HOUSE OF REPRESENTATIVES
THE THIRTEENTH LEGISLATURE
REGULAR SESSION-1985

COMMITTEE ON PUBLIC EMPLOYMENT AND GOVERNMENT OPERATIONS

Representative Dwight L. Yoshimura, Chairman
Representative Donna M. Kim, Vice Chairman

NOTICE OF PUBLIC HEARING

DATE: Thursday, March 21, 1985

TIME: 4:30 p.m.

PLACE: Conference Room 310, State Capitol

A G E N D A

S.B. No. 1413 S.D. 1	RELATING TO PUBLIC AGENCY MEETINGS AND RECORDS. (PEG,JUD)
S.B. No. 471 S.D. 2	RELATING TO THE COMPENSATION OF PUBLIC OFFICERS AND EMPLOYEES AND MAKING AN APPROPRIATION THEREFOR. (PEG,FIN)
S.B. No. 381	RELATING TO THE COMPENSATION OF PUBLIC OFFICERS. (PEG,FIN)

DECISION-MAKING ONLY

S.B. No. 6 S.D. 2	RELATING TO COLLECTIVE BARGAINING. (PEG,FIN)
S.B. No. 426 S.D. 2	RELATING TO THE PUBLIC EMPLOYEES HEALTH FUND. (PEG,FIN)
S.B. No. 589	RELATING TO PUBLIC EMPLOYEES. (PEG,FIN)

DECISION-MAKING TO FOLLOW, IF TIME PERMITS.

PERSONS WISHING TO TESTIFY SHOULD SUBMIT 40 COPIES OF THEIR TESTIMONY TO THE COMMITTEE CLERK IN ROOM 304. FOR FURTHER INFORMATION, PLEASE CALL THE COMMITTEE CLERK AT 548-4167.

The Senate
The Thirteenth Legislature
of the
State of Hawaii

STATE CAPITOL
HONOLULU, HAWAII 96813

The Honorable Terrance Tom, Chairman
Committee on Judiciary
Hawaii State House of Representatives
State Capitol Building
Honolulu, Hawaii 96813

Re: SB No. 1413, S.D. #1

Dear Mr. Chairman:

I would like to thank you for the opportunity to testify in favor of SB No. 1413, SD 1. I think this bill to amend Section 92, Hawaii Revised Statutes, is clearly in the best interest of the public's right to know. In the past our legislators have enacted laws which would protect the public's interests and these amendments are consistent with the stated purpose of the legislature in the Declaration of policy and intent of this section:

> "In a democracy, the people are vested with the ultimate decision making power. Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore, the legislature declares that it is the policy of this State that the information and conduct of public policy - the discussions, deliberations, decisions, and action of governmental agencies - shall be conducted as openly as possible."

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State of Hawaii
Thirteenth Legislature
The Senate

In the past, some agencies have tried to forestall the public's right to know; I think the Legislature should fill in any loop holes in Section 92 that are being used to thwart the original intent in the enactment of this section.

Sincerely

Mary-Jane McMurdo

Mary-Jane McMurdo
Senator, 15th District

GA MORRIS, INC.
GOVERNMENTAL AFFAIRS/REAL ESTATE COUNSELOR
THE BLAISDELL ON THE MALL
1154 FORT STREET MALL, SUITE 307
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March 21, 1985

The Honorable Dwight Yoshimura, Chairman
Members-House Committee on Public Employment/Government Operations
State Capitol
Honolulu, HI 96813

Dear Mr. Chairman & Members:

RE: S.B. 1413, S.D. 1
Relating to Public Agency Meetings and Records

We believe that S.B. 1413, S.D. 1 should be amended to reinstate the records portions that was deleted in the Senate.

This would be a step in the right direction in providing access to public records. There are records that should be specifically declared public as they serve no purpose in all being grouped under the guise of the "privacy law".

It is, therefore, suggested that an amendment be made to the bill requiring the Office of the Ombudsman to prepare a listing of those state records within each department that will be declared public and those that will be "private" to which there will be limited access and those that no access will be provided. Such list to be adopted by the legislature in 1986.

Senate Bill 1413, S.D. 1 should be amended to require an agency to disclose records.

A case in point is the motor vehicle registration records that are contained in the statewide traffic records system. In 1983, you passed S.B. 1247, S.D. 1, H.D 1, C.D. 1 (copy attached) which provided for access to these records if the recipient adhered to certain safeguards such as making sure that individual identities will be properly protected and that the information will not be used to compile a list of individuals for the purposes of any commercial solicitation by mail or otherwise, or the collection of delinquent accounts or any other purpose not allowed or provided by the rules.

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There were a few other requirements as well, which included a surety bond and that the State be held harmless from claims of improper use or release of the inforamtion.

