

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 Government Reform

From: Cheryl Kakazu Park, Director

Date: February 11, 2022, 9:30 a.m.
State Capitol, Conference Room 309

Re: Testimony on H.B. No. 2026
Relating to Chapter 92, Hawaii Revised Statutes

Thank you for the opportunity to submit testimony on this bill, which would amend part I of chapter 92, the Sunshine Law, by codifying the definition of board business, adding a new permitted interaction allowing board members to circulate a position statement in the course of preparing legislative testimony, setting a deadline of 24 hours before a meeting for board packets to be provided to members and the public, barring the practice of hearing oral testimony at the beginning of a meeting, and removing land use issues from the Sunshine Law exemption generally applicable to quasi-judicial functions such as contested cases. The Office of Information Practices (OIP) believes the changes proposed in this bill are relatively minor and not inconsistent with the policy and purpose of the law, and thus does not take a position for or against those proposals, but instead **offers comments on how they would change the current law and their potential effects** to assist this Committee in making the policy decision of whether to pursue each proposed amendment.

1. Definition changes

First, this bill would amend section 92-2, HRS, to add definitions of “board business” and an “informal gathering” and delete the definition of a “chance meeting.” OIP believes this change would not represent a substantive change to the law. The term “chance meeting,” defined as a social or informal assemblage of members at which board business is not discussed, is used only once in the Sunshine Law, in a provision in section 92-5(b) stating that a chance meeting, permitted interaction, or electronic communication cannot be used to circumvent the law’s spirit or requirements. Thus, the term just serves to underline that a gathering of members at which no board business is discussed is not required to be conducted as a Sunshine Law meeting but also cannot be used as a way to get around the law’s requirements. This proposal would simply replace the term “chance meeting” with the term “informal gathering,” leaving the definition and function the same. OIP therefore believes this change would have no impact on the law’s operation.

The addition of a statutory definition of “board business” would effectively codify the definition of “board business” that OIP adopted in an opinion over twenty years ago and has followed since that time. The proposed definition would not substantively change OIP’s existing definition. Codifying the definition will make it easier to find, as not everyone is aware of the body of OIP’s opinions interpreting the Sunshine Law. **Thus, OIP believes that although this change will not alter how the law applies to boards, it will add clarity to the statute itself.**

2. Permitted Interaction to Circulate and Comment on Testimony

At page 7 the bill proposes a new permitted interaction, section 92-2.5(h), that would allow board members to “circulate for approval a statement regarding a position previously adopted by the board” to meet a legislative testimony deadline that is shorter than the Sunshine Law’s six calendar day deadline to notice a meeting, so long as the position was previously adopted by the board and the statement and all communications among board members about it are written and publicly posted online within two days. The issue of how a Sunshine Law board can prepare legislative testimony is one many boards find challenging, and although there are ways for a board to deal with this such as through delegation to staff or to a minority of board members designated under section 92-2.5(b)(2), HRS, to prepare testimony on and present the board’s previously adopted position, the only way for all members of a board to be able to discuss the actual testimony would be for the board to notice an emergency meeting based on an unanticipated event under section 92-8(b), HRS, which is not a straightforward process. This proposed permitted interaction would make a full board’s discussion of its testimony easier.

Although it goes farther than most permitted interactions by allowing discussion of board business among not just a quorum but all board members, the topic that can be discussed is limited to the approval of a written statement intended for the legislature that reflects a position previously adopted by the board, and the requirement for all communications to be in writing and posted online should help to ensure that the permitted interaction is used only for this fairly narrow purpose and not to shut the public out of policymaking discussions. **OIP thus does not object in principle to this proposed permitted interaction, and believes the Legislature must decide whether it represents an**

appropriate balance between boards' expediency and the public interest in access to government boards' discussions and decisions.

