DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
530 SOUTH KING STREET, ROOM 110 * HONOLULU, HAWAII 96813
PHONE: (808) 768-5193 * FAX: (808) 768-5105 * INTERNET: www.honolulu.gov

KIRK CALDWELL
MAYOR

DONNA Y. L. LEONG
CORPORATION COUNSEL

PAUL S. AOKI
FIRST DEPUTY CORPORATION COUNSEL

March 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 Senate Bill No. 2294, SD2
Hearing: Thursday, March 17, 2016, 2:01 p.m. Room 325

The Department of the Corporation Counsel of the City and County of Honolulu ("City") opposes Senate Bill ("SB") 2294, SD2, because it places an unduly burden on and exposes the State and county government to unprecedented liability.

- **SB 2294, SD2 Would Permit Unprecedented Potential Liability and Damages.**

Subsection (b) of SB 2294, SD2, provides that the "adherence" to a duly adopted records retention and destruction policy creates a rebuttable presumption of the exercise of reasonable care. However, the State and counties will have difficulty in establishing "adherence" to their respective records retention and destruction policies that had been promulgated years ago for very old records. For example, a requested document that had been misfiled and later discovered had been "maintained" by the government agency consistent with its records retention policy. In order to establish the rebuttable presumption, however, the agency will have to hope that it can find an employee who had personal knowledge of the prior records retention policy so as to establish "adherence" to that policy. This is precisely what happened in the Molfino v. Yuen case where the document was temporarily missing[1]. As another example, if a

[1] In Molfino v. Yuen, 134 Haw. 181, 339 P.3d 679 (Haw. 2014), the issue was whether a

request is made for an old record, current employees may likely not be aware of whether a records retention and destruction policy was "duly adopted" in prior years whether prior employees adhered to such a policy. Memories fade, and former employees who participated in the collection, maintenance, or use of the records ma have since retired or passed away. Even if the intent of the bill is to apply only to records maintained at the time of the effective date of the legislation, it would likely no be possible to ascertain in the future, which records were maintained by agencies at tl time of the effective date of the bill. Thus, in such circumstances, the State and the counties are essentially left with no defense to a claim of a breach of duty or "a cause c action raised" under said section.

The addition of subsection (b) does not adequately address the concerns that the bill will expose governmental agencies to frequent litigation and unprecedented liability. The language does not expressly preclude other tort causes of action and damage claims based upon the alleged statutory violation of the proposed legislation, such as negligent infliction of emotional distress. The creation of a new statutory standard of care invites more litigation for monetary damages, thereby forcing the State and the counties to redirect and re-prioritize resources in the defense of such claims.

The reference to "breach of the duty" in subsection (c) suggests that the failure to perform any component of subsection (a) could amount to a "breach of duty." Although damages are limited to $2,000 per violation, the term "violation" is not defined. Therefore, it is unclear whether in a single request made under the Uniform Information Practices Act (Modified) ("UIPA") set forth in Hawaii Revised Statutes ("HRS"), Chapter 92F, a separate finding of a "breach of duty" and/or "violation" may be based upon each missing, lost or unavailable document. To the extent that "breach of duty" and/or "violation" can mean the latter, the proposed limit up to "$2000 per violation" could very well be in excess of thousands of dollars if a "violation" of the statute is measured by each document.

- **Extension of the Effective Date to July 1, 2017 Is Inadequate**

The proposed effective date of July 1, 2017 does not afford the counties fficient time to revise and update applicable records retention and destruction licies, and to secure approval by each counties' legislative body, as required by HRS 6-43. Additional time is also needed to comply with two additional duties imposed by bill on the State and counties: (1) to issue instructions and guidelines necessary to

---

ister under HRS § 92F could assert a negligence action against the County of Hawaii's Planning tment for failing to provide access to a May 2000 pre-existing lot determination that had been rarily missing from a particular property's TMK file. The Hawaii Supreme Court rejected plaintiff's nce-based claim and held that the government had no duty to maintain its records in its property all times.

effectuate the proposed legislation, and (2) to take steps to ensure that all its emp and officers who are responsible for the collection, maintenance, use and dissemi of government records are informed of the requirements of HRS § 92F. While the Office of Information Practices suggested that the effective date of SB 2294, SD2 should be extended by at least a year, the City and County of Honolulu would requi more than one year because of the separate record retention and destruction policie needed for its separate departments and agencies and its legislative approval proce As such, the effective date of this bill should be set at least three years from its passage.

- **SB 2294, SD2 Conflicts With HRS § 92F-16 Which Provides Immunit from Liability to Persons Acting in Good Faith.**

HRS § 92F-16 presently affords immunity from liability where employees act in good faith in providing public records. The UIPA provision states that any person "participating in good faith in the disclosure or non-disclosure of a government record shall be immune from any liability, civil or criminal, that might otherwise be incurred, imposed or result from such acts or omissions."