In addition, in order to qualify to receive the records, you had to have a legitimate reason as determined by the director, as provided by the rules; or to obtain the information for verification of vehicle ownership, traffic safety programs, or for research or statistical reports or the person is required or authorized by law to give written notice by mail to owners of vehicles.

The law also provides that a person may receive the entire file if the person performs recalls on behalf of manufacturers of motor vehicles as authorized by the Federal government or as deemed necessary by a manufacturer in order to protect the public health, safety and welfare.

To date, we have not received the records or tape from the State to process these recall requests.

Therefore, it is suggested that you amend the bill by requiring the Ombudsman specifically to provide you with a list which will state which records are public and those that are not.

At the top of the list should be motor vehicle registration records.

Respectfully submitted,

G. A. "Red" Morris
for
R. L. Polk & Co.

COMMON CAUSE/HAWAII

250 S. Hotel St., Rm. 209, Honolulu, HI 96813 Tel: 533-6996/538-7244

TESTIMONY IN SUPPORT OF S.B. 1413, S.D.1
RELATING TO PUBLIC AGENCY MEETINGS AND RECORDS

Presented by Ian Lind, executive director, Common Cause/Hawaii
House Public Employment/Government Operations Committee.

Common Cause strongly supports passage of S.B. 1413, S.D. 1. This bill strengthens the open meetings provisions of the Sunshine Law by eliminating certain loopholes and clarifying areas which were previously ambiguous. If passed, this bill will insure the public's "right to know" by allowing for more complete public access to meetings of public agencies.

This measure has gone through considerable redrafting over the past four years in order to accomodate the views expressed by agency representatives. In its current form, it is a prudent and constructive measure that has broad support.

Common Cause urges you to act favorably on this bill.

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The Hawaii Council of Churches

BLDG. "A", SUITE 403 • 200 N. VINEYARD BLVD. • PHONE 521-2666 • HONOLULU, HAWAII 96817

March 21, 1985

Dwight L. Yoshimura, Chairperson
Public Employment/Government Operations Committee
House of Representatives
Hawaii State Legislature
Honolulu, Hawaii 96813

RE: S. B. 1413 SD 1 - Public Agency Meetings and Records

Dear Representative Yoshimura and members of the committee:

In line with our belief that openness in the conduct of public agency meetings and business is not only in the best interests of the community but should over time cause citizens to participate more meaningfully in public affairs, the Legislative Concerns Committee of the Hawaii Council of Churches supports S. B. 1413, SD 1 and urges its passage this session. This measure, as we understand it, would improve what is already Hawaii's relatively good law on the manner in which public agency meetings are conducted and records are kept. Only experience tells us where our policies and practices need to be changed. The time has clearly come for the kinds of changes (fine tuning) provided for in S. B. 1413 SD 1. Accordingly, we urge you to move it forward with a recommendation for passage this session.

Sincerely,

Harold A. Jambor, Chair
Legislative Concerns Committee
Community Outreach Division

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41:30 p.

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813

FRANK F. FASI
MAYOR

RICHARD D. WURDEMAN
CORPORATION COUNSEL

March 20, 1985

The Honorable Dwight L. Yoshimura,
Chairman and Members
Public Employment/Government
Operations Committee
House of Representatives
Thirteenth Legislature
State Capitol, Room 304
Honolulu, Hawaii 96813

Dear Representative Yoshimura and Members:

Subject: Senate Bill No. 1413, S.D. 1

We would like to raise with this Committee some concerns over the proposed changes to the existing law in Chapter 92, Hawaii Revised Statutes [HRS].

The first proposed amendment includes the requirement that all boards must allow all interested parties to submit data, views or arguments on any agenda item. Although the intent is noteworthy, as a matter of practicality, it will be very difficult for any board to complete its own work within the limited time they would normally have. Many of the boards which are part of the City are made up of citizen volunteers who are basically donating their time and energy to assist the government. If they are not allowed the discretion to manage their own schedule, then either no work would ever get done or there would not be enough citizens who would be willing to put in the time which would be required if such a provision were included.

Secondly, this Committee must realize that the original intent behind the Sunshine Law was merely to give the public access to meetings where decisions would be made, not necessarily to allow the public to become legislators themselves. As one noted legal scholar has stated:

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> The First Amendment does not guarantee a right of access to sources of information within governmental control, nor is any right of access found at common law. Where the right of access is granted by statute, it comprises a limited right to be present, listen and evaluate. There is no right to speak or vote implied in a right of access to meetings of governmental bodies. [Charles Rhyne, The Law of Local Government Operations, supra, at 135]

We believe that this first proposed amendment goes too far.