3. Board Packet Deadline

At pages 8 and 10, the bill would amend sections 92-3 and 92-7.5 to require that any board packet be available at least twenty-four hours before public testimony. Currently the Sunshine Law does not require boards to have board packets, but if a board does, at the same time it distributes the packet to board members it must also make the packet (or a redacted "public" version) available for public inspection in its office, notify persons on its mailing list, and email it upon request. The deadline for public disclosure is thus determined by when the board distributes the packet to the board members, which could be any time up to the meeting itself, and a board that does not distribute a board packet to its members also does not trigger the requirement to make a board packet available to the public. OIP understands the intent of this provision is to set a firm deadline for when packets must be distributed to ensure there is some time for the public (and board members) to look at them prior to the meeting. However, **OIP has some technical concerns with the proposed placement of the requirement in both sections 92-3 and 92-7.5, which is duplicative; with calculating the deadline in two different ways; and with the potential for the language used in the proposal to inadvertently change current law by adding a requirement for all boards to have board packets and an authorization for boards to set a deadline for written testimony.**

The substantive question for this Committee is whether to create a firm deadline for submission of board packets, rather than tying it to when packets are distributed to members no matter how late that may be. OIP is aware that

some boards distribute a board packet at the meeting itself, so those boards would have to change their practices to get the board packet out in advance of the meeting. However, a change from submitting board packets any time up to the meeting itself, to submitting board packets any time up to 24 hours before the meeting, is likely not to affect most boards using board packets as the packets are more commonly distributed in time for board members, as well as the interested public, to look at the materials prior to the meeting. The change thus would not have a large effect on how boards operate.

If this Committee does decide to amend the Sunshine Law to create a firm deadline for submission of board packets, OIP recommends first that it delete the proposed new language referring to board packets in section 92-3, HRS, at bill page 8 lines 14-16 and 18-20, to avoid confusingly setting two duplicative but slightly different deadlines and also avoid creating a statutory requirement that even a board that does not normally create board packets must always have a board packet for the public review. Second, OIP recommends it change the proposed amendment to section 92-7.5, HRS, on bill page 10 lines 6-9, to avoid creating a requirement for all boards to have board packets and also measure the deadline from the meeting time itself for clarity and to avoid implying that boards are allowed to set a deadline for submission of written testimony, which OIP opinions have found not to be allowed under the Sunshine Law. The following language at what is now bill page 10 lines 4-9 would do that:

“At the time the board packet is distributed to the board members, but no later than twenty-four hours prior to the meeting time, the board shall also make the board packet available for public inspection in the

board’s [~~office.~~] office; providing that nothing in this section shall require creation of a board packet. The board shall provide notice . . .”

4. Timing of Testimony

Part of the proposed amendment to section 92-3, HRS, specifically the portion at bill page 8 lines 20-21, does not deal with board packets but instead would set a requirement that oral testimony “not be limited to the beginning of a board’s agenda or meeting.” In its opinions, **OIP has interpreted the Sunshine Law not to set a specific requirement regarding when in a meeting oral testimony may be taken, other than to require that testimony on a particular agenda item at least be taken prior to the board’s own discussion of that issue** (because the function of testimony is to give the public an opportunity to present information and arguments and perhaps sway the board in its consideration of the issue). OIP is aware that many boards choose to take public testimony on all agenda items at the beginning of a meeting, and OIP has opined that the practice is allowed under the Sunshine Law so long as each interested person has a sufficient opportunity to speak to each agenda item during that period – in other words, taking testimony all at the beginning cannot be used as a way to shorten the total period of time allowed for public testimony. Boards have their own reasons for choosing whether to take testimony at the beginning of a meeting or as each item is called, and OIP’s understanding is that those reasons can include both the board’s own convenience and organizational preference and consideration of what is easier for the public (some people prefer to testify and leave rather than sit through a meeting waiting for their items of interest).

