

OFFICE OF INFORMATION PRACTICES

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To: Senate Committee on Public Safety, Intergovernmental,
and Military Affairs

From: Cheryl Kakazu Park, Director

Date: February 2, 2018, 3:00 p.m.
State Capitol, Conference Room 414

Re: Testimony on S.B. No. 2167
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.**

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.

S.B. 478, a version of this bill, was amended twice and did not get out of conference during the 2017 legislative session. **OIP worked with other interested parties to create the language in S.B. 478, S.D. 1, H.D. 1 (attached), which would meet the concerns expressed by testifiers** about the possibility of board members carrying on an e-mail discussion and about the timing of public access. The H.D. 1 restricts the records that can be exchanged to those

authored by third parties and sets a standard for when records must be filed for public inspection. In addition, since not all boards have a board office in which such records could readily be filed, and the impetus for this bill appears to be from the county councils, the H.D. 1 limits the bill to the county councils (which have the administrative support to make the records available for public inspection as would be required). The council would be required to file the record in its office for public inspection on the same day the transmittal took place, at least 24 hours before discussing any relevant issues at a meeting, and provide electronic copies upon request. To avoid a situation where that condition was impossible to comply with (such as a transmittal happening in the evening after office hours), the H.D. 1 would also require that the transmission of records between members take place only during business hours.

Thus, under language from S.B. 478, S.D. 1, H.D. 1, (1) the information transmitted under this permitted interaction would be limited to a document created by a third party and a statement of what the document is and what issue before the board it pertains to, and (2) a copy of the exchange would be available to the public on that same day, and at least 24 hours before any discussion of relevant matters at a meeting. OIP supports the S.B. 478, S.D. 1, H.D. 1 proposal to allow transmission to “other members of the board” without setting a limitation on the number.

OIP urges this committee to amend this bill by replacing it with the language of S.B. 478, S.D. 1, H.D. 1, which was developed with the input of other testifiers and would provide the county councils with additional flexibility while protecting against potential abuses, and would further provide advance public access to information being considered by

Senate Committee on Public Safety, Intergovernmental, and Military Affairs
February 2, 2018
Page 4 of 4

the councils. The effective date in this bill would be the only other change necessary. Thank you for considering our proposed amendments.

A BILL FOR AN ACT

RELATING TO GOVERNMENT RECORDS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 92-2, Hawaii Revised Statutes, is
2 amended by amending the definition of "board" to read as
3 follows:
4 "Board" means any agency, county council, board,
5 commission, authority, or committee of the State or its
6 political subdivisions which is created by constitution,
7 statute, rule, or executive order, to have supervision, control,
8 jurisdiction, or advisory power over specific matters and which
9 is required to conduct meetings and to take official actions."
10 SECTION 2. Section 92-2.5, Hawaii Revised Statutes, is
11 amended to read as follows:
12 "§92-2.5 Permitted interactions of members. (a) Two
13 members of a board may discuss between themselves matters
14 relating to official board business to enable them to perform
15 their duties faithfully, as long as no commitment to vote is
16 made or sought and the two members do not constitute a quorum of
17 their board.



1 (b) Two or more members of a board, but less than the
2 number of members [~~which~~] that would constitute a quorum for the
3 board, may be assigned to:

4 (1) Investigate a matter relating to the official business
5 of their board; provided that:

6 (A) The scope of the investigation and the scope of
7 each member's authority are defined at a meeting
8 of the board;

9 (B) All resulting findings and recommendations are
10 presented to the board at a meeting of the board;
11 and

12 (C) Deliberation and decisionmaking on the matter
13 investigated, if any, occurs only at a duly
14 noticed meeting of the board held subsequent to
15 the meeting at which the findings and
16 recommendations of the investigation were
17 presented to the board; or

18 (2) Present, discuss, or negotiate any position [~~which~~]
19 that the board has adopted at a meeting of the board;
20 provided that the assignment is made and the scope of
21 each member's authority is defined at a meeting of the



1 board prior to the presentation, discussion, or
2 negotiation.

3 (c) Discussions between two or more members of a board,
4 but less than the number of members [~~which~~] that would
5 constitute a quorum for the board, concerning the selection of
6 the board's officers may be conducted in private without
7 limitation or subsequent reporting.