Our next concern deals with the proposals to require that any call for executive sessions by a board must be publicly announced, stating the reason therefor. This really does not appear to be necessary as the only reasons for which an executive session would be allowed are already stated in Section 92-5, HRS. This brings us to the next proposed addition to Section 92-5(4), HRS. That proposal seeks to limit the right of a board to consult with its attorney. In effect, it seeks to abrogate or severely limit the commonly recognized right to an attorney-client privilege. All parties, whether they are private individuals or whether they are boards, have a right to consult with their attorney in private for whatever the reason they feel is necessary. Even if this Committee were to agree that the attorney-client privilege is not to be recognized, the language which is presently in the proposal goes too far. In particular, we draw your attention to the last part of the phrase "under which the board falls is named as a party." That implies that although the attorney-client privilege exists, it can only be exercised when the board "is named as a party." Whether or not the words "actual, proposed or threatened lawsuit" are included, the effect of the last phrase is to limit this right to only when an actual lawsuit has been started and that board has been named a party to the action. In contrast, any person, in a civil or criminal action, has the right to expect that the attorney-client privilege exists, no matter whether a lawsuit has been started or not.

The next issue of concern which should be addressed pertains to the proposed language which would prohibit a board from deliberating towards a decision in an executive session. This provision appears to be superfluous in light of the fact that Section 92-5, HRS, is specific as to what are the only items allowed to be discussed in executive session. The statute already prohibits the discussion of any other subject. If the Committee does decide that such language is necessary, then we would like the Committee to be reminded of some of the original deliberations which surrounded the enactment of this law in 1975. The House Judiciary Committee, in explaining its version of the then proposed law, pointed out as follows:

> Your committee is in disagreement with the definition of 'meeting'. Your committee observes that as it appears on the original version of the bill, such definition would make it a crime for members of a governmental body to informally discuss almost anything of official concern amoung [sic] themselves. As such, the presumption would govern that any informal conversation between such members are necessarily sinister.
>
> Your committee is of a contrary view. We think that free and honest discussion is the essence of intelligent and effective government. We think that diligence requires a participant in the governmental process to make thorough inquiries into every aspect of any public policy or matter that comes before him. We expect that he will search out others in exchange of ideas and to learn from the expertise and different viewpoints of others. In our private lives this is accomplished by exercise of our cherished right of private conversation. We cannot deny this right to an individual merely because he participates in the process of government.
>
> Accordingly, your committee has amended the original version of House Bill

> No. 126 to except 'informal conversation' from the definition of 'meeting'. Similarly, your committee has also excepted 'informal meetings' which are not called by the chairman or the majority of the board from the same definition.
>
> Your committee is aware of the dangers of 'secret' government. We feel, however, that sufficient safeguards are provided in the requirement of prior notice of meetings, public attendance at meetings, and public access to minutes. Your committee feels that manipulations to stifle open debate or disclosure will become sufficiently evident through these safeguards. Accordingly, your committee amended the definition of 'meeting' at subsection 92-2(3) to exclude informal conversations among members in preparation for, or in the course of, open discussion. [House Journal, House Judiciary Committee Report 485 (1975) at 1184] [Emphasis added]

If this Committee feels compelled to include the proposed language noted above, we ask that further language be added to clarify that we are not altering the intent of this body not to discourage open and free conversation or discussion.

In addition to some other concerns which we will discuss hereafter, there are some minor proposed changes which again appear to be superfluous. The proposed requirement to require notice for an executive meeting does not serve any function as, by definition, an executive session would be closed. Also, the proposal which would require "items of reasonably major importance" not to be considered at a later meeting appears to be unnecessary as any subsequent meetings would still be subject to the notice provisions and the public would be afforded the proper opportunity to be advised of the later meeting and to make provisions to attend. The other problem with this proposal is that it again unreasonably interferes with the right of a board to arrange its own schedule. On a practical

note, in instances where you have issues of major importance, there will certainly be much testimony and discussion. This bill would require the board to continue throughout all hours of the day or night, until the matter is completed. This is simply not reasonable. Lastly, how can we define and apply the phrase "items of reasonably major importance."

The last series of concerns deal with the additional language which would allow a citizen to sue for compliance and to allow a temporary restraining order to be granted. Again, this appears to be unnecessary as Section 92-11, HRS, already allows a suit to be filed to invalidate any board action taken in violation of the Sunshine Law. If the board were an agency which falls under Chapter 91, HRS, then avenues for appeal of board action would already be provided under the Administrative Procedure Act [APA]. This has been the case ever since the APA was enacted in Hawaii. These sections are simply not needed.

In concluding this presentation, we submit that many of the proposed amendments which are contained in Senate Bill No. 1413, S.D. 1 are unnecessary or simply go too far. Despite the public emotion which seems to surround this particular bill, it is important for this Committee to maintain its sense of reasonableness. We ask that you carefully consider the ramifications of this bill before you approve it.