This proposal would bar the practice of taking all testimony at the beginning of a meeting, and effectively require that testimony be taken

either immediately prior to discussion of each item or at least prior to each category or set of agenda items. It is not a huge change to the law, but it will change the way some boards operate and give them less control over how they organize their meetings. **Is there a benefit to eliminating the practice of taking testimony at the beginning of a meeting that outweighs the potential inconvenience to boards of having to change the way they run meetings on pain of violating the Sunshine Law? The question, OIP believes, is a policy decision for this Committee to make.**

5. Land Use Related Adjudicatory Functions

On page 9 beginning at line 16, this bill would amend section 92-6(b), HRS, to make the Sunshine Law applicable to any board's adjudicatory functions concerning land use. Section 92-6(a) sets out an exemption to the Sunshine Law for boards' adjudicatory functions, including but not limited to those governed by contested case requirements. In current law, subsection 92-6(b) creates an exception to that exemption under which the Land Use Commission remains subject to the Sunshine Law's requirements even when exercising its adjudicatory functions. This proposal would extend that exception-to-the-exemption to make the Sunshine Law applicable to any Sunshine Law board exercising its adjudicatory functions concerning land use, not just the Land Use Commission.

The exemption for boards' exercise of adjudicatory functions recognizes that for its adjudicatory functions a board is already subject to a different set of standards for public notice, testimony, and written records of decisions, typically as set out in the contested case requirements and with the primary goal of ensuring due process among interested parties rather than of ensuring general public access to the formation and conduct of public policy as under the Sunshine Law. By

exempting boards' adjudicatory functions, the Sunshine Law prevents such boards from being required to simultaneously follow two potentially incompatible standards for notice, testimony, and so forth. The downside of creating an exception to the exemption, then, is that it creates greater administrative challenges for boards that must follow both standards. The benefit is that following both standards helps ensure that for issues where there is both a general public interest and a more direct interest for involved parties, both the public and the involved parties have the opportunity to attend and participate appropriately. **Here, too, OIP believes this Committee must balance those considerations in making a policy decision on whether to make this proposed amendment to the Sunshine Law.**

6. General Considerations

As a final observation, OIP notes that recent years have seen regular and sometimes substantial changes to the Sunshine Law, including the addition last year of a statutory process by which boards can hold remote Sunshine Law meetings. **Frequent changes to the law can be challenging for boards to adapt to**, as it requires them to learn new requirements and change aspects of how they operate on what can be an annual basis. In addition to the policy considerations applicable to specific proposed amendments, **OIP would ask this Committee to bear in mind that frequent changes to the law can itself present a challenge to boards' ability to keep up with the requirements.** Nonetheless, OIP also notes that the changes proposed in this bill are not sweeping in scope and would present relatively minimal alterations to how most boards currently do business.

Thank you for considering OIP's testimony.



Hawai'i Convention Center
1801 Kalākaua Avenue, Honolulu, Hawai'i 96815
kelepona tel 808 973 2255
kelepa'i fax 808 973 2253
kahua pa'a web hawaiiitourismauthority.org

David Y. Ige
Governor

John De Fries
President and Chief Executive Officer

Statement of
JOHN DE FRIES

Hawai'i Tourism Authority
before the
COMMITTEE ON ECONOMIC DEVELOPMENT

February 11, 2022
9:30 a.m.
State Capitol
via videoconference

In consideration of
HOUSE BILL NO. 2026
RELATING TO CHAPTER 92, HAWAII REVISED STATUTES

Aloha Chair McKelvey, Vice Chair Wildberger, and members of the Committee on Government Reform.

The Hawai'i Tourism Authority (HTA) appreciates the opportunity to offer comments on HB2026, which adds definitions for "board business" and "informal gatherings" while also specifying that a board may prepare and circulate amongst its members a statement on a position previously adopted for purposes of submission to the legislature when notice by the legislature is insufficient to interact in any other permitted manner. The measure further outlines when board packets must be available to interested persons and requires the application of the sunshine law to all adjudicatory functions concerning land use.

As an attached agency that is governed by a board, we are often faced with impossible deadlines to circulate and approve drafts of testimony that have a short window to submit to the legislature. This measure, while the intent is good, would create an inefficiency in that process by requiring that communications among board members about the statement, including drafts, be made accessible to the public within two days of it being circulated. We believe this may frustrate the process and lead to agencies, such as ours, not meeting the often-short deadlines and present meaningful testimony. We would recommend keeping the section that states: "Where notice of the deadline to submit testimony to the legislature is less than the notice requirements in this section, a board may circulate for approval a statement regarding a position previously adopted by the board," and deleting the remaining language.

