LATE TESTIMONY

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PETER B. CARLISLE
MAYOR

March 15, 2011

The Honorable Clayton Hee, Chair
Senate Committee on Judiciary
Twenty-Sixth Legislature
Regular Session of 2011
State of Hawaii

RE: Testimony of Mayor Peter Carlisle on H.B. 640, H.D. 1, Relating to Public Agency Meetings

Chair Hee and members of the Senate Committee on Judiciary and Labor, Mayor Peter Carlisle submits the following comments on H.B. 640, H.D. 1.

The purpose of this bill is to amend Hawaii's open meeting law to require boards to report any action taken by the board in executive session.

My concerns about this bill revolve around what "action" a board must report. The term action is vague and could result in confusion and/or make it difficult for boards to comply with the provisions of Hawaii's open meeting law.

This is because if construed broadly, the term "action" could be interpreted as meaning that the board must report generally what it did during the executive session. Hawaii Revised Statutes ("HRS") section 92-4 requires boards to announce the reason for entering into an executive session. Furthermore, HRS 92-5 outlines the instances in which a board may enter into an executive session (e.g. to consult with the board's attorney). Accordingly, the additional language could result in boards having to duplicate what it already did prior to entering into the executive session (e.g., the board consulted with its attorney).

However, if the term "action" is interpreted more narrowly as requiring boards to announce specifically what was discussed during the executive session, then the additional requirement would undermine the intent and purpose of entering into executive session. The added language as proposed in the bill would essentially usurp the intent behind allowing boards to enter into executive session and undermine the exceptions to the open meeting law as outlined in HRS 92-5.

Finally, it should be noted that if the term "action" is interpreted as meaning any decision that is made by the board, then this bill could create further confusion and potentially cause

boards to violate other laws or court orders. This is because except as provided in HRS 92-5(a)(8), any decision made by a board should be done during a meeting open to the public. HRS 92-5(a)(8) provides that the board may enter in to executive session "to deliberate, or make a decision upon a matter that requires the consideration of information that must be kept confidential pursuant to a state or federal law, or a court order." Accordingly, the current language of the open meetings law provides for a narrow and limited instance when a board may actually make a decision during an executive session. However, requiring a board to report what decision it made after an executive session that was closed pursuant to HRS 92-5(a)(8) could result in the board violating other state or federal law, or a court order.

I am also concerned that the provisions of this bill requiring reporting of actions upon reconvening of the board in an open meeting may conflict with the current provisions of HRS 92-9 which states that the minutes of the board meeting shall be available within thirty days of the meeting. In addition, HRS 92-9(b) specifically exempts disclosures inconsistent with HRS section 92-5 and allows that the minutes of meetings may be withheld so long as their publication would defeat the lawful purpose of the executive meeting; these provisions seem to be in contradiction to the intent of HB 640, H.D.1 that actions be reported when the board reconvenes in open meeting.

I realize that this bill is intended to improve the transparency in the actions and deliberations of boards; however I am concerned that because it is unclear what has to be reported that this bill, that enactment of this bill will lead to confusion and uncertainty.

Thank you for this opportunity to testify before you.

LATE TESTIMONY

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2011

ON THE FOLLOWING MEASURE:
H.B. NO. 640, H.D. 1, RELATING TO PUBLIC AGENCY MEETINGS.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Tuesday, March 15, 2011 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): David M. Louie, Attorney General, or
Charleen M. Aina, Deputy Attorney General

Chair Hee and Members of the Committee:

The Attorney General has serious reservations about this bill.

H.B. No. 640, H.D. 1, amends the executive meetings section of the Sunshine Law to require boards and commissions to report "[a]ny action taken by a board in an executive meeting when the board reconvenes" its open meeting.

Because this new reporting requirement could eviscerate every one of the exceptions to the Sunshine Law public meeting requirement listed in section 92-5(a), Hawaii Revised Statutes, and effectively repeal that subsection and the executive meeting section of the Sunshine Law, the Attorney General asks that the bill be held.

In testimony the Office of Information Practices submitted to the House Committee on Judiciary supporting the bill's passage, the Acting Director assumed that the only "actions" to which the amendment would apply, were board votes taken in an executive meeting. If the bill was revised to expressly provide that "only votes taken by a board in an executive meeting" need to be reported, the Attorney General would have no objection to its passage.

However, the bill needs to be held if "action" includes a board's initial impressions of an applicant's capabilities, or a public officer's or employee's annual performance, because a board could violate the liberty interests and right to privacy of every applicant for a professional or vocational license, or a public officer or employee who was being evaluated or disciplined by making the report the bill requires. Similarly, if "action" includes decisions to initiate investigations into possible criminal misconduct and retain experts for that purpose, the bill should be held because evidence could be destroyed and investigations compromised, if those decisions were reported. The bill also should be held if what board members heard in discussions with offerors held pursuant to section 103D-304 of the Procurement Code constituted "action" and had to be reported, because that disclosure would countermand section 103D-304's requirement that the contents of competitive sealed proposals not be disclosed to other offerors until after a contract is awarded.

Further, having to report more than board votes could subject every board and the State to severe disadvantages in negotiating contracts, formulating or considering settlement proposals, asserting or defending against claims, maintaining public order in the face of potential threats to public safety and security, and complying with confidentiality requirements imposed by federal or state law, or a court order.

LATE TESTIMONY

THE LEAGUE OF WOMEN VOTERS OF HAWAII

TESTIMONY ON HB 640, HD1, RELATING TO PUBLIC AGENCY MEETINGS

Committee on Judiciary and Labor
Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

Hearng Date: Tuesday, March 15, 2011
Time: 930 A.M.
Place: Conference Room 016

Testifier: Jean Aoki, LWV Legislative Committee,

Chair Hee, Vice Chair Shimabukuro, members of the Committee on Judiciary and Labor,

The League of Women Voters of Hawaii strongly supports HB 640, HD1 relating to public agency meetings which provides that any action by a board in an executive meeting shall be reported to the public when the board reconvenes in the open meeting at which the executive meeting is held.

Especially for boards that seem to conduct so much of their meetings in executive session excluding those like the Ethics Commission which deals largely with personal ethics allegations, the public is entitled to know what, if any, actions were taken outside of the open meeting unless the action taken itself is legally excused from disclosure for the moment. When situations are such that the public is willing to wait for the executive sessions to end to be apprised of any actions or even lack of actions, surely, this can be explained very simply instead of coming out and adjourning so abruptly as is done at times.

We feel that the passage of HB 640, HD1, and its implementation would increase the public's understanding of the boards' objectives and interpretations of the problems and solutions before them.

Thank you for hearing this bill.

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