Thank you very much for this opportunity to address this Committee and for your attention during this lengthy presentation on this very difficult question.

Very truly yours,

Burt T. Lau

BURT T. LAU
Deputy Corporation Counsel

Received
Hawaii City Council

BTL:ct

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March 21, 1985

TESTIMONY OF JEFFREY S. PORTNOY
ON BEHALF OF THE HONOLULU ADVERTISER
REGARDING S.B. 1413

Before the Public Employment/Government
Operations Committee
Thursday, March 21, 1985, 4:30 p.m.

I am honored and pleased to appear before this Committee on behalf of the Honolulu Advertiser whom I have represented as its First Amendment attorney for the past ten years. I have also represented various other media corporations in the State of Hawaii in matters relative to open records and open meetings, including KHON-TV; KITV-TV; KGU-Radio; and various neighbor island newspapers.

Ten years ago this legislature passed a Sunshine Law guaranteeing access to meetings and records which was hailed by many as one of the most progressive open government statutes

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in the United States. Unfortunately, this spirit of open government has proven to be difficult to maintain, and our experiences of the past several years have demonstrated an increasing philosophy towards more secrecy in government and governmental decision making.

Abuses in the interpretation of Chapter 92, specifically as it relates to open meetings, are addressed in S.B. 1413. Despite the fact that this legislature has clearly stated the public policy of this state is to conduct the operations of government in public and that the public's right to know is secure, there is an increasingly disturbing trend which has evolved in our state toward a presumption of closed government. S.B. 1413 attempts to eliminate some of the ambiguities and more blatant abuses by redefining when meetings must be opened and under what limited circumstances they can be closed.

It also amends Chapter 92 to provide to citizens denied their rights under this Chapter to pursue their claims directly in the Courts and allows the Courts to award those citizens attorneys' fees and costs when their claims of violations under this Chapter are sustained. This eliminates the disparity which presently exists in which the government uses tax dollars to defend its attempts to limit access to quit while private citizens are obligated to pay substantial fees and costs in order to protect the public interest.

It should be the renewed dedication of this legislature to open the processes of government to citizens of this state and to restrict access to meetings and records only where that access would clearly be an unwarranted invasion of a private individual's privacy or in those extremely limited situations where confidentiality and secrecy are in the public's interest. The past several years have proven to be a disappointment to those of us who believe that government should conduct its operations in public, and I strongly urge this Committee to recommend to the Senate passage of those bills designed to emphasize our state's rededication to open government.

Respectfully submitted,

JEFFREY S. PORTNOY

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813

FRANK F. FASI
MAYOR

RICHARD D. WURDEMAN
CORPORATION COUNSEL

March 20, 1985

The Honorable Dwight L. Yoshimura,
Chairman and Members
Public Employment/Government
Operations Committee
House of Representatives
Thirteenth Legislature
State Capitol, Room 304
Honolulu, Hawaii 96813

Dear Representative Yoshimura and Members:

Subject: Senate Bill No. 1413, S.D. 1

Thank you for allowing me to present testimony on behalf of the City and County of Honolulu with regard to Senate Bill 1413, S.D. 1. My remarks will address the problem posed to county government by the failure of the existing law to either specifically include or exclude the county councils.

As a general rule, the City and its Council, as with all of the other counties, has attempted to follow what has been perceived to be the applicable laws with regard to open meetings. In the past, however, this has led to numerous situations in which the orderly function of government has been thwarted or upset by overzealous attacks and baseless lawsuits. Despite the benefits which all of us agree are forthcoming from the Sunshine Law, it is important to recognize that there is a need not to be overly suspicious about the operations of government and to allow some measure of flexibility for lawmakers to carry out the mandate of their constituents. Councilmembers, as elected officials, are ultimately responsible to the electorate for their actions and not merely to the special interest groups which tend to haunt the halls of government. I believe that this Legislature, at the very outset, recognized

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this need when, in 1975, it created an exception to the applicability of the Sunshine Law to the operations of the Legislature. The recognition of this need is not only present at the State level but, as we are all aware, at the highest level of the federal government. All of the Presidents of the United States, past and present, Democrat or Republican, have met with members of the Congress without being subject to the requirement that these meetings be open. There is no basis in either common law or our Constitution which requires that such meetings be open. See Charles Rhyne, The Law of Local Government (1st Ed. 1980) at 135; see also Houchins v. KQED, Inc., et al., 438 U.S. 1, 57 L.Ed.2d 553, 92 S.Ct. 2588 (1978).