February 9, 2022

Related to the board packets and minutes, the HTA's agendas often contain items that are time-sensitive and are released on the day of the meeting. One example is the research reports that are released by DBEDT and HTA on the day of the board meeting. Including such material in a board packet that is posted at least twenty-four hours prior to the written testimony would release the results of that research before DBEDT's intended release date. It is likely that DBEDT would not allow this information to be included and would withdraw from participating in our board meetings. This would frustrate the board's ability to make informed policy decisions in a timely and meaningful way. We would recommend removing this language from the proposal.

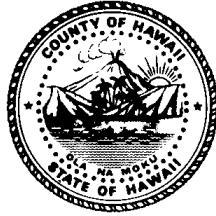
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We appreciate the opportunity to provide our comments on HB2026. Mahalo.

HEATHER L. KIMBALL

Council Member

*Chair, Committee on Governmental Operations,
Relations and Economic Development
Council District 1*



Contact Information

(808) 961-8828

(808) 961-8018 (staff)

heather.kimball@hawaiicounty.gov

HAWAI‘I COUNTY COUNCIL

*County of Hawai‘i
Hawai‘i County Building
25 Aupuni Street, Suite 1402
Hilo, Hawai‘i 96720*

February 10, 2022

To: Rep. McKelvey, Chair House Committee on Government
and Rep. Wildberger, Vice Chair House Committee on Government

RE: Strong Support for Bill HB2026

Aloha Chair McKelvey, Vice Chair Wildberger and honorable members of the House Committee on Government Reform,

Thank you for scheduling a hearing of HB2026. I am writing today to offer my **strong support for HB2026** relating to HRS Chapter 92, Sunshine Law; Board Business; Informal Gatherings; Board Packets; Land Use

This bill is the result of several months of conversations between City and County of Honolulu Chair Tommy Waters, representatives from Common Cause, League of Women Voters, Office of Information Practices (OIP) and me. I am very pleased with the collaborative approach used in the drafting this bill and I am grateful to Rep. Nakashima for introducing it on our behalf.

HB2026 would have been part of the HSAC legislative package had the drafting been completed in time. However, increasing government transparency and increasing public involvement in government decision was adopted as a priority for HSAC. We feel that the language in this bill accomplishes both of these objectives.

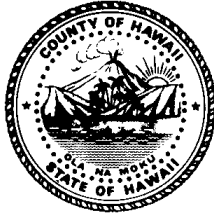
The lack of clarity in the definition of board business in HRS Chapter 92 has led to confusion and often resulted in a chilling effect on the work of boards subject to Sunshine law. This is particularly true for the County Councils whose work often includes community organizing in addition to board business. Boards are also unclear about their ability to engage in trainings and professional development that would improve their ability to do their work effectively. HB2026 aims to put into statute a clear definition of board business, that was crafted based on previous OIP opinion, and make editorial changes to clarify the reference to this definition.

As state legislators, you more than anyone, are aware of how quickly things move during session. Due to the notice requirements, boards are unable to testify as a whole body on state legislative proceedings in a timely way. The language in this bill provides a mechanism for boards to fully participate in the legislative process when the board has agreed to policy positions in a previously held public hearing.

HEATHER L. KIMBALL

Council Member

*Chair, Committee on Governmental Operations,
Relations and Economic Development
Council District 1*



Contact Information

(808) 961-8828

(808) 961-8018 (staff)

heather.kimball@hawaiiicounty.gov

HAWAI‘I COUNTY COUNCIL

*County of Hawai‘i
Hawai‘i County Building
25 Aupuni Street, Suite 1402
Hilo, Hawai‘i 96720*

Furthermore, this bill increases the ability of the public to participate in board proceedings by setting a specific time requirement for board packets to be made available to the public. The public needs the same information as the boards in order to be able to meaningfully testify on matters before the board.