8 (d) Board members present at a meeting that must be
9 canceled for lack of quorum or terminated pursuant to section
10 92-3.5(c) may nonetheless receive testimony and presentations on
11 items on the agenda and question the testifiers or presenters;
12 provided that:

13 (1) Deliberation or decisionmaking on any item, for which
14 testimony or presentations are received, occurs only
15 at a duly noticed meeting of the board held subsequent
16 to the meeting at which the testimony and
17 presentations were received;

18 (2) The members present shall create a record of the oral
19 testimony or presentations in the same manner as would
20 be required by section 92-9 for testimony or
21 presentations heard during a meeting of the board; and



1 (3) Before its deliberation or decisionmaking at a
2 subsequent meeting, the board shall:
3 (A) Provide copies of the testimony and presentations
4 received at the canceled meeting to all members
5 of the board; and
6 (B) Receive a report by the members who were present
7 at the canceled or terminated meeting about the
8 testimony and presentations received.
9 (e) Two or more members of a board, but less than the
10 number of members [~~which~~] that would constitute a quorum for the
11 board, may attend an informational meeting or presentation on
12 matters relating to official board business, including a meeting
13 of another entity, legislative hearing, convention, seminar, or
14 community meeting; provided that the meeting or presentation is
15 not specifically and exclusively organized for or directed
16 toward members of the board. The board members in attendance
17 may participate in discussions, including discussions among
18 themselves; provided that the discussions occur during and as
19 part of the informational meeting or presentation; and provided
20 further that no commitment relating to a vote on the matter is
21 made or sought.



1 At the next duly noticed meeting of the board, the board
2 members shall report their attendance and the matters presented
3 and discussed that related to official board business at the
4 informational meeting or presentation.

5 (f) Discussions between the governor and one or more
6 members of a board may be conducted in private without
7 limitation or subsequent reporting; provided that the discussion
8 does not relate to a matter over which a board is exercising its
9 adjudicatory function.

10 (g) Discussions between two or more members of a board and
11 the head of a department to which the board is administratively
12 assigned may be conducted in private without limitation;
13 provided that the discussion is limited to matters specified in
14 section 26-35.

15 (h) A member of a county council may provide other members
16 any government record that is open to public inspection under
17 chapter 92F, provided that:

18 (1) The record was created by a person other than a member
19 or employee of the county council;

20 (2) No additional discussion is added to the record other
21 than a neutral statement in the transmittal to



1 identify the government record and the related matter
2 of official business;
3 (3) No commitment relating to a vote on the matter is made
4 or sought;
5 (4) The transmission of government records between county
6 council members occurs during business hours;
7 (5) On the same day the government record is transmitted
8 to other county council members, the transmittal
9 document and government record shall be filed for
10 public inspection in the county council office. The
11 public shall have access to the transmittal document
12 and government records at least twenty-four hours
13 before the county council meets to discuss matters
14 relating to the government records; and
15 (6) The transmittal document and government record filed
16 in the county council office shall, upon request, be
17 electronically transmitted to the requester.
18 [~~h~~] (i) Communications, interactions, discussions,
19 investigations, and presentations described in this section are
20 not meetings for purposes of this part."



1 SECTION 3. Section 279D-9, Hawaii Revised Statutes, is
2 amended by amending subsection (b) to read as follows:

3 "(b) Participation by members of any other board in a
4 meeting of a policy board shall be permitted interaction as
5 provided in section [~~92-2.5(h)-.~~] 92-2.5(i)."

6 SECTION 4. Statutory material to be repealed is bracketed
7 and stricken. New statutory material is underscored.

8 SECTION 5. This Act shall take effect on January 7, 2059.



Report Title:

County Council Records; Required Disclosures; Sunshine Law

Description:

Allows a county council member to provide other council members with government records that are public record and created by persons who are not members or employees of the county council, subject to certain conditions. (SB478 HD1)

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



Harry Kim
Mayor



Wil Okabe
Managing Director

Barbara J. Kossow
Deputy Managing Director

County of Hawai'i
Office of the Mayor

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January 31, 2018

Senator Clarence K. Nishihara, Chair
Committee on Public Safety, Intergovernmental, and Military Affairs
Hawai'i State Capitol, Room 414
Honolulu, HI 96813

Dear Chair Nishihara and Committee Members:

Re: SB 2167 Sharing of public records among board members
Hearing Date: 02/02/18 – 3:00 pm; Conference Room 414

Thank you for this opportunity to testify in support of SB 2167.

