 2597 at this time.

If the electronic notice provisions are retained in H.B. 2597, then OIP would concur with a request made by the Hawaii Strategic Development Corporation that language at bill page 6, lines 15-21 should be amended to conform more closely to the original statutory wording, by changing it to read:

> (b) The board shall file the notice in the [~~office of the lieutenant governor or the appropriate county clerk's office, and in the~~] board's office for public inspection, at least six calendar days before the meeting. The notice shall also be posted at the site of the meeting whenever feasible.

This amendment would retain the current requirement that the posting at the meeting site would be only required "whenever feasible" and would not need to take place at least six days before the meeting.

In conclusion, OIP respectfully requests this Committee's support of H.B. 2597, which we believe reasonably enhances government efficiency and cost savings while effectively protecting the public's right to openness and transparency and increasing public participation in government.

Thank you for considering our proposed legislation.