

OFFICE OF INFORMATION PRACTICES

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To: Senate Committee on Judiciary and Labor

From: Cheryl Kakazu Park, Director

Date: February 13, 2015, 9:00 a.m.
State Capitol, Conference Room 016

Re: Testimony on S.B. No. 465
Relating to Government Records

Thank you for the opportunity to submit testimony on this bill, which would amend the Sunshine Law, Part 1 of Chapter 92, HRS, to allow a board member to transmit to another board member a government record that is mandated to be public under section 92F-12, HRS, of the Uniform Information Practices Act (UIPA). The Office of Information Practices (“OIP”) has concerns about the bill in its present form, but could support it in an amended form.

Section 92F-12, HRS, lists categories of government records subject to the UIPA that are required to be disclosed notwithstanding the UIPA’s exceptions. For records listed in this section, the exceptions to disclosure do not apply. The first part of the section, subsection 92F-12(a), sets out a laundry list of various types of records that either were historically of public record when the UIPA was enacted, such as agency rules and opinions and land records, or that the Legislature determined at that time should be public, such as specific information about public employees. The remainder of the section, subsection 92F-12(b), has more general disclosure provisions to ensure that the UIPA will not be a barrier to access where there is already a statutory right of access, a relevant subpoena or court order,

compelling circumstances affecting safety, or where all individuals concerned have consented to the release of otherwise private information.

The records set out in subsection 92F-12(a) are an identifiable and limited set of records that have been recognized as being of particularly high public interest and therefore automatically public, and OIP believes that allowing board members to provide copies of such records to one another is in no way inconsistent with the common purpose of the UIPA and Sunshine Law to conduct government business as openly as possible. In contrast, the other subsection, 92F-12(b), is not limited to specific records and thus has the potential for much broader application. For instance, a memorandum or e-mail written by one board member listing his or her thoughts on an issue would be a government record falling under subsection 92F-12(b)(1) if the authoring member consented to its disclosure, which means that a provision permitting members to exchange such records would create a loophole by which members could privately or serially discuss an issue through memoranda or e-mails.

OIP thus recommends that this bill's reference at page 5, lines 12-14, to "any government record that would be subject to disclosure pursuant to *section 92F-12*," be narrowed to apply only to subsection (a) and thus read, "any government record that would be subject to disclosure pursuant to *subsection 92F-12(a)*."

The bill also provides (at page 5, lines 14-16) that when a board member transmits a public record under this proposed permitted interaction, the "no commitment relating to a vote on the matter [may be] made or sought by the board member in the means of transmittal." That language would still allow the transmitting board member to freely express his or her views on the issue, so long as no commitment was made or sought. **To ensure that the transmittal is not**

used as a way to discuss board business via e-mail or memorandum, OIP recommends that this language be amended to instead provide that “the transmittal shall not include additional discussion beyond a statement of what the attachment is and what issue it relates to.”

Finally, OIP notes that the proposed permitted interaction does not provide a limitation on the number of other members of the board a public record may be transmitted to. If OIP’s recommended amendments are made, then the information transmitted under this permitted interaction would be limited to (1) a document that is essentially a factual statement of existing rights, law of an agency, land ownership, purchasing information, or something similar, and (2) a statement of what the document is and what issue before the board it pertains to. Thus, **if OIP’s amendments recommended above are made, OIP would support the proposal to allow transmission to “other members of the board” without setting a limitation on the number.**

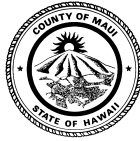
Thank you for the opportunity to testify.

Council Chair
Mike White

Vice-Chair
Don S. Guzman

Presiding Officer Pro Tempore
Michael P. Victorino

Councilmembers
Gladys C. Baisa
Robert Carroll
Elle Cochran
Don Couch
Stacy Crivello
Riki Hokama




Director of Council Services
David M. Raatz, Jr., Esq.

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.MauiCounty.us

February 12, 2015

TO: The Honorable Gilbert S.C. Keith-Agaran, Chair
Senate Committee on Judiciary and Labor

FROM: Mike White,
Council Chair 

SUBJECT: **HEARING OF FEBRUARY 13, 2015; TESTIMONY IN SUPPORT OF SB 465,
RELATING TO GOVERNMENT RECORDS**

Thank you for the opportunity to testify in **support** of this important measure. The purpose of this bill is to amend the Sunshine Law to allow certain government records to be shared among public board members where no commitment relating to a vote on the matter is made or sought.

The Maui County Council has not had the opportunity to take a formal position on this measure. Therefore, I am providing this testimony in my capacity as an individual member of the Council. I support this measure for the following reasons:

1. Under the Hawaii Supreme Court's 2013 decision in *Kanahele v. Maui County Council*, 130 Haw. 228 (2013), memoranda circulated among members of a "board" subject to the Sunshine Law may not be "permitted interactions" under Section 92-2.5, Hawaii Revised Statutes ("HRS"). Since the ruling, board members have been constrained from transmitting to each other public documents related to board business.
2. This measure would amend HRS Section 92-2.5 to allow board members to distribute certain public documents among themselves, so long as the transmittal does not include a commitment to vote on a matter to be considered by the board or a request for such a commitment.
3. This bill would increase government transparency and efficiency. Documents circulated among board members would be available for public disclosure and posting on the board's website. This would allow both board members and the public to better prepare for meetings. Members of the public have complained that receiving documents on the day of a meeting is unfair and does not afford them the appropriate time to incorporate any new material into their testimony.
4. This measure would put county councilmembers on equal footing with executive-branch officials and special-interest groups, who under current law can freely disseminate information and documents to councilmembers and the public.

