

Honolulu, Hawaii
February 19, 2016

RE: H.B. No. 369
H.D. 1

Honorable Joseph M. Souki
Speaker, House of Representatives
Twenty-Eighth State Legislature
Regular Session of 2016
State of Hawaii

Sir:

Your Committee on Judiciary, to which was referred H.B. No. 369 entitled:

"A BILL FOR AN ACT RELATING TO OPEN GOVERNMENT,"

begs leave to report as follows:

The purpose of this measure is to enhance open government by facilitating public participation and testimony at meetings of government agencies and providing greater public access to relevant documents and recordings pertinent to those meetings.

Common Cause Hawaii, the Education Caucus of the Democratic Party of Hawaii, Hui 'Oia'i'o, Hui Malama O Hale Coalition, League of Women Voters of Hawaii, Civil Beat Law Center for the Public Interest, Sierra Club of Hawai'i, and many concerned individuals testified in support of this measure. The Office of Information Practices and Chair of the Maui County Council testified in opposition. The Department of Land and Natural Resources, Department of Business, Economic Development and Tourism, Aha Moku Advisory Committee, Hawaii Educational Policy Center, and a concerned person provided comments.

While your Committee strongly supports the goals of this measure, your Committee ascertained that certain aspects of the bill, in the form in which it was received by your Committee, could present difficulties in administration and therefore should be revised.



This bill addresses several matters in both the state sunshine law, chapter 92, Part I, Hawaii Revised Statutes (HRS), and the Uniform Information Practices Act (UIPA) chapter 92F, HRS. These laws are closely interrelated in purpose and philosophy and your Committee recognizes that amendments to either must take into account the effects of such amendments on the other.

Among other things, the declarations of policy and intent in both laws have been identical; that identity is legally important. Accordingly, in order to preserve the closeness of purpose of the two laws, your Committee deleted provisions in the original bill that would have amended the declarations of policy and intent of section 92-1, HRS and the UIPA, section 92F-2, HRS in divergent ways.

This measure also proposes to amend section 92-3, HRS to ensure that the public has adequate prior access to the texts of documents that are to be considered at public meetings. Your Committee agrees that all interested persons should have an adequate opportunity to view such documents before meetings. However, your Committee believes that agencies should ensure that the information to be disclosed should only be information that is not protected from disclosure under the UIPA. Accordingly, your Committee has amended this measure to allow for appropriate redactions of such documents prior to the meeting in which they are to be discussed.

This measure also proposes to expand the scope of public participation in agency meetings by requiring the agencies to afford all interested persons an opportunity to present oral testimony on any matter within the jurisdiction of the agency, even if the topic is not on the agenda. Your Committee recognizes that each public agency should afford the public an opportunity to hold the agency accountable for matters that the agency might routinely avoid placing on its agendas.

While the public should have an opportunity to make public agencies more accountable in this respect, your Committee believes that requiring agencies to allow such open-ended discussions at every meeting would have unintended adverse consequences. Among other things, such an open-ended opportunity would lead to great unpredictability as to the length of meetings and the topics that would be under discussion. Decision-making could not reasonably take place because the public would not have advance notice that a particular matter would be discussed. Many persons potentially affected might not have attended the meeting because they could



not predict that a particular topic would arise during this open-ended period.

Moreover, agencies must, from time to time, devote all their public meeting time to an item of overriding urgency and importance and agencies must be allowed to defer consideration of less-pressing issues to a later date. Thus, although your Committee believes that agencies must allow for eventual public input on matters that have been deferred, your Committee also believes that the proposal is too inflexible to be adopted in its original form. Accordingly, your Committee has deleted the provision that would have required agencies to hear public input in any meeting on any matter within its jurisdiction.

The bill also proposed to require that public input be limited to a specific time-frame: after the agency's discussion of a particular matter yet before the decision-making on the matter. Under this proposal, it appears that agency members would not be free to comment on, respond to, or engage in dialogue with members of the public who presented opinions in oral testimony during this limited time-frame. For this reason, your Committee has amended the bill to allow the agency to permit public testimony at any reasonable time before decision-making. Your Committee understands that this amendment will maintain the current practice of interspersing agency discussion and public testimony to allow dialogue between agency members and the public.

The bill as originally written also would allow the agency to impose time limits on testimony on an ad hoc basis during the meeting. It appears to your Committee that any rule imposing time limits should be adopted as a general policy in advance to be applied as appropriate at those meetings in which time limits may be necessary. Accordingly, your Committee has retained the current statutory language on regulation of oral testimony.

The bill also treated video and audio recordings made by the agency as if they were minutes of a given meeting. Your Committee believes that such a characterization is inaccurate and unnecessary because section 92-9(a), HRS, requires minutes to be written. Such recordings should be treated as public documents except insofar as they are otherwise subject to redaction for reasons of confidentiality and the recordings should be treated independently of the minutes of a meeting. In any event, your Committee agrees with the basic premise of this measure that recordings and minutes should be made available within thirty days after a meeting, and that publishing of minutes should not be



delayed on the ground that they have not yet been approved by the agency.

Accordingly, your Committee has amended this measure as described above and has made additional technical, nonsubstantive amendments.

As affirmed by the record of votes of the members of your Committee on Judiciary that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 369, as amended herein, and recommends that it pass Second Reading in the form attached hereto as H.B. No. 369, H.D. 1, and be referred to your Committee on Finance.

Respectfully submitted on
behalf of the members of the
Committee on Judiciary,



KARL RHOADS, Chair