Similarly, we believe that this exception should also apply to the county governments if it does not already exist. Recently, upon a close reexamination of the statutes and the legislative history behind Chapter 92, Hawaii Revised Statutes [HRS], there appears to be some question as to whether or not county councils are subject to the requirements of Chapter 92, HRS. Specifically, we would like to direct this Committee's attention to the definition of the term "board" as contained in Section 92-2, HRS. That section defines "board" to include any "agency, board, commission, authority, or committee . . . which is created by constitution, statutes, rule or executive order . . . ." (Emphasis added) None of the county councils in this State are created by Constitution, statute, rule or executive order. Rather, they are all created by county charter which, in itself, creates a separate governing body subject to its own terms, procedures and mechanics. There is a common maxim of law which all attorneys are aware of which states: "Expressio unius est exclusio alterius." Literally translated, it means "Expression of one thing is the exclusion of another." See Black's Law Dictionary (Rev. 4th Ed. 1968) at 692. In law, it is commonly applied to interpret statutes. In effect, it means that if the statutes specifically mention one item and not another, all other items not mentioned are therefore excluded or exempted from the scope of that law. In the case of Chapter 92, HRS, it appears that county councils were specifically excluded

as neither they nor the manner in which they were created is specified in the list included in the definition contained in Section 92-2, HRS. It is interesting to note that the language of the original act "either legislative or executive" was deleted after one year. Act 166, SLH 1975. In light of the impact which this question has on all counties and their daily operations, it is of the utmost importance that this matter be cleared up immediately. It would be the position of this County that, for the same reasons that it is sound policy to provide exemptions for the State Legislature and the President of the United States, the open meetings law should not apply to the legislative bodies of the counties which are subject to their own open meeting laws in their respective Charters.

"Sunshine" is not necessarily all warmth and goodness. Ideas often must be brainstormed before being exposed to the glare of publicity. Cooperation between the Executive and Legislative Branches is at least as desirable an objective as public sensation.

Thank you for your time and consideration.

Very truly yours,

RICHARD D. WURDEMAN
Corporation Counsel

RDW:ct

PRESENTATION OF THE DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

TO THE HOUSE COMMITTEE ON
PUBLIC EMPLOYMENT AND GOVERNMENT OPERATIONS

THIRTEENTH STATE LEGISLATURE
REGULAR SESSION

March 21, 1985

STATEMENT ON SENATE BILL NO. 1413, S.D. 1

THE HONORABLE DWIGHT L. YOSHIMURA, CHAIRMAN,
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs has no objections to Senate Bill No. 1413, S.D. 1. We appreciate the reasons for such amendments and believe that they have been drafted to address the problems which have occurred in the past without creating new problems or burdens for our boards and commissions.

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AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

HONOLULU BRANCH
1802 KEEAUMOKU STREET
HONOLULU, HAWAII 96822 • PHONE: 537-4702

March 21, 1985

REPRESENTATIVE DWIGHT YOSHIMURA
CHAIRMAN, Committee on Public Employment/
Government Operations

TESTIMONY FROM: AMERICAN ASSOCIATION OF UNIVERSITY WOMEN,
HAWAII PACIFIC DIVISION
Sherrie Fessler, Legislative Chair
Honolulu Branch

RE: S.B. 1413, S.D. 1 Relating to Public Agency Meetings and Records

The American Association of University Women (AAUW), Hawaii Pacific Division, strongly supports passage of this bill.

This year marks the 10th anniversary of Hawaii's Sunshine Law, Chapter 92, Hawaii Revised Statutes. The introductory portion of the law eloquently states its intent-- to make government as open as possible in order to protect the public's interest. Since the law's enactiment, sunshine has not become the accepted way of doing public business. There have been violations of the spirit of sunshine as well as efforts to circumvent the letter of the law.

Shortly after passage, some portions of the law were recognized as 'gray', but there have been few substantive changes since enactment. S.B. 1413, S.D. 1, represents nearly five years of cooperative effort on the part of government officials, interested citizens and organizations to achieve compromise language. The proposed amendments do not repeal any portion of the law; they are an attempt to clarify amibiguities.

Sec. 92-3: The open meetings provision has been expanded to allow citizens to give testimony. We believe citizen participation is key to open government. In its most elementary form, participation is the opportunity to express a personal belief or opinion.

Sec. 92-4: The changes in the executive meeting provision accomplish two things. First, it ensures full board participation. A majority of the members to which a board is entitled is required to close a meeting. Second, it reduces public cynacism. Both members of the board and the public should know why a meeting is closed. The minutes of such meetings are often not available to the public.

Sec. 92-5: The revisions of the exceptions provision are in response to concerns expressed by boards administered by the Department of Commerce and Consumer Affairs and the Attorney General. Subsection (a)(1) was added to protect personal information about applicants for vocational and professional licenses.

Subsection (a)(4. is a carefully considered revision, incorporating language suggested by the Attorney General, specificly, PROPOSED and THREATENED in relation to lawsuit. As originally, enacted, the law permits any subject whatsoever to be discussed in executive session. To protect the public's right to know, we believe there should be guidelines limiting subject matter. This is in keeping with the federal Government in the Sunshine Act and the sunshine laws of approximately half the states. The addition at subsection (b) reaffirms the declared policy of open deliberation and decision-making.