For the foregoing reasons, I **support** this measure.

Council Chair
Mike White

Vice-Chair
Don S. Guzman

Presiding Officer Pro Tempore
Michael P. Victorino

Councilmembers
Gladys C. Baisa
Robert Carroll
Elle Cochran
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February 12, 2015

TO: The Honorable Gilbert S.C. Keith-Agaran, Chair
Senate Committee on Judiciary and Labor

FROM: Gladys C. Baisa *GCB*
Councilmember

SUBJECT: **HEARING OF FEBRUARY 13, 2015; TESTIMONY IN SUPPORT OF SB
465, RELATING TO GOVERNMENT RECORDS**

I support SB 465 for the reasons cited in testimony submitted by the Maui County Council Chair, and urge you to support this measure.

Council Chair
Mike White

Vice-Chair
Don S. Guzman

Presiding Officer Pro Tempore
Michael P. Victorino

Councilmembers
Gladys C. Baisa
Robert Carroll
Elle Cochran
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David M. Raatz, Jr., Esq.

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February 11, 2015

TO: Honorable Gilbert S.C. Keith-Agaran, Chair
Seante Committee on Judiciary and Labor

FROM: Robert Carroll
Councilmember, East Maui *Robert Carroll*

DATE: Friday, February 13, 2015

SUBJECT: **SUPPORT OF SB 465, RELATING TO GOVERNMENT RECORDS**

I support SB 465 for the reasons cited in testimony submitted by the Maui County Council Chair, and urge you to support this measure.



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SENATE COMMITTEE ON JUDICIARY AND LABOR
Hearing Scheduled 9 am, Friday, February 13, 2015, Conference Room 16
SB 465 RELATING TO GOVERNMENT RECORDS
TESTIMONY
Douglas Meller, Legislative Committee, League of Women Voters of Hawaii

Chair Gilbert S.C. Keith-Agaran, Vice-Chair Maile S.L. Shimabukuro, and Committee Members:

The League of Women Voters opposes SB 465. The bill allows a member of a public board to transmit any "... government record for which disclosure is required..." to other board members "... provided that no commitment relating to a vote on the matter is made or sought ... *in the means of transmittal*". Unfortunately, SB 465 would create two unacceptable loopholes in Hawaii's Sunshine Law under which board members could use memos and email to privately, serially discuss and even make voting commitments on matters before the board outside of any board meeting.

Although a transmittal memo or transmittal email could not directly make or seek a voting commitment, SB 465, as drafted, would authorize a member of a public board to use a transmittal memo or transmittal email (forwarding an attached government record) to express opinions on board matters to other board members. Moreover, if a board member authored and authorized public disclosure of a policy memo which expressed opinions, made voting commitments, or sought voting commitments about matters before the board, SB 465 would allow that policy memo to be transmitted to other board members outside of any board meeting. Such a policy memo would constitute a "government record" which would have to be disclosed under Section 92F-12(b)(1), Hawaii Revised Statutes.

Thank you for the opportunity to submit testimony.

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

700 Bishop Street, Suite 1701
Honolulu, HI 96813

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Senate Committee on Judiciary & Labor
Honorable Gilbert S.C. Keith-Agaran, Chair
Honorable Maile S.L. Shimabukuro, Vice Chair

RE: Testimony Commenting on S.B. 465, Relating to Government Records
Hearing: February 13, 2015 at 9:00 a.m.

Dear Chair and Members of the Committee:

My name is Brian Black. I am the Executive Director of the Civil Beat Law Center for the Public Interest, a nonprofit organization whose primary mission concerns solutions that promote government transparency. Thank you for the opportunity to submit testimony on S.B. 465. The Law Center takes no position on the bill's objective, but **respectfully requests that the Committee clarify that the transmittal is a public record.**

S.B. 465 provides that a transmittal of public records between board members is permitted, so long as "no commitment relating to a vote on the matter is made or sought by the board member in the means of transmittal." Public accountability for compliance with that condition is best achieved through public access to the transmittals. The other option would be *in camera* review of the transmittal by the Office of Information Practices or the courts. Public access would minimize the burden of this amendment on OIP and judicial resources.

Access also keeps the public informed as to the information being considered by board members. As the Sunshine Law declares, board proceedings are conducted as openly as possible because boards "exist to aid the people in the formation and conduct of public policy." HRS § 92-1. When board members exchange documents to educate each other on issues in advance of board decisions, the public also should have the opportunity to learn about the issues and thus better understand the board's subsequent Sunshine discussion. Governmental decision-making is well served by the "public scrutiny and participation" of an educated citizenry.

Thank you again for the opportunity to testify.

From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc:
Subject: Submitted testimony for SB465 on Feb 13, 2015 09:00AM
Date: Thursday, February 12, 2015 9:44:07 AM

SB465

Submitted on: 2/12/2015

Testimony for JDL on Feb 13, 2015 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Morris Haole Jr.	Individual	Support	No

Comments: I support the following measure for reasons cited in Maui County Chair Mike White's testimony.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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