OFFICE OF INFORMATION PRACTICES

STATE OF HAWAII
NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAI'I 96813
TELEPHONE: 808-586-1400 FAX: 808-586-1412
EMAIL: oip@hawaii.gov

To: Senate Committee on Judiciary

From: Carlotta Amerino, Acting Director

Date: April 2, 2024, 10:05 a.m.
State Capitol, Conference Room 016

Re: Testimony on H.B. No. 1597, H.D. 1, S.D. 1
Relating to Open Meetings

Thank you for the opportunity to submit testimony on this bill, which would update the Sunshine Law's provision allowing any person to enforce the law in court. **The Office of Information Practices (OIP) supports this bill.**

This bill would better align the court enforcement provisions of the Sunshine Law, part I of chapter 92, HRS, with those of the Uniform Information Practices Act (UIPA), chapter 92F, HRS, especially where a member of the public has obtained an unfavorable OIP opinion and wishes to challenge that opinion in court. Under the UIPA, if OIP issues a decision finding that an agency properly denied access to records the requester can still sue the agency for access to the records, and the court will hear that action *de novo*. Under the Sunshine Law, if OIP issues a decision finding that a board did not violate the Sunshine Law, there is not a clear statutory path for the person who complained to OIP to challenge the OIP decision. As a result, after an OIP decision that a board had not violated the Sunshine Law, **the Hawaii Supreme Court allowed the complaining party to sue OIP instead of the board for the alleged Sunshine Law violation, which is like suing a court instead of the party who the court found had not violated the law.**

This bill would clarify the matter by making the Sunshine Law provisions consistent with the UIPA's process to appeal OIP decisions and specifying that a person can challenge an adverse OIP decision by suing the board (not OIP) over the board's alleged violation that gave rise to the OIP decision. The court will hear that lawsuit *de novo*, just as would be the case when a record requester goes to court to challenge an adverse OIP decision under the UIPA. Also consistent with the UIPA's provisions, the bill provides that a board can only challenge an OIP decision through an appeal as provided in section 92F-43, HRS – in other words, if a complainant goes to court to challenge OIP's conclusion that one thing a board did was not a Sunshine Law violation, the board cannot use the court action to challenge OIP's conclusion that a different thing the board did was a Sunshine Law violation as an alternative to appealing the OIP decision under section 92F-43.

This bill would also require a person bringing a Sunshine Law suit to notify OIP, which may then intervene, aligning the Sunshine Law with an existing UIPA provision to that effect. The bill would clarify how long a person has to bring a Sunshine Law suit that does not seek to void a final board action, which currently is not specifically stated in the statute, and would align it with the two-year limitation period under the UIPA. Finally, the bill would provide that when a person sues to void a final board action under section 92-11, HRS, that action takes precedence over other cases on the court's docket. This, too, is consistent with a UIPA provision, and also will help to ensure finality for board decisions within a reasonable timeframe, consistent with the short 90-day period after a board's final action for any suit to void the action to be filed.

OIP notes that there was testimony in opposition to the Senate companion to this bill, S.B. 2639, from a number of individuals who evidently assumed that the

absence of an explicit limitation period in section 92-12, HRS, means that there is currently no limit on how long after a board's action allegedly violating the Sunshine Law a lawsuit can be brought to challenge that action. Contrary to this assumption, the absence of a limitation period in the statute itself likely means that a court would apply section 662-4, HRS, the two-year limitation period for tort claims against the state, as the applicable period. Thus, stating the limitation period in section 92-12 is a way to make the limitation period clear to the public, rather than leaving it to be set by a more general statute of limitations that many members of the public are evidently unaware of. Nonetheless, if this Committee would prefer not to include a clear limitation period in the Sunshine Law and thus leave it to a future court to determine, OIP would not object to that.

OIP believes this bill brings clarity to the Sunshine Law's enforcement provisions and simplifies things for all concerned by aligning the process for appealing an OIP decision under the Sunshine Law with the process for appealing an OIP decision under the UIPA. Thus, **OIP supports this bill.**

Thank you for considering OIP's testimony.

PUBLIC FIRST
LAW CENTER

Senate Committee on Judiciary
Honorable Karl Rhoads, Chair
Honorable Mike Gabbard, Vice Chair

RE: Testimony in Support of H.B. 1597 H.D. 1 S.D. 1, Relating to Open Meetings
Hearing: April 2, 2024 at 10:05 a.m.