Finally, HB2026 includes all adjudicatory functions concerning land use in the proceedings subject to Sunshine Law. This will increase transparency and give the the public the ability to meaningfully participate and ensure the best land use decision are made through public involvement.

Thank you for the opportunity to testify in **support of HB2026** and I urge the committee to pass this important bill.

Thank you in advance for your consideration,

A handwritten signature in cursive script that reads "Heather Kimball".

Heather Kimball

Hawaii County Council, District 1

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

700 Bishop Street, Suite 1701
Honolulu, HI 96813

Office: (808) 531-4000
Fax: (808) 380-3580
info@civilbeatlawcenter.org

House Committee on Government Reform
Honorable Angus L.K. McKelvey, Chair
Honorable Tina Wildberger, Vice Chair

**RE: Testimony Supporting H.B. 2026,
Relating to Chapter 92, Hawaii Revised Statutes**
Hearing: February 11, 2022 at 9:30 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 **supporting H.B. 2026**.

This bill addresses multiple issues that will provide members of the public and members of Sunshine Law boards with greater opportunity to participate more meaningfully in public discourse.

Section 2 codifies the definition of “board business” that has been used by the Office of Information Practices for decades and may help to address overly conservative legal advice by attorneys for boards and commissions regarding what board members can discuss outside an open meeting.

Section 3 adds a permitted interaction group that will allow board members – subject to reasonable guardrails to avoid private discussions of board business – to participate more readily in proceedings before the Legislature.

Section 4 and Section 7 provide the public with better advance notice of what will be discussed and a more meaningful opportunity to participate in discussions by Sunshine Law boards. Consistent with other proposals before this Committee, the Law Center would suggest increasing the availability of board packets to 48 hours before a meeting.

Section 6 recognizes that the Land Use Commission is not the only Sunshine Law board that addresses critical issues of land use that affect our entire community and thus justify greater public notice and participation than typical adjudicatory proceedings.

Thank you again for the opportunity to testify **supporting H.B. 2026**.



HOUSE COMMITTEE ON GOVERNMENT REFORM
Friday, February 11, 2022, 9:30 am, State Capitol Room 309 & Videoconference
HB 2026
Relating to Chapter 92, Hawaii Revised Statutes

TESTIMONY

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

Chair McKelvey and Committee Members:

The League of Women Voters of Hawaii strongly supports HB 2026.

Our following testimony will explain Section 6 of HB 2026. Other parties will submit testimony which explains the rest of this bill.

Under §92-6, Hawaii Revised Statutes, the State Land Use Commission is partially subject to the Sunshine Law, but all other boards are exempt from the Sunshine Law when they exercise “adjudicatory functions” which concern land use. This exemption applies regardless of whether anyone wants, has the right to, or has requested a contested case hearing under Chapter 91. In other words, when a board holds a conventional (not a contested case) hearing on a land use application, the Sunshine Law does **NOT** require public notice, the Sunshine Law does **NOT** establish a public right to attend and testify, and the Sunshine Law does **NOT** require meeting minutes. The Sunshine Law does not even require a board quorum. Fortunately most boards assume or voluntarily act as if the Sunshine law applies to land use applications.

Section 6 of HB 2026 would make the Sunshine Law apply to all board meetings which concern land use. This would mean that

- the public has the right to request email meeting notice of a board meeting on land use (just like other board meetings).
- a quorum is required for a board meeting on land use (just like other board meetings).
- the public can review board packets prior to board meetings on land use (just like other board meetings).
- the public has the right to attend, testify at, and videotape board meetings on land use (just like other board meetings).
- board meeting minutes must include appropriate summary information on board meetings on land use (just like other board meetings).

Thank you for the opportunity to submit testimony.

