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To: House Committee on Judiciary

From: Cheryl Kakazu Park, Director

Date: March 20, 2015, 2:00 p.m.
State Capitol, Conference Room 325

Re: Testimony on S.B. No. 652, S.D. 1
Relating to Public Agency Meetings

The Office of Information Practices ("OIP") supports the intent of this bill, which would require a board subject to the Sunshine Law, part I of chapter 92, HRS, to report any discussion or final action taken during an executive session, when a board reconvenes in an open meeting, provided that the disclosure is not inconsistent with the purpose of holding the executive session. However, OIP recommends amendments to address its concerns about the inclusion of executive session "discussion" as something a board must report in an open meeting, as it will often be impracticable for a board that had a valid basis for holding a discussion in executive session to then immediately report that discussion in public session.

The Hawaii Supreme Court has interpreted "final action," as used elsewhere in the Sunshine Law, to mean "the final vote required to carry out the board's authority on a matter." Kanahele v. Maui Cnty. Council, 130 Haw. 228, 259, 307 P.3d 1174, 1205, as corrected (Aug. 30, 2013), reconsideration denied, 130 Haw. 261, 307 P.3d 1207 (2013). Thus, it is conceivable that a vote taken in executive session may not be a "final action" that must be reported under this bill.

The Sunshine Law does not bar a board from discussing or voting in a closed, or executive, session regarding matters specified in HRS § 92-5. Nevertheless, because a board's executive session discussion must be limited to matters directly related to the purpose of the closed meeting, the practical effect is that the board will discuss in private but vote to take final action in public. There are rare instances, however, where a board can legitimately vote in executive session to avoid frustrating the purpose of the executive session. For instance, a board might vote in executive session on the question of whether to fire its executive director, because until the point where the board voted to take that action, the executive director would still have a significant privacy interest in the fact that the board was considering taking such personnel action.

In contrast to a vote, a board's **discussion** held in executive session **does not typically become public** as soon as the executive session is over. Assuming that the board had a valid reason for holding the executive session in the first place, it is difficult to see how the board could make a meaningful report of its discussion immediately after an executive session, without frustrating the very purpose for which it held the executive session. Thus, OIP believes the requirement in SB 652, SD 1 for a board to both publicly report its executive session **discussion**, while at the same time withholding any information whose disclosure would defeat the purpose of the executive session, is impracticable in most instances and would most likely result in a mere restatement of the executive session topic as described on the board's agenda.

There is an alternative way under existing law to learn what was discussed in an executive session, which is to make a request for the executive session minutes can be made under the Uniform Information Practices Act (modified), chapter 92F, HRS ("UIPA). While most of the matters may be redacted

as being exempt from disclosure under the UIPA, nonprotected matters must be disclosed, including the votes. Once disclosure would no longer frustrate the purpose for which the executive session was held, then the minutes must be disclosed.

OIP' second concern about SB 652, SD 1 is that the use of the word "shall" rather than "may" at bill page 2, line 5, will have the effect of taking away the power a board currently possesses to choose to release information about an executive session, by making it mandatory instead of optional to withhold such information from the public. Finally, OIP notes that the bill has an intentionally defective date.

OIP therefore recommends that this Committee (1) delete the words "discussion or" from bill page 1, line 13; (2) change "shall" to "may" at bill page 2, line 5, and (3) change the effective date at bill page 2, line 11, to read "upon approval."

With OIP's amendments, this bill would ensure that members of the public interested in any board will have the opportunity to learn that a board has voted to take a final action during an executive session. The bill would put the onus on a board to affirmatively announce that it has voted to take final action on a matter, while at the same time recognizing that such an announcement should be phrased in a way that does not reveal additional information about the board's discussion that would frustrate the original purpose of the executive session. OIP believes that this bill promotes the public interest in access to the formation of government policy while at the same time protecting confidentiality of information as recognized in the Sunshine Law's executive session purposes. OIP therefore supports this bill, with the suggested amendments.

Thank you for the opportunity to testify.

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House Committee on Judiciary
Honorable Karl Rhoads, Chair
Honorable Joy A. San Buenaventura, Vice Chair

RE: Testimony Supporting S.B. 652 S.D. 1, Relating to Public Agency Meetings
Hearing: March 20, 2015 at 2:00 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 government transparency. Thank you for the opportunity to submit testimony on S.B. 652 S.D. 1. The Law Center strongly supports the intent of this bill and provides comments.

S.B. 652 requires that a board publicly report on any discussions or final action taken in an executive session to the extent disclosure will not defeat the purpose of the closed meeting. This amendment will ensure the public remains educated about actions taken by its government, even if the deliberations were not entirely public.

The Law Center provides two comments to avoid the possibility that S.B. 652 might impede government transparency in a manner not intended by the Legislature.

Eliminate Subsection (b)(2)
Contrary to existing law, subsection (b)(2) *requires* that a board keep confidential the matters discussed in an executive meeting. But the Sunshine Law is not a confidentiality statute. For example, the executive meeting exceptions are discretionary reasons that a board "*may* hold a meeting closed to the public." HRS § 92-5 (emphasis added). Nothing in the Sunshine Law requires that a board hold closed meetings or keep information from the public. The conditions in proposed subsection (b)(2), however, strip boards of their discretion and require mandatory confidentiality that contradicts the intent of Sunshine.

As drafted, S.B. 652 requires that, once a board holds an executive meeting, it must maintain the confidentiality of that meeting until the reason for the closed session no longer applies. Boards would no longer have absolute discretion to waive the confidentiality of the executive session when they deem it in the public interest. In doing so, the amendment also arguably authorizes a third party—interested in keeping a board proceeding confidential—to sue the board. Within the statutory confines of the

Sunshine Law, boards should have discretion to determine when an executive session may be made public.[1]

Moreover, HRS § 92-9(b) already addresses the confidentiality of executive meetings after the meeting has adjourned. That section provides that executive minutes—the only written record of closed deliberations—"*may* be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer." (emphasis added). Subsection (b)(2) thus is unnecessary.[2]

Clarify the Bill's Intent
To avoid potential confusion, the Law Center respectfully suggests clarifying language in the committee report to **explain that this bill is not intended to authorize a board to vote in an executive meeting unless otherwise permitted by section 92-5**. Under existing law, authority for an executive meeting does not necessarily permit a board to vote behind closed doors. OIP has explained that voting may occur in executive session only when a public vote "would defeat the lawful purpose for holding an executive meeting in the first place." OIP Op. No. 03-07 at 6. For example, in the specific context of closed sessions for attorney consultation, OIP has explained that "once the [board] receives the benefit of the attorney's advice, it should discuss the courses of action in public, *and vote in public*, unless to do otherwise would defeat the lawful purpose of holding the executive meeting." OIP Op. No. 03-12 at 10 (emphasis added). This bill should not leave open an ambiguity as to whether the amended language now authorizes boards to vote in all executive meetings.

Thank you again for the opportunity to testify.

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[1] The discretion to disclose closed proceedings belongs to the board, not the individual board members. Att'y Gen. Op. 94-01 (explaining that a individual board member may disclose only his or her own vote and personal rationale after a closed session, so long as the disclosure does not reveal information that defeats the purpose of the executive meeting).

[2] If subsection (b)(2) remains, it should be amended to track the discretion in HRS § 92-9(b) and as a **technical matter** to focus on the confidentiality of the executive meeting—not as currently drafted, focused on the confidentiality of information to be publicly reported. The Law Center would respectfully propose: "The board **may** maintain confidentiality **of the executive meeting** for as long as disclosure would defeat the purpose of convening the executive meeting."