Sec. 92-7: Expanding notice to include anticipated executive meetings extends a common courtesy to the public; publishing the reason for executive session, protects the public's right to know. The provision to prohibit continuing a meeting to a later date ensures the public's right to participate.

Sec. 92-12: Enforcement is strengthened by enjoining the Attorney General and prosecuting attorney to investigate a complaint and by providing citizens the right to sue. We believe citizen participation includes making use of the Sunshine Law.

During hearings before the Senate Judiciary Committee, two sections 92-51 and 92-52 dealing with open records were separated from this bill and included in S.B. 613 relating only to records. We wish to have S.B. 1413, S.D. 1, amended to included these deleted sections. The decision to remove the subsections was based on convenience, not content.

Sec. 92-51: The attitude of some public officials makes gaining access to public records a frustrating experience. We believe a citizen should not be intimidated by having to state a reason to examine public records. (I can testify to my personal experience.)

Sec. 92-52: Both time and expense are involved when a citizen cares enough to exercise his rights. In criminal cases, the rights of the individual of modest means are protected. In civil cases, we believe the individual should also have the opportunity to claim his rights without financial consideration. Giving courts the option to award attorney fees and court costs to a successful plaintiff accomplishes this. The court is in the best position to judge if an individual warrants compensation to prevent financial injury.

As Hawaii's Sunshine Law begins its second decade, AAUW is preparing to strengthen further its commitment to sunshine in government. In June at our national biennial convention, we will adopt the following legislative position:

> AAUW supports measures to ensure open, democratic governmental decision-making processes with maximum opportunity for citizen participation.

League of Women Voters

49 SOUTH HOTEL STREET, SUITE 314 HONOLULU, HAWAII 96813

March 21, 1985

Representative Dwight Yoshimura, Chairman
Committee on Public Employment & Government Operations

Testimony from: League of Women Voters of Hawaii
Sherrie Fessler, Member, Sunshine Co-alition

Re: S.B. No. 1413 Relating to Public Agency Meetings and Records

The League of Women Voters of Hawaii endorses this bill. Since 1975, when the Sunshine Law (Chapter 92, HRS) was enacted, most government agencies have tried to observe the spirit of the statute-- to conduct the public's business as openly as possible. Abuses have occurred and efforts have been made to amend the law.

S.B. No. 1413 had its genesis in the 11th Legislature as S.B. No. 991. It passed the Senate Judiciary Committee, with amendment, and the full Senate. In 1982, it passed the House Committee on Public Employment and Government Operations. In the closing days of the Legislature, it was referred to several committees and died without additional hearings.

In the 12th Legislature, a revised bill was introduced in the Senate as S.B. No. 564 and in the House as H.B. No. 1186. In the Senate, the bill was held by the Committee on Government Operations and County Relations. In the House, the bill was not heard in the Committee on the Judiciary.

League endorsed all of the previous bills. We would like to give our reasons for supporting S.B. No. 1413:

(Sec. 92-3) The right of a citizen to address a board must be protected. Other boards should not follow the lead of the Board of Regents, which requires at least 24 hour advance notice for an individual to speak before it. Our intent is to preserve access to testify. The language of this amendment needs some clarification, and we suggest the following:

> The boards shall afford all interested persons REASONABLE ACCESS to submit data, views, or arguments, orally or in writing, on any agenda item.

(Sec. 92-4) A citizen who accepts service on a government board should attend its meetings. Under the existing statute, a nine member board with a 1/3 quorum provision could adjourn into executive session on the vote of just two members. Changing the law to a majority of members to which the board is entitled could encourage members to attend and ensure a more democratic environment.

The reasons for executive session are stated in the law. Members should know why they are voting for closed session and inform the attending public. Members should not vote for closed session and then seek a qualifying reason.

(Sec. 92-5 (a)) The present law does not specify the subject matter or the purpose of consultation with the board's attorney. As a result, a board could have its attorney attend a meeting to consult and circumvent the effect of the law. League feels closed-door discussions should be limited to matters related to actual, proposed or threatened lawsuits to which the board is or may be named as a party. The words PROPOSED OR THREATENED were added to meet the Attorney General's objections in the 11th Legislature. In the 12th Legislature, the Attorney General raised new objections to limiting subject matter based on attorney-client privilege. In our representative form of government, board members are surrogates of the people. The client is the public.

(Sec. 92-5 (b)) The League contends that in the spirit of Chapter 92, deliberation and decision-making should be conducted openly. This preserves the declared intent of the law-- to protect the people's right to know.