League of Women Voters of Hawaii
P.O. Box 235026 ♦ Honolulu, HI 96823
Voicemail 808.377.6727 ♦ my.lwv.org/hawaii ♦ voters@lwvhi.org

Statement Before The
Friday, February 11, 2022
9:30 AM
Via Videoconference, Conference Room 309

in consideration of
HB 2026

RELATING TO RELATING TO CHAPTER 92, HAWAII REVISED STATUTES.

Chair McKELVEY, Vice Chair WILDBERGER, and Members of the House Government Reform Committee

Common Cause Hawaii supports HB 2026, which (1) adds definitions for "board business" and "informal gatherings", (2) specifies that a board may prepare and circulate amongst members a statement on a position previously adopted for purposes of submission to the legislature when notice by the legislature is insufficient to interact in any other permitted manner, (3) outlines when board packets must be available to interested persons, and (4) requires the application of the sunshine law to all adjudicatory functions concerning land use.

Common Cause Hawaii is a nonprofit, nonpartisan, grassroots organization dedicated to reforming government and strengthening our representative democracy through transparency and accountability reforms.

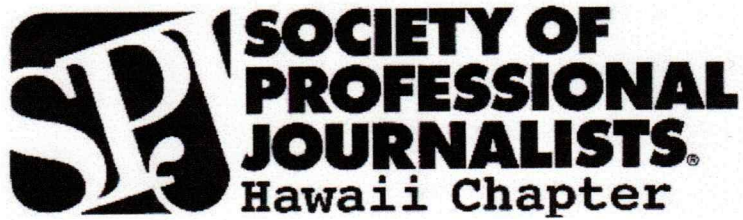
Common Cause Hawaii specifically supports Section 4 of HB 2026, which provides at page 8, lines 18-21, that "interested persons shall be afforded at least twenty-four hours to review board packets prior to their oral testimony, and the oral testimonies of interested persons shall not be limited to the beginning of a board's agenda or meeting." Common Cause Hawaii also specifically supports Section 7 of HB 2026, which provides at page 10, lines 6-9 that "[b]oard packets shall be made available to interested persons at least twenty-four hours prior to the deadline for written testimony to be submitted on any agenda item."

These proposed changes to the Sunshine Law will provide the public with time to review board packets before having to provide written testimony so that meaningful testimony may be submitted. Additionally, if the agenda of boards have presentations, the public will have time to review and/or observe the presentations and then provide testimony accordingly, instead of being limited to testifying indiscriminately at the beginning of an agenda without having the opportunity to review board packets or agenda presentations. The public will be able to testify before boards cogently and intelligently with the amendments proposed by HB 2026.

Thank you for the opportunity to testify in support of HB 2026. If you have further questions of me, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii



Feb. 11, 2022

Rep. Angus L.K. McKelvey
House Committee on Government Reform
State Capitol
Honolulu, HI 96813

Re: House Bills 2026 and 2235

Chairman McKelvey and Committee Members:

As we have said in past years, please kill this bill as it enacts a broad exemption from the Sunshine Law that is not necessary. We prefer that the committee favorably consider HB 2026, which should resolve many of the issues raised by county councils.

For many years, the county councils have come to the Legislature to find ways to meet outside the Sunshine Law. And various attempts have been enacted.

In 2014, lawmakers came up with yet-another amendment to allow council members to meet with community groups with some limitations designed to protect the public's rights, but the county councils have not used it. Now the councils are once again asking for another major exemption in HB 2235.

Thank you for your attention,

Stirling Morita
President
Hawaii Chapter SPJ

HB-2026

Submitted on: 2/10/2022 2:30:20 PM

Testimony for GVR on 2/11/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Gerard Silva	Individual	Oppose	No

Comments:

All meeting Have to be Open and dicsion made together no Predetermed meetings this is all Bull Shit !!!

HB-2026

Submitted on: 2/11/2022 12:45:14 PM

Testimony for GVR on 2/11/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Donnie Wolfe	Individual	Support	No

Comments:

Why not exclude "...during a declared emergency" and allow reciprocity always? Not only might it help us avoid the challenges we now face with EMS personnel but it will also help military family members who comes with these credentials from other states.

Thank you!