

OFFICE OF INFORMATION PRACTICES

STATE OF HAWAII
NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
TELEPHONE: 808-586-1400 FAX: 808-586-1412
EMAIL: oip@hawaii.gov

To: House Committee on Finance

From: Cheryl Kakazu Park, Director

Date: April 9, 2015, 2:00 p.m.
State Capitol, Conference Room 308

Re: Testimony on S.B. No. 652, S.D. 1, H.D. 1
Relating to Public Agency Meetings

The Office of Information Practices (“OIP”) supports the intent of this bill, which would require a board subject to the Sunshine Law, part I of chapter 92, HRS, to report any discussion or final action taken during an executive session, when a board reconvenes in an open meeting, provided that the disclosure is not inconsistent with the purpose of holding the executive session. However, OIP recommends an amendment to address its concerns about the inclusion of executive session “discussion” as something a board must report in an open meeting, as it will often be impracticable for a board that had a valid basis for holding a discussion in executive session to then immediately report that discussion in public session.

The Hawaii Supreme Court has interpreted “final action,” as used elsewhere in the Sunshine Law, to mean “the final vote required to carry out the board's authority on a matter.” Kanahele v. Maui Cnty. Council, 130 Haw. 228, 259, 307 P.3d 1174, 1205, as corrected (Aug. 30, 2013), reconsideration denied, 130 Haw. 261, 307 P.3d 1207 (2013). Thus, it is conceivable that a vote taken in executive session may not be a “final action” that must be reported under this bill.

The Sunshine Law does not bar a board from discussing or voting in a closed, or executive, session regarding matters specified in HRS § 92-5.

Nevertheless, because a board's executive session discussion must be limited to matters directly related to the purpose of the closed meeting, the practical effect is that the board will discuss in private but vote to take final action in public. There are rare instances, however, where a board can legitimately vote in executive session to avoid frustrating the purpose of the executive session. For instance, a board might vote in executive session on the question of whether to fire its executive director, because until the point where the board voted to take that action, the executive director would still have a significant privacy interest in the fact that the board was considering taking such personnel action.

In contrast to a vote, a board's **discussion** held in executive session **does not typically become public** as soon as the executive session is over. Assuming that the board had a valid reason for holding the executive session in the first place, it is difficult to see how the board could make a meaningful report of its discussion immediately after an executive session, without frustrating the very purpose for which it held the executive session. Thus, OIP believes the requirement in SB 652, SD 1, HD 1 for a board to both publicly report its executive session **discussion**, while at the same time withholding any information whose disclosure would defeat the purpose of the executive session, is impracticable in most instances and would most likely result in a mere restatement of the executive session topic as described on the board's agenda.

There is an alternative way under existing law to learn what was discussed in an executive session, which is to make a request for the executive session minutes can be made under the Uniform Information Practices Act (modified), chapter 92F, HRS ("UIPA). While most of the matters may be redacted

as being exempt from disclosure under the UIPA, nonprotected matters must be disclosed, including the votes. Once disclosure would no longer frustrate the purpose for which the executive session was held, then the minutes must be disclosed.

OIP therefore recommends that this Committee delete the words “discussion or” from bill page 1, line 13.

With OIP’s amendments, this bill would ensure that members of the public interested in any board will have the opportunity to learn that a board has voted to take a final action during an executive session. The bill would put the onus on a board to affirmatively announce that it has voted to take final action on a matter, while at the same time recognizing that such an announcement should be phrased in a way that does not reveal additional information about the board’s discussion that would frustrate the original purpose of the executive session. OIP believes that this bill promotes the public interest in access to the formation of government policy while at the same time protecting confidentiality of information as recognized in the Sunshine Law’s executive session purposes. OIP therefore supports this bill, with the suggested amendment.

Thank you for the opportunity to testify.