SB 2167 would seem to be an appropriate way to share public information among members of a board. It proposes something to be encouraged, not prohibited. The principles of "sunshine" and open government are very important, but it is possible to inadvertently create inappropriate barriers to the sharing of knowledge that is needed to make informed decisions.

I hope you will act favorably on SB 2167. If it is thought necessary, provide that the transmittal itself be part of the public record, so that all interested parties will be aware of the information being shared and relied on as decisions are made.

Respectfully submitted,

Harry Kim
Mayor, County of Hawai'i

Council Chair
Mike White

Vice-Chair
Robert Carroll

Presiding Officer Pro Tempore
Stacy Crivello

Councilmembers
Alika Atay
Elle Cochran
Don S. Guzman
Riki Hokama
Kelly T. King
Yuki Lei K. Sugimura



Director of Council Services
Sandy K. Baz

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

February 1, 2018

TO: The Honorable Clarence K. Nishihara, Chair
Senate Committee on Public Safety, Intergovernmental and Military Affairs

FROM: Robert Carroll
Council Member

DATE: February 2, 2018

SUBJECT: **TESTIMONY IN SUPPORT OF SB 2167; RELATING TO GOVERNMENT RECORDS**

Thank you for the opportunity to testify in **support** of this important measure. The purpose of this measure amends 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 proposed bill. Therefore, I am providing this testimony in my capacity as an individual member of the Maui County Council.

I strongly **support** this measure for the following reasons:

1. The amendment of Section 92-2.5, Hawaii Revised Statutes reads as follows, 92-2.5 Permitted interactions of members: (a) two members of a board may discuss between themselves matters relating to official board business to enable them to perform their duties faithfully, as long as no commitment to vote is made or sought and the two members do not constitute a quorum of their board.
2. Members should be able to attend an informational meeting or presentation on matters relating to official business, including a legislative hearing, convention, seminar or community meeting; When information is provided through a memorandum, or another form of transmittal or any government record is required for disclosure is required, should be permitted when no commitment is relating to a vote on the matter. It is important to be able to participate in discussions, including discussions

February 1, 2018
Page 2

amongst themselves, provided that the discussions occur during and part of the informational meeting or presentation and no commitment relating to a vote on the matter is made or sought. When we can work within these parameters it helps members to better understand ongoing concerns and issues.

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

RC:dna

COUNTY COUNCIL

Mel Rapozo, Chair
Ross Kagawa, Vice Chair
Arthur Brun
Mason K. Chock
Arryl Kaneshiro
Derek S.K. Kawakami
JoAnn A. Yukimura



OFFICE OF THE COUNTY CLERK

Jade K. Fountain-Tanigawa, County Clerk
Scott K. Sato, Deputy County Clerk

Telephone: (808) 241-4188
Facsimile: (808) 241-6349
E-mail: cokcouncil@kauai.gov

Council Services Division
4396 Rice Street, Suite 209
Lihu'e, Kaua'i, Hawai'i 96766

January 31, 2018

TESTIMONY OF DEREK S.K. KAWAKAMI
COUNCILMEMBER, KAUAI COUNTY COUNCIL
ON
SB 2167, RELATING TO GOVERNMENT RECORDS
Senate Committee on Public Safety, Intergovernmental, and Military Affairs
Friday, February 2, 2018
3:00 p.m.
Conference Room 414

Dear Chair Nishihara and Members of the Committee:

Thank you for this opportunity to provide testimony in strong support of SB 2167, Relating to Government Records. My testimony is submitted as Vice President of the Hawai'i State Association of Counties, and in my individual capacity as a member of the Kaua'i County Council and Chair of the Council's Economic Development & Intergovernmental Relations Committee.

SB 2167, Relating to Government Records, is included in the 2018 Hawai'i State Association of Counties Legislative Package. Amending the Sunshine Law to allow for certain government records to be shared amongst public board members where no commitment relating to a vote on the matter is made or being sought enables public officials, for instance myself as a Councilmember, gain a better understanding and knowledge of other perspectives on issues in our community. Decisions made by public officials should not be done without all the necessary information delivered in a timely fashion.

For the reasons stated above, I urge the Senate Committee on Public Safety, Intergovernmental, and Military Affairs to support this measure. Should you have any questions, please feel free to contact me or Council Services Staff at (808) 241-4188.

