

OFFICE OF INFORMATION PRACTICES

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To: Senate Committee on Judiciary and Labor

From: Cheryl Kakazu Park, Director

Date: February 21, 2017, 9:00 a.m.
State Capitol, Conference Room 016

Re: Testimony on S.B. No. 478
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 considered public records 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 and potential abuse. 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 for which disclosure is required by *section 92F-12*," **be narrowed to apply only to subsection (a) and not to subsection (b) and thus read, "any government record for which disclosure is required by *subsection 92F-12(a)*."**

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. If not, then OIP recommends that the language be limited to only "one other member of the board."**

Thank you for considering our proposed amendments.

THE CIVIL BEAT
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Senate Committee on Judiciary and Labor
Honorable Gilbert S.C. Keith-Agaran, Chair
Honorable Karl Rhoads, Vice Chair

RE: Testimony Commenting on S.B. 478, Relating to Government Records
Hearing: February 21, 2017 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 governmental transparency. Thank you for the opportunity to submit testimony. The Law Center **supports the intent of S.B. 478 if amendments are made to protect the public interest.**

S.B. 478 would permit members of Sunshine boards and commissions to circulate public records among each other outside an open meeting. The Sunshine Law is intended “to protect the people’s right to know.” HRS § 92-1. It is State policy that “the formation and conduct of public policy – the discussions, deliberations, decisions, and action of governmental agencies – shall be conducted as openly as possible.” *Id.*

Documents exchanged among board or commission members concerning official board business are part of the decision-making process. Thus, current law prohibits board members from exchanging documents outside an open meeting. With appropriate protections for timely public access to these written deliberations, however, the Legislature can *advance public accountability as well as efficiency* at the State’s boards and commissions.

1. *Records circulated and transmittal memoranda must be made publicly available promptly.* This legislation must expressly provide mechanisms for timely public access to any documents exchanged among board members. The correspondence and attached documents should be filed, as circulated, in the board’s office contemporaneous to being sent to the other board members. Board members should not be permitted to exchange records unless the board or commission has identified on its meeting notices where such communications will be made available to the public.

2. *Neither the transmittal memorandum nor records circulated may express a board member’s position on any matter of board business.* Board members should not share their position on a matter of board business with all other board members before the public has had an opportunity to provide input at an open meeting. Thus, the transmittal

memorandum and the records circulated should not contain any statement by the board member regarding his or her position on a matter.

3. *Expand the scope of records that can be circulated.* The bill focuses on the records available under HRS § 92F-12. That section, however, is limited in scope (*e.g.*, administrative rules, environmental test results, payroll records). If the intent of the legislation is to improve board efficiency and communication for better decision-making, this proposal unnecessarily hampers that intent. ***So long as appropriate protections are in place for public access to monitor board communications***, the proposal should permit board members to exchange any records that are public under the Uniform Information Practices Act.

The House Committee on Judiciary passed an amended version of this bill through H.B. 308 that, according to the summary announced at the committee hearing, will address these concerns.

The following revision suggests one way to address the issues identified:

- (h) A member of a board may provide other members of the board any government record open to public inspection, provided that:
 - (1) The board member does not express a position relating to a matter of official board business in the government record or transmittal, except a neutral statement in the transmittal that identifies the government record and the related matter of official board business;
 - (2) No commitment relating to a vote on a matter of official board business is made or sought;
 - (3) When the government record is provided to other members of the board, the transmittal and government record are promptly filed in the board's office; and
 - (4) This subsection applies only if the board's last notice pursuant to section 92-7 identified where members of the public may obtain copies in person.

Thank you again for the opportunity to testify.



Senate Judiciary and Labor Committee
Chair Gilbert Keith-Agaran, Vice Chair Karl Rhoads

02/21/2017 at 9:00 AM in Room 016
SB478 – Relating to Government Records

TESTIMONY — COMMENTS
Corie Tanida, Executive Director, Common Cause Hawaii

Dear Chair Keith-Agaran, Vice Chair Rhoads, and members of the Committee:

Common Cause Hawaii offers comments on SB478 which would allow board members to transmit government records to other board members under specified conditions.

While we recognize board members' need to be able to share government records amongst each other, it is important that the public's interest be protected as well. Thus we suggest specifying that the records circulated amongst members and transmittal memoranda are public records, which should promptly be made available to the public, and specifying the mechanisms required to provide prompt public access to these records.

Thank you for the opportunity to offer comments on SB478.



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SENATE COMMITTEE ON JUDICIARY AND LABOR

Tuesday, February 21, 2017, 9 AM, Conference Room 016
SB 478, Relating to Government Records

TESTIMONY

Douglas Meller, Legislative Committee, League of Women Voters of Hawaii

Chair Nishimoto and Committee Members:

The League of Women Voters opposes SB 478. The bill allows a member of a public board to transmit any "... government record for which disclosure is required by section 92F-12 ..." to other board members. Unfortunately, SB 478 would create an unacceptable loophole in Hawaii's Sunshine Law under which board members could use policy memos and email to privately, serially discuss and even make voting commitments on board matters outside of any board meeting.

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, such a policy memo would constitute a "government record" for which disclosure is required under Section 92F-12(b)(1), Hawaii Revised Statutes. SB 478 would allow that policy memo to be transmitted without public notice to other board members outside of any board meeting.

Thank you for the opportunity to submit testimony.