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To: Senate Committee on Judiciary and Labor

From: Cheryl Kakazu Park, Director

Date: February 13, 2015, 9:00 a.m.
State Capitol, Conference Room 016

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

The Office of Information Practices ("OIP") supports this bill, which would require a board subject to the Sunshine Law, part I of chapter 92, HRS, to report any final action taken during an executive session, provided that the disclosure is not inconsistent with the purpose of holding the executive session.

The Sunshine Law does not bar a board from voting in a closed, or executive, session regarding matters specified in HRS § 92-5. Because a board's executive session discussion must be limited to matters directly related to the purpose of the executive session, the practical effect is that the board will vote in public in most cases. There are 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 an action.

Although the Sunshine Law does not require public announcement of a board's vote in executive session, the vote must generally be disclosed in response

to, for instance, a request for the executive session minutes. In such instance, while most of the discussion during an executive session would generally be redacted from the minutes, the vote itself would be disclosed. Even without a request, some boards voluntarily choose to publicly announce the action they have taken in executive session, but other boards are extremely reluctant to divulge any information about executive sessions, even for the purpose of confidential in camera ("in chambers") review by OIP in response to a complaint. (For example, there is a pending lawsuit by the County of Maui against OIP, seeking to prevent OIP from reviewing executive session minutes to determine if it was proper for the county to go into executive session in the first place.)

This bill would ensure that members of the public interested in any board will have the opportunity to at least 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.

Thank you for the opportunity to testify.

THE CIVIL BEAT
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Senate Committee on Judiciary & Labor
Honorable Gilbert S.C. Keith-Agaran, Chair
Honorable Maile S.L. Shimabukuro, Vice Chair

RE: Testimony Supporting S.B. 652, Relating to Public Agency Meetings
Hearing: February 13, 2015 at 9:00 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 government transparency. Thank you for the opportunity to submit testimony on S.B. 652. The Law Center supports the intent of this bill and provides comments.

S.B. 652 requires that a board publicly report on any final action taken in an executive session to the extent disclosure will not defeat the purpose of the closed meeting. This clarifying 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.

Modify the Limits on Disclosure
S.B. 652 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), 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.

To achieve the intent of S.B. 652 without creating a mandatory confidentiality clause that strips boards of the ability to be more transparent and open, the Law Center would propose revising subsection (b) to read as follows (revised language bolded):

> (b) Any final action taken by a board in an executive meeting shall be reported to the public when the board reconvenes in the open meeting at which the executive meeting is held; provided that, in describing the final action taken by the board, **the board may limit the report as necessary when disclosure would defeat the lawful purpose of the executive meeting.**[1]

Clarify the Bill's Intent

It is not clear whether S.B. 652 assumes that a board may take final action in *any* closed meeting. That is not the case. 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).

To avoid potential confusion and disputes about whether S.B. 652 modifies when a board may vote in an executive meeting, 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**.

Thank you again for the opportunity to testify.

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[1] The revision tracks the discretionary standard set in HRS § 92-9(b), which provides that board executive session minutes "may be withheld so long as their publication *would defeat the lawful purpose of the executive meeting*, but no longer." (emphasis added).