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To: House Committee on Judiciary & Hawaiian Affairs

From: Cheryl Kakazu Park, Director

Date: February 11, 2021, 2:00 p.m.
Via Videoconference

Re: Testimony on H.B. No. 157, H.D. 1
Relating to Public Agency Meetings and Records

Thank you for the opportunity to submit testimony on this bill, which would add a new executive session purpose to the Sunshine Law, part I of chapter 92, HRS, allowing boards to hold a closed session to hear victim or witness testimony related to a personnel action or complaint against an employee or officer when needed to protect privacy. The Office of Information Practices (OIP) offers comments on this measure, but believes it is ultimately a policy question for the Legislature to decide whether the benefit of increasing a full board's ability to hear from victims or witnesses outweighs the drawback of diminishing public access to an employee evaluation or investigation where the employee has waived his or her own privacy interest.

Under current law, a board can hold an executive session to "consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee" where that individual's privacy is concerned; however, the employee concerned has the right to waive his or her privacy and request that the discussion be held in an open meeting, in which case

the board must consider the issue publicly unless it has another statutory basis for holding a closed executive session. There may be other executive session purposes that apply, such as a board's need to consult with its attorney, but typically that purpose would not apply for the entirety of a board's consideration of the matter. A board that expects the employee concerned to request an open meeting but wants to hear from other witnesses – for instance, a board evaluating its executive director that wants to hear from the rank and file employees – can create an investigative group or “permitted interaction group” of less than a quorum of its members to speak privately to those witnesses and later report back to the full board. This allows the witnesses to speak more freely to the minority of board members in the investigative group, but also means that the majority of board members will be privy to only the investigative group's anonymized summary of witness testimony, not the witnesses' full remarks.

By adding the proposed new purpose for which a board can hold an executive session, the Legislature would enable Sunshine Law boards to have the whole board hear witness testimony regarding an officer or employee in closed session whenever the witness was reluctant to give testimony publicly based on his or her own privacy interest, regardless of whether the officer or employee who was the subject of the proposed personnel action or complaint had requested an open meeting, and regardless of whether another executive session purpose applied. This would obviously be a benefit to the board's discussion and decision-making. However, OIP has some concern that the proposed executive session purpose could be susceptible to over-use.

The current law forces boards to narrowly tailor their approach to witness testimony when an officer or employee under consideration waives privacy, so as to minimize what is kept confidential and have as much information as possible provided in the summary that the rest of the board and the public will hear. Under current law, the majority of the board will not be able to hear from the witnesses directly but will only have the information from the permitted interaction group's report to use as the basis for their consideration, which is the same information available to the public to use as the base for their testimony. In contrast, the proposed amendment would likely mean that consideration of personnel action regarding an officer or employee would take place largely in executive session closed to the public, even when the officer or employee concerned waived his or her own privacy. Thus, while boards' access to detailed witness information would be enhanced, public access and participation would be diminished.

Where to draw this balance, and whether to add the proposed executive session purpose to the Sunshine Law, is ultimately a policy call for the Legislature. OIP is happy to answer questions regarding the effects the new executive session purpose would have.

Thank you for the opportunity to testify.