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To: House Committee on Judiciary

From: Cheryl Kakazu Park, Director

Date: February 16, 2016, 2:00 p.m.
State Capitol, Conference Room 325

Re: Testimony on H.B. No. 2158
Relating to Government Records

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Thank you for the opportunity to submit testimony on this bill. The Office of Information Practices ("OIP") supports the intent of H.B. 2158, which would require government agencies to exercise reasonable care in maintaining government records, but OIP opposes its present form and respectfully requests that it be amended. A proposed draft bill is attached.

The Uniform Information Practices Act, chapter 92F, HRS ("UIPA"), requires an agency to provide public access to government records the agency maintains, unless an exception to disclosure applies. The definition of government record is a broad one, encompassing essentially all the information the agency keeps in tangible form. It is not limited to records an agency is required by law to maintain, or to what an agency might consider its "official" records; rather, it includes everything from e-mails to handwritten notes to clippings files, in addition to an agency's more formal correspondence files or case or contract files. Under the UIPA, unless an exception to disclosure applies, any government record is required to be available for public inspection upon request, and where an exception applies to only part of the record, a redacted version of the record must be provided.

The UIPA in its present form only applies to records that an agency actually has, however, not to records that an agency should have but does not keep. Even when another law requires an agency to keep a certain record, if the agency can demonstrate that it does not have the record, the agency's failure to produce it does not violate the UIPA. (It may, of course, violate the law requiring the agency to keep the record in question.)

**Because of the broad definition of "government record," this bill as written would apply to essentially every piece of paper in an agency's office and every file on its computers,** and could create legal liability for the agency whenever an employee cleans out old files, deletes old e-mails, or records over an audiotape. **This bill would make the failure to reasonably maintain records a violation of the UIPA, and potentially also the basis for a tort claim of negligence.**

**It may also create liability if a document is maintained by an agency, but has been temporarily removed from a file** for review by a government employee, and the rest of the file is provided for public inspection or is reviewed by another employee as the basis for a governmental decision. That is apparently what happened in Molfino v. Yuen, 134 Haw. 181 ((Nov. 16, 2014), where a particular letter was not in the file at the time the agency reviewed the file and erroneously informed an owner that his property was approved for only two, not seven, lots.

As the Hawaii Supreme Court recognized in Molfino, the UIPA does not "impose tort liability upon a government agency for its failure to maintain government records" because it does not "create a statutory legal duty, flowing from the Planning Department to Molfino, to maintain a property's TMK file in accurate,

relevant, timely, and complete condition at all times." For this reason, the Molfino court rejected the plaintiff's tort claim against Hawaii County.

**Maintaining records in "accurate, relevant, timely, and complete condition at all times" would be an extraordinarily high standard to meet, and would invite constant litigation seeking monetary damages, which the bill in its present form would place no limits on**. The UIPA already imposes criminal penalties for intentional violations of confidentiality, and it provides immunity from liability only to those "participating in good faith in the disclosure or nondisclosure of a government record." Id.; HRS § 92F-16. **This bill, however, would fill the gap noted by the Molfino court by creating a new "duty of reasonable care" that would, following the Molfino opinion, apparently permit tort actions for negligence and lead to additional litigation under the UIPA. Note that all state and county agencies, as well as the Legislature, would be subject to any new duty or liability placed in the UIPA.**

If this bill is passed unamended, **OIP fears that it will be inundated with additional complaints each time a requester is denied a record request because the agency does not have the requested record.** Besides the rights already provided under the UIPA, a record requester may seek an additional determination from OIP that an agency violated its duty of care to maintain a record. **If OIP agrees that the duty of care was violated, then the agency could appeal but be subjected to a strict standard of review to prove that OIP's finding was palpably erroneous. If OIP disagrees, then the requester has a second bite at the apple and can still bring a court case based on its tort claim.** Because the requester has nothing to lose and no attorney fees to have to pay by complaining to OIP, **OIP's work will substantially**

**increase and additional personnel and resources will be required to implement the bill.**

**Moreover, the agency may find itself liable for an unlimited amount of damages if it cannot produce a requested record that was supposed to be kept for a certain period of time under its record retention schedule, which can be as long as forever for some agencies** ("permanent" retention required for certain appropriations and allotment reports; certain committee and conference files and legislative files), or in the case of personnel action reports, for 30 years after termination of employment. Existing retention schedules were created on the assumption that a failure to follow them would **not** be penalized, so they may need to be amended to reflect any new liability for failure to follow a retention schedule. The development and adoption of new retention rules under Chapter 91, including public hearings, could take two years or more.