(Sec. 92-7 (a)) The policy of government agencies about public notification of executive session in advance is inconsistent. If a government agency lists executive session, there is rarely a reason given for the closed-door meeting.

(Sec. 92-7 (b)) Citizens have been frustrated by some boards which place important items last on the agenda and/or continue the item to another date. The effect is to cut off debate and move decision-making to a later day.

(Sec. 92-12) League approves attempts to clarify the role of the Attorney General by directing the Attorney General to investigate a complaint brought by a citizen. Under existing law, the only recourse a citizen may have to a violation is to ask the Attorney General to enforce the law. League also approves establishing the citizen's right to bring suit for violations of this law.

(Sec. 92-51 (b)) Access to public records is a citizen's right. A citizen should not be intimidated by having to state a reason when exercising this right.

(Sec. 92-52) The intent of the proposed language is to discourage frivolous suits.

TESTIMONY OF BEVERLY ANN KEEVER
REGARDING S. B. 1413
RELATING TO PUBLIC AGENCY MEETINGS, RECORDS
AND ESPECIALLY REGARDING THAT PORTION OF SECTION THREE
RELATING TO CLOSED-DOOR MEETINGS BETWEEN A BOARD AND ITS ATTORNEY

Before the House Committee on
Public Employment & Government Operations
Thursday, March 21, 1985 4:30 p.m.

My name is Beverly Ann Keever. I have worked as a professional journalist for many years and am currently a journalism educator at the post-secondary level. Because I am teaching this morning and am unable to present oral testimony, I would like the committee to consider this written version and then to pass S.B. 1413.

My testimony will focus on the one provision of S.B. 1413 that has caused the most trouble for the community-interest groups that have through the years supported versions of this bill designed to strengthen Hawaii's open-meeting law. Such community groups as the League of Women Voters, Common Cause, the Hawaii Council of Churches, and the now-inactive Hawaii Committee for the Freedom of the Press have often coordinated their efforts through the Sunshine Law Coalition, of which I am a member and have served as unpaid volunteer coordinator.

The provision that I will discuss affects one of the five exceptions to open meetings as mandated in H.R.S. Chapter 92. That provision in Section 3 of S.B. 1413 reads:

> [(3)] (4) To consult with the board's attorney[;] only in matters relating to an actual, proposed, or threatened lawsuit in which the board or government agency under which the board falls is named as a party;

The current law has been construed to give blanket permission to justify closed-door meetings to discuss any subject whatsoever when a board meets with its attorney. This subsection of the law has become a catchall loophole enabling a board to hold a closed-door meeting when it was unable to hold it under any of the other four exceptions to the open-meeting law, according to testimony presented in support of earlier versions of this bill. Thus this provision of the current law facilitates the undercutting of the state policy expressed by the Legislature in Section 92-1. The Legislature has specifically provided in Section 92-1 that "the formulation and conduct of public policy -- the discussions, deliberations, decisions, and action of governmental agencies -- shall be conducted as openly as possible."

11th LEGISLATURE

The genesis for amending this provision was the 11th Legislature when S.B. 991 was introduced in 1981 and heard--again by the Senate Judiciary Committee. Coincidentally, its hearing was also held on March 5. But the committee dropped this proposed amendment from the bill before sending it to the full Senate, which then passed the amended version. Although the committee heard several community organizations back the entire bill, it sided with the one paragraph of testimony on this point presented by the office of the attorney general. In that paragraph, the attorney general objected to restricting to actual litigation the subject matter that could justify closing a meeting between a board and its attorney. The written testimony explained:

> "We feel this language is too limited. Oftentimes proposed or threatened litigation must be discussed with a board--to discuss strategy, whether to sue, prosecute, etc., and such discussions are just as important, confidential and protected by the attorney-client privilege, as actual litigation. We feel that such discussions must take place privately to protect the interests of the State."

12th LEGISLATURE

Because of the attorney general's view, the bill revamped for the 12th Legislature included several explicit words cited in the one paragraph of testimony cited above. Instead of only actual litigation, a closed-door meeting could then be held also to discuss proposed or threatened litigation.

Despite the inclusion of these key words, however, the attorney general's office again opposed this provision--this time in seven pages of testimony. His opposition this time largely hinged on the attorney-client privilege. These fresh objections were then answered in writing by the Sunshine Law Coalition, at the request of the chairman of the Senate Committee on Government Operations and County Relations. I would like to summarize the highlights of that rebuttal so that they may be considered simultaneously if the attorney general's office again opposes this provision.

First, the attorney general's testimony glosses over the fact that the Legislature has provided guidelines for the holding of executive sessions on other matters but has not provided any such guidelines with reference to consultations with lawyers. And the loose language used by the attorney general's representative shows why it is necessary to provide clear guidelines.

