

Statement Before The
HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Tuesday, February 2, 2021

2:00 PM

Via Video Conference, Conference Room 325

in consideration of

HB 356**RELATING TO THE JUDICIAL COUNCIL.**

Chair NAKASHIMA, Vice Chair MATAYOSHI, and Members of the Judiciary & Hawaiian Affairs Committee

Common Cause Hawaii provides written comments on HB 670, which requires meetings of the judicial council to be open to the public.

Common Cause Hawaii is a nonprofit, nonpartisan, grassroots organization focused on upholding the core values of American democracy through increasing open government and government transparency and accountability.

HB 670 would subject the meetings of the judicial council to the open meetings law, a.k.a. the Sunshine Law Hawaii Revised Statutes § 92-3. To the understanding of Common Cause Hawaii, the judicial council interviews candidates for both the State Ethics and Campaign Spending Commissions, which are integral to good government and government accountability.

Common Cause Hawaii supports open government and meetings. Common Cause Hawaii also understands the balance that needs to be struck with a person's privacy, such as personal information and data, when considering serving on a public board, the judicial council's vetting process, and the public's right to know. The public should have a significant right to learn the philosophy of a candidate being considered by the judicial council for State Ethics and/or Campaign Spending Commissions and a candidate's possible conflicts, demeanor, ability to interact with the public, etc. Common Cause Hawaii hopes that having the judicial council be subject to open meetings without caveats will be the right balance.

Thank you for the opportunity to comment on HB 670. If you have further questions of me, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii

HB-356

Submitted on: 1/31/2021 6:03:51 PM

Testimony for JHA on 2/2/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
cathy lee	Individual	Support	No

Comments:

I support any legislation that encourages more transparency (and thereby accountability) from the state to the public.



HAWAI'I STATE ETHICS COMMISSION

State of Hawai'i · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawai'i 96813

Committee: Committee on Judiciary and Hawaiian Affairs
Bill Number: H.B. 356
Hearing Date/Time: Tuesday, February 2, 2021, 2:00 p.m.
Re: Testimony of the Hawai'i State Ethics Commission
with **COMMENTS** on H.B. 356, Relating to the Judicial Council

Chair Nakashima, Vice Chair Matayoshi, and Committee Members:

The Hawai'i State Ethics Commission respectfully submits the following comments on H.B. 356, which seeks to make meetings of the Judicial Council public. The Commission's only interest is in ensuring that the Judicial Council may continue to hold non-public meetings to interview and deliberate on applicants seeking to become members of the Ethics Commission.

The Ethics Commission supports efforts to increase transparency in government. However, one of the Judicial Council's functions is to screen and interview applicants for both the Ethics Commission and the Campaign Spending Commission. See Hawai'i Revised Statutes ("HRS") § 84-21 (Ethics Commission), § 11-311 (Campaign Spending Commission). The Ethics Commission believes that any preliminary interviews and documents considered by the Judicial Council (such as curriculum vitae or application materials) should remain confidential at the initial screening/interview stage.

The Ethics Commission respectfully requests that, if this bill moves forward, the Committee make clear in its report that the Judicial Council's consideration of applicants to the Ethics Commission remain confidential pursuant to HRS §§ 92-4 and 92-5.¹ The Ethics Commission does not take a position on the applicability of this measure to the Judicial Council's other functions.

Thank you for your continuing support of the Commission's work and for considering the Commission's testimony on H.B. 356.

Very truly yours,

Kee Campbell
Staff Attorney

¹ Our understanding is that the Campaign Spending Commission intends to take the same position with respect to the Judicial Council's consideration of applicants to the Campaign Spending Commission.



The Judiciary, State of Hawai‘i

Testimony to the Thirty-first State Legislature, Regular Session of 2021

House Committee on Judiciary and Hawaiian Affairs
Representative Mark M. Nakashima, Chair
Representative Scot Z. Matayoshi, Vice Chair

Tuesday, February 2, 2021, 2:00 PM
State Capitol, Conference Room 325

by
Rodney A. Maile
Administrative Director of the Courts

Bill No. and Title: House Bill No. 356, Relating to the Judicial Council.

Purpose: Requires meetings of the Judicial Council to be open to the public.

Judiciary's Position:

The Judiciary respectfully offers the following comments on House Bill No. 356, which proposes to open judicial council meetings to the public.

The Sunshine Law’s intent is to open up governmental processes to public scrutiny and participation by requiring state and county boards to conduct their business as openly as possible. While the Judiciary fully appreciates the importance of open meetings, we are concerned that this bill:

(1) is inconsistent with HRS chapter 92 (Sunshine Law) precepts given that the Judicial Council’s functions are not analogous to those of governmental boards and commissions under general and long-standing definitional standards of entities subject to open meetings under the Sunshine Law;

(2) could result in a chilling of candid discussions necessary for vetting candidates by the judicial council for the Ethics and Campaign Spending Commissions; and



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(3) could result in potential candidates for those entities being unwilling to apply based on concerns that discussions of their credentials would be known to the public.

HRS section 601-4 directs the supreme court to appoint a “judicial council, which shall serve in an advisory capacity only.” While HRS section 601-4 provides that the judicial council shall make reports and recommendations to the supreme court biennially, the judicial council does not act as a “board” as defined by HRS section 92-2, inasmuch as it is not “required to conduct meetings and to take official actions.” Moreover, the Judiciary is specifically exempt from the Sunshine Law under HRS Section 92-6. Requiring the Judiciary’s judicial council to now be exempted from the specific judicial exemption appears inconsistent with the Sunshine Law’s mandates and definitions, as well as the reasons the legislature originally decided to exempt the judiciary from the Sunshine Law. (*See, e.g.*, Standing Committee Report 878 (1975 HB 126), wherein the Senate noted that “the judicial branch is specifically excluded from the operation of the bill in deference to the doctrine of ‘separation of powers.’”).

The primary function of the judicial council is to recruit, review, interview and evaluate candidates for the Ethics Commission and the Campaign Spending Commission. (*See* HRS Section 84-21(c) (Ethics Commission) and Section 11-311(c) (Campaign Spending Commission). To fulfill this function, judicial council members review applications, interview candidates and consider candidates’ private and confidential information to evaluate respective qualifications.

Judicial council members may be reluctant to openly discuss concerns about particular candidates if the public were privy to such private and confidential conversations. The Sunshine Law itself carves out a distinction for when a board considers “the hire, evaluation, dismissal, or discipline of an officer or employee” (HRS Section 92-5(a)(2)). Given that this evaluative role constitutes the primary function of the judicial council, it would seem counterproductive to open council meetings to the public, only to then invoke this statutory exception from open meetings.

In sum, the council must be able to meaningfully vet the relative merits of applicants for the Ethics and Campaign Spending Commission with candor and frankness, so as to ensure that optimally qualified candidates are recommended for, and ultimately serve, these important positions.

Moreover, it should be emphasized that the Judicial Council’s list of applicants is available for public inspection and copying upon request. Thus, there appears to be little advantage to making the preceding review and application process open to the public.

Thank you for the opportunity to comment on House Bill No. 356.