**Proposed Amendments:**

A version of this bill carried over from the 2015 session, S.B. 140, H.D. 2, is currently in conference committee. OIP recommends that if this Committee is inclined to pass out this bill, the Committee should **use the language of S.B. 140, H.D. 2, as a starting point, as it has already been amended to address some of the issues with the bill and creates a rebuttable presumption that an agency exercises reasonable care by following its existing record retention and destruction policies.** This language helps to reduce anticipated litigation by providing a clear-cut, objective standard based on the agencies following their retention policies and not prematurely destroying records.

**OIP would further recommend that the proposed new section be placed in part V of chapter 92,** to meet the Department of Accounting and General Services' (DAGS) concern that it would be required to interpret what is a

public record under the UIPA if the provision were placed in chapter 94. OIP similarly does not want to be responsible for writing opinions interpreting what is required by DAGS's record retention schedules pursuant to chapter 94, as placement in chapter 92F would require OIP to do. Since the proposed provision includes elements dealing with retention of records and dealing with status as public records, **placement in part V of chapter 92 relating to "Public Records" would not require either OIP or DAGS to interpret each other's statutes and would properly leave that determination to the courts, which are empowered to enforce the new cause of action being created by this bill and can impose monetary damages.**

**OIP also recommends that if this Committee does intend to create the potential for tort liability, as this bill would do, it should place limits on the dollar amount of liability** that can be incurred for a breach of the duty to exercise reasonable care in the maintenance of government records, to avoid exposing the state and county agencies to open-ended financial liability.

For the Committee's consideration, OIP makes the following suggestions, which have not been incorporated into the attached proposal. Because retention and destruction policies would be used to establish standards as to what constitutes reasonable care (per language of S.B. 140, H.D. 2), **OIP recommends that the effective date for this bill be set at least a year out** to allow agencies to amend existing record retention policies or adopt new internal policies. Although DAGS has a general record retention schedule, each agency has its own agency-specific records for which policies must be adopted or amended. Moreover, agencies may have created new records that would have to be added to their existing retention and destruction policies. On the other hand, **if** this Committee intends that record retention policies should be **adopted by administrative rule, rather**

**than as internal policies, the effective date should be set two to three years out to allow for the chapter 91 rulemaking process**. This Committee may also want to **consider additional appropriations** for agencies to meet the hearings and publication requirements of chapter 91.

Finally, OIP notes that the Senate Judiciary and Labor Committee earlier this session considered a companion bill, **S.B. 2294**, and announced at its decision-making on February 10, 2016, that it would amend that bill to include OIP's recommendations, except for the effective date which will be "upon approval."

In summary, OIP believes that encouraging agencies to be attentive to existing retention schedules and to take care with their "official" files is a laudable goal, but the broad application of this bill, combined with the potentially unlimited legal liability it creates, makes it an impractical solution. While OIP supports its intent, OIP does not support this bill in its present form and hopes that this committee will amend it as suggested by this testimony. For your consideration, **OIP has attached a draft bill** based on S.B. 140, H.D. 2, which incorporates the amendments suggested in this testimony (except for the effective date and appropriations) and was the basis for the Senate Judiciary and Labor Committee's amendments to S.B. 2294, the companion to H.B. 2158 being considered today. Thank you for considering OIP's concerns and proposal.

OIP DRAFT of SB 2294 (2.8.2016) & HB2158 (2.12.16)
Showing proposed revisions to SB 140, HD 2

# A BILL FOR AN ACT

RELATING TO GOVERNMENT RECORDS.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

SECTION 1. In *Molfino v. Yuen*, No. 07-1-0378 (Haw. Sup. Ct. Nov. 13, 2014), the supreme court of the State of Hawaii upheld a circuit court ruling that, absent a statutory requirement, a government agency does not have a duty of reasonable care with respect to maintaining government records for the purpose of public inspection.

The purpose of this Act is to amend chapter 94, Hawaii Revised Statutes, to create a statutory requirement that government agencies exercise reasonable care in maintaining government records that are open to public inspection.