Sincerely,

DEREK S.K. KAWAKAMI
Councilmember, Kaua'i County Council

AMK:lc

Hawai'i State Association of Counties (HSAC)

Counties of Kaua'i, Maui, Hawai'i and City & County of Honolulu

74-5014 Ane Keohokalole Highway, Bldg A, Kailua-Kona, HI 96740



January 30, 2018

TESTIMONY OF DRU KANUHA HSAC PRESIDENT

ON SB 2167, RELATING TO GOVERNMENT RECORDS.

Committee on Public Safety, Intergovernmental, and Military Affairs

Friday, February 2, 2018

3:00 p.m.

Conference Room 414

Aloha Chair Nishihara and Members of the Committee:

Thank you for the opportunity to testify on behalf of the Hawai'i State Association of Counties in **support** of Senate Bill 2167, relating to government records which is included in the 2018 Hawai'i State of Association of Counties legislative package.

The purpose of 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 or a request for commitment. This bill would increase government transparency and efficiency and 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.

HSAC supports this measure for the reasons stated above and we urge the Committee on Public Safety, Intergovernmental, and Military Affairs to support this measure as well. Should you have any questions, please feel free to contact me at (808) 323-4267.

Mahalo for your consideration.

A handwritten signature in black ink, appearing to read "Dr. Kanuha", with a long horizontal flourish extending to the right.

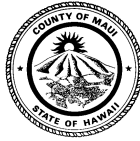
DRU KANUHA
HSAC PRESIDENT

Council Chair
Mike White

Vice-Chair
Robert Carroll

Presiding Officer Pro Tempore
Stacy Crivello

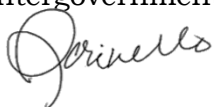
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February 1, 2018

TO: Honorable Clarence K. Nishihara, Chair
Senate Committee on Public Safety, Intergovernmental, and Military Affairs

FROM: Stacy Crivello, Secretary 
Hawaii State Association of Counties

SUBJECT: **HEARING OF FEBRUARY 2, 2018; TESTIMONY IN SUPPORT OF SB 2167, 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.

This measure is included in the Hawaii State Association of Counties' ("HSAC") Legislative Package; therefore, I offer this testimony as HSAC's Secretary.

I am aware that the President of HSAC has submitted testimony, on behalf of HSAC, in support of this measure. As Secretary, I concur with the testimony submitted by the President, and urge you to **support** this measure.

ocs:proj:legis:18legis:18testimony:sb2167_paf18-025_ajw:ajw

SB-2167

Submitted on: 2/1/2018 1:34:56 PM

Testimony for PSM on 2/2/2018 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Councilmember Yuki Lei Sugimura	Maui County Council	Support	No

Comments:

This measure is included in the HSAC Legislative Package, therefore I offer support of this bill.

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

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Senate Committee on Public Safety,
Intergovernmental, and Military Affairs
Honorable Clarence K. Nishihara, Chair
Honorable Glenn Wakai, Vice Chair

RE: Testimony Commenting on S.B. 2167, Relating to Government Records
Hearing: February 2, 2018 at 3:00 p.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. 2167 if amendments are made to protect the public interest.** *Please consider the amendments made to the similar bill last session as reflected in H.B. 308, H.D. 1, S.D. 2.*

S.B. 2167 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 and available to the public by request contemporaneous to being sent to the other board members.
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.

Thank you again for the opportunity to testify.



Senate Committee on Public Safety, Intergovernmental, and Military Affairs
Chair Clarence Nishihara, Vice Chair Glenn Wakai

02/02/2018 3:00 PM Room 414
SB2167 – Relating to Government Records

TESTIMONY / OPPOSE
Corie Tanida, Executive Director, Common Cause Hawaii

Dear Chair Nishihara, Vice Chair Wakai, and members of the committee:

Common Cause opposes SB2167 which would amend the Sunshine Law to permit certain government records to be shared among public board members where no commitment relating to a vote is made or sought.

While we recognize board members' need to be able to share government records amongst each other, the public's interest must also be protected. We suggest amending the bill to reflect HB308 SD1 (2017), which:

1. Expands the scope of records that can be shared between board members
2. Limits the circumstances and criteria which board members may share records
3. Clarifies that when transmitted the record must be *promptly* filed in the board's office

Thank you for the opportunity to offer testimony **opposing SB2167**.