At one point there is reference to "consultation with attorneys that must of necessity require private deliberation." But in the next sentence there is reference to "the sanctity of the private nature of the consultation of the board as a client with the board's attorney."

The first reference is, of course, consistent with the Legislature's policy as established in Section 92-1. The second reference, however, is so vague and ambiguous that it clearly flies in the face of that policy. It ignores the fact that not all consultations between a board and its attorney must necessarily require a private deliberation. Certainly, in the private sector, where the public has no interest, clients converse in private with their attorneys on a whole panoply of matters. But, when a government board is the client -- and the public is embodied as a part of that client -- then the balancing test prescribed by the Legislature must be made. That is the meeting must "be conducted as openly as possible."

For example, a closed door meeting may serve the public interest better than an open meeting when it involves actual, proposed or threatened litigation because it enhances the State's chances of protecting the larger public interest. The short term disadvantages of secrecy thus are outweighed by the long-term public gain.

The Legislature needs to be as specific in this portion of the bill as it was in that portion wherein it provided for executive sessions only "to deliberate concerning the authority of persons designated by the board to conduct labor negotiations or to negotiate the acquisition of public property." The

proposed language in S.B. 1413 would provide this clarity and would avoid loose statements such as those made by the attorney general's representative.

Second, the attorney general's argument that the sanctity of the attorney-client privilege protected all discussions between a board and its attorney fails to apply in numerous other states. A tabulation made in 1983 by the Coalition for the Senate Committee indicated that nearly 50 percent of the remaining 49 states restrict discussions to litigation-related, quasi-judicial or similarly specific matters when a board is permitted to close its doors to meet with its attorney. The tabulation of the compilation on this point contained in the open-meeting statutes of all 50 states showed the following breakdown:

> 15 states restrict to LITIGATION, PENDING OR IMMINENT LITIGATION, OR POTENTIAL LITIGATION the subject matter to be discussed behind closed doors when a board meets with its attorney;
>
> 6 states restrict to STRATEGY SESSIONS ON COLLECTIVE BARGAINING AND/OR NEGOTIATION WITH RESPECT TO LITIGATION, COLLECTIVE BARGAINING, AND/OR CLAIMS;
>
> 2 states restrict to QUASI-JUDICIAL FUNCTIONS the subject matter to be discussed behind closed doors when a board meets with its attorney.

I will attach as part of this testimony the state-by-state compendium of this research. Although the precise figures may have changed since 1983, I believe that the order of magnitude they suggest is still significant.

Third, the federal Government In The Sunshine Act restricts even more than does the Senate bill the nature of litigation-related matters that can be discussed behind closed doors by a

federal board and its attorney. The federal Government in the Sunshine Act provides that every portion of every meeting of an agency shall be open, with 10 enumerated exceptions. The sole exception relevant here permits closed-door meetings that

> "specifically concern the agency's issuance of a subpena [sic], or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing."

I hope these three arguments persuade the committee to retain this provision in S.B. 1413--and then to pass the entire bill.

Mahalo nui loa for your consideration of this testimony and for your decision to hold a public hearing on this bill that is so important for keeping the public in touch with and informed about its government.

Respectfully submitted,

Beverly Ann Keever

Attachment: 1

COMPILATION OF STATES THAT RESTRICT THE SUBJECT MATTER THAT MAY LEGALLY BE DISCUSSED BEHIND CLOSED DOORS WHEN A GOVERNMENT BOARD MEETS WITH ITS ATTORNEY

15 STATES THAT RESTRICT TO LITIGATION, PENDING LITIGATION, IMMINENT LITIGATION, OR POTENTIAL LITIGATION THE SUBJECT MATTER TO BE DISCUSSED BEHIND CLOSED DOORS WHEN A BOARD MEETS WITH ITS ATTORNEY:

- Colorado
- Illinois (interpreted as actual litigation by appellate court)
- Iowa
- Kentucky
- Maine
- Michigan
- Missouri
- New York
- North Carolina
- Ohio
- Oregon
- Rhode Island
- Texas
- Virginia
- Wyoming

6 STATES THAT RESTRICT SUBJECT MATTER TO STRATEGY SESSIONS AND/OR NEGOTIATION WITH RESPECT TO LITIGATION, COLLECTIVE BARGAINING AND/OR CLAIMS:

- Connecticut
- Delaware
- Louisiana
- Montana
- Nebraska
- New Jersey

2 STATES THAT RESTRICT TO QUASI-JUDICIAL FUNCTIONS THE SUBJECT MATTER TO BE DISCUSSED BEHIND CLOSED DOORS WHEN A BOARD MEETS WITH ITS ATTORNEY:

- Washington
- Wyoming

Tabulation made March 7, 1983, by Sunshine Law Coalition based on Common Cause state-by-state survey made about two years ago.