SECTION 2. [~~Chapter 94~~] Part V of chapter 92, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"{**~~§94-~~]§92- Duty to exercise reasonable care in maintaining records.** (a) Each unit of government in the State and its political subdivisions shall:

(1) Exercise reasonable care in the maintenance of all government records under its control that are required by chapter 92F to be available for public inspection;

(2) Issue instructions and guidelines necessary to effectuate this section; and

(3) Take steps to ensure that all its employees and officers responsible for the collection, maintenance, use, and dissemination of government records are informed of the requirements of this section.

Adherence to a duly adopted records retention and destruction [plan] policy shall create a rebuttable presumption that the unit of the State or its political subdivisions exercised reasonable care in its maintenance of government records for purposes of this section and in defending a cause of action raised pursuant to this section. Damages for any breach of the duty set forth by this section shall be limited to $2000 per incident."

SECTION 3. New statutory material is underscored.

SECTION 4. This Act shall take effect on July 1, 2030.

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February 16, 2016

The Honorable Karl Rhoads, Chair
and Members of the Committee on Judiciary
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Rhoads and Committee Members:

Re: Testimony in Opposition to House Bill No. 2158
Hearing: Tuesday, February 16, 2016, 2:00 p.m. Room 325

The Corporation Counsel of the City and County of Honolulu ("City") hereby submits its testimony in opposition to HB 2158 because it imposes an unduly burdensome and unlimited liability on the State and County governments.

HB 2158 would "create a statutory requirement that government agencies exercise reasonable care in maintaining those government records open to public inspection." Thus, the statutory duty of reasonable care would apply to nearly all forms of government records. In order to meet this duty, agencies would potentially have to maintain all records indefinitely. Failure to do so could expose agencies to unprecedented liability, would impose unreasonable staffing, storage and financial burdens on the agencies to maintain the records, and would render meaningless record retention policies that currently allow for the regular disposal of records that no longer need to be maintained.

The imposition of a statutory duty of reasonable care could also result in frequent litigation. Such a result will burden government with additional expenses and detract from providing public access to records, a primary purpose of HRS Chapter 92F. Limited government resources are better used for more productive purposes than indefinite maintenance of records and expensive litigation over an unprecedented legal duty.

We note that HRS § 92F-16 currently provides immunity from liability for persons participating in good faith in the disclosure or nondisclosure of a government

record. We respectfully suggest that this existing statutory provision is an appropriate standard to apply to the many hardworking public servants who daily strive to carry out their important tasks, including responding to public record requests. By contrast, establishing potential liability for negligent maintenance of records is unreasonable and unduly burdensome.

For these reasons, the City opposes HB 2158. Should you have any questions, please feel free to contact me.

Very truly yours,

DONNA Y. L. LEONG
Corporation Counsel

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# ʻĀINA HAINA COMMUNITY ASSOCIATION

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February 16, 2016

To: Representative Karl Rhoads, Chair
Representative Joy San Buenaventura, Vice Chair and
Members of the Committee on Judiciary

From: Jeanne Y. Ohta, President
ʻĀina Haina Community Association

RE: HB 2158 Relating to Government Records
Hearing: Tuesday, February 16, 2016, 2:00 p.m., Room 325

Position: Support

The Board of Directors of the ʻĀina Haina Community Association write is support of HB 2158 Relating to Government Records which would create a statutory requirement that government agencies exercise reasonable care in maintaining government records that are open to public inspection.

Government agencies need to be held accountable for the maintenance of documents. We believe further that a breach of this responsibility must have a remedy. As a community group, access to all relevant documents are necessary to our ability to be informed and to take action on a variety of community concerns. Our ability to advocate on behalf of ourselves and our community is hampered when we do not have access to documents and therefore information that we should have access to.

While in most cases, government agencies have provided us access to documents, we have also learned by experience that there are problems with the maintenance these documents. As an example, we made numerous requests for a file from a city agency. These requests were made over several months and the file was never provided. We received the following reasons: "the file was missing," "the file must have been misplaced," "the file is lost;" and the most concerning reason: "the file never existed." Since we requested the file by its number, we are puzzled as to why a number was given to a non-existent file.

It's these kind of situations that are of concern and why we ask that government agencies be given the responsibility of exercising reasonable care in the maintenance of all government records under its control that are required to be made available for public inspections.

We respectfully request that the committee pass this measure. Thank you for the opportunity to provide testimony today.