Dear Chair and Members of the Committee:

My name is Ben Creps. I am a staff attorney at the Public First Law Center, a nonprofit organization that promotes government transparency. Thank you for the opportunity to submit testimony **in strong support** of H.B. 1597 H.D. 1 S.D. 1. By aligning the enforcement mechanisms under the Sunshine Law and the Uniform Information Practices Act (UIPA), this measure promotes compliance with the law and ensures OIP serves its intended role. It does this in several respects, highlighted below.

***De novo* review**. This measure would recognize that members of the public may sue a board after receiving an adverse Office of Information Practices (OIP) decision, and that the decision will be reviewed *de novo*—parallel to the UIPA cause of action standards. Under the UIPA, a member of the public who receives an adverse decision from OIP may challenge that decision in court under a *de novo* standard (*i.e.*, no deference to OIP's decision). In other words, a requester is not punished for going to OIP first instead of going straight to court. In contrast, in the Sunshine Law context, the Hawai`i Supreme Court recognized a cause of action for a member of the public to challenge an adverse OIP decision, but held that the standard of review for the OIP decision was "palpably erroneous" (*i.e.*, a high level of deference to OIP's decision). *In re OIP Op. No. F16-01*, 147 Hawai`i 286, 465 P.3d 733 (2020). Thus, **absent the amendment proposed by this measure, there exists a strong incentive to bypass OIP altogether on Sunshine Law issues**, contrary to the Legislature's intent for OIP to serve as a faster and more cost-effective venue than courts.

Action against board (not OIP) & limitations period. Similar to the UIPA, H.B. 1597 H.D. 1 S.D. 1 would make clear that an action concerning a Sunshine Law violation is brought against the board, not OIP. The same 2020 Hawai`i Supreme Court decision recognized a cause of action under the Sunshine Law *against OIP*. *Id*. at 297, 465 P.3d at 744 ("original actions may be brought against OIP under HRS § 92-12"). This proposal would close that cause of action but make clear that the public still has a claim—one that must be brought against the board. This proposal also requires that such actions must be brought within two years of the alleged violation. Although there is a 90-day limitations period for claims seeking to void board actions under section 92-11, chapter

700 Bishop St., Ste 1701
Honolulu, HI 96813
info@publicfirstlaw.org
www.publicfirstlaw.org
o (808) 531-4000
f (808) 380-3580

92 lacks a limitations period for Sunshine Law claims that do not seek to void board actions. Given the nature of these claims—such as a claim of legally insufficient meeting minutes—there is little value in allowing them to be brought beyond two years. This measure ensures that these claims will be timely brought.

Fees and costs recovery. Similar to the UIPA, H.B. 1597 H.D. 1 S.D. 1 would recognize that only a member of the public may recover attorney's fees and costs if that person prevails in a Sunshine Law case. Existing law provides a general "prevailing party" fees provision, which in most circumstances would mean that whoever wins may recover fees and costs. In the context of a statute intended to provide government accountability, it does not make sense that a government board could recover money against a member of the public who thought—incorrectly—that the board violated the Sunshine Law. Government should encourage people to question compliance with the law, but the threat of potentially significant liability merely for questioning whether a board violated the Sunshine Law has a chilling effect on lawsuits. In dicta, the Hawai`i Supreme Court has recognized that a broad reading of the current law would have a chilling effect. *Kahana Sunset Owners Ass'n v. Maui County Council*, 86 Hawai`i 132, 136 n.4, 948 P.2d 122, 126 n.4 (1997) ("The main purpose behind HRS § 92-12(c) was to encourage citizens to pursue claims of violations of the sunshine law, and an award of attorneys' fees against a citizen who challenged a sunshine law violation and lost would have a 'chilling effect' and deter citizens from filing HRS § 92-12(c) suits in the future."). This amendment would clarify the language consistent with the original intent, as recognized by the Hawai`i Supreme Court.

OIP lawsuit notice. Like the UIPA, this bill would require that individuals suing under chapter 92 must notify OIP so it may decide whether to intervene.

Prioritization of suits seeking to void board action. Similar to the UIPA, this measure would provide that Sunshine Law lawsuits are to be prioritized by the courts, but only when the plaintiff seeks to void a board's final action. Under the Sunshine Law, the most consequential remedy for a violation is voiding an action of the board, which is reserved for the most egregious violations. Such a remedy can have significant implications for the board and for the public, so it is important that lawsuits alleging that a board action is void be resolved expeditiously. This proposal takes the lawsuit priority language from the UIPA and applies it to the Sunshine Law, but restricts that priority to lawsuits that concern voiding a board action under HRS § 92-11.

Thank you again for the opportunity to testify in strong support of H.B. 1597 H.D. 1 S.D. 1.