Maintenance of government records is necessarily part of the process of disclosing or not disclosing a government record under HRS § 92F et seq. SB 2294, SD2 however creates a new rebuttable presumption provision which conflicts with the statutory immunity granted under HRS § 92F-16 by imposing a new duty of care and civil liability for negligent acts or omissions in the maintenance of government records for the purpose of providing public access under HRS § 92F et seq. The existing immunity provision is a more appropriate standard to apply due to the impracticalities of satisfying the requirements to invoke the rebuttable presumption.

- **The Policy Considerations in Molfino Should Be Considered.**

In adding a new section to HRS § 92F by imposing a statutory duty of care garding the maintenance of government records open for public inspection, the gislature ignores the cogent policy considerations that the Hawaii Supreme Court culated in Molfino and Cootey v. Sun. Inv. Inc., 68 Haw. 480, 485, 718 P.2d 1086, 0 (Haw. 1986). Both Molfino and Cootey noted that the imposition of a statutory of care upon government units in the maintenance of its records would result in the tering of priorities and reallocation of resources away from the actual purpose of § 92F towards document management and forestalling potential litigation and y therefrom. In addition, the State and counties should not be liable for all injuries ate persons because of governmental activity since government should be d to effectively function to achieve "socially approved ends." (Molfino, 134 Haw. at 9 P.3d at 683, Cootey, 68 Haw. at 485-86, 718 P.2d at 1090.)

Based upon the above, the Department of the Corporation Counsel opposes SB 2294, SD2.

However, if this bill is to be passed, the Department of the Corporation Counsel urges revisions to subsections (b) and (c). The Department of Corporation Counsel proposes the following changes to subsection (b): "For purposes of this section, any unit of government in the State and its political subdivisions acting in good faith in the maintenance of government records shall be immune from any liability, civil or criminal, that might otherwise be incurred, imposed or result from such acts or omissions." The Department of Corporation Counsel further proposes the following changes to subsection (c): "Damages up to $2000 shall be a one-time total remedy for any and all breaches set forth under this section."

Should you have any questions, please feel free to contact me.

Very truly yours,

DONNA Y. L. LEONG
Corporation Counsel

LATE

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
530 SOUTH KING STREET, ROOM 110 * HONOLULU, HAWAII 96813
PHONE: (808) 768-5193 * FAX: (808) 768-5105 * INTERNET: www.honolulu.gov

KIRK CALDWELL
MAYOR

DONNA Y. L. LEONG
CORPORATION COUNSEL

PAUL S. AOKI
FIRST DEPUTY CORPORATION COUNSEL

March 17, 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: Supplemental Testimony Regarding Senate Bill No. 2294, SD2
Hearing: Thursday, March 17, 2016, 2:01 p.m. Room 325

The Department of the Corporation Counsel ("COR") of the City and County of Honolulu ("City") hereby submits this supplemental testimony in the event the House Committee on Judiciary will recommend passage of SB 2294, SD2, and proposes the following amendments to address the concerns raised in its March 16, 2016 testimony.

Subsection (b) of the bill creates a rebuttable presumption that the State or the counties exercised reasonable care in the maintenance of government records upon proof by the State and the counties that they adhered to a duly adopted records retention and destruction policy. It is difficult to perceive how "adherence" can be proven. Furthermore, COR is concerned that this language not be construed to create strict liability and believes that "good faith" or "reasonable" adherence to the existing records retention and destruction policy would be workable for the counties. In addition, the remedies provided by this legislation should be the exclusive remedy.

Accordingly, COR proposes the following revisions to subsection (b):

(b) Good faith adherence to the current, duly adopted records retention and destruction policy creates a rebuttable presumption that the government unit exercised reasonable care in the maintenance of government records for purposes of this section. The remedies provided

herein shall be exclusive, and nothing in this provision shall give rise to any additional action against the government unit for damages, including attorneys' fees and costs.

Further, in an effort to reduce the risk of increased litigation under SB 2294, SD2, the record requestor should be required to establish monetary damages from the alleged breach of the duty of care before any statutorily capped damages of no more than $2,000.00 may be awarded. COR recommends the following revisions to subsection (c):

(c) Upon proof that any breach of the duty set forth under this section resulted in monetary damages, damages may be awarded but shall not cumulatively be more than $2000.

Lastly, we respectfully submit that the current effective date of July 1, 2017 is unrealistic. Once the City and its agencies complete the substantial and lengthy process of revising and updating their general and agency-specific document retention and destruction policies, the policies must be approved by the City Council. This process takes several months. Once the revised and updated retention policies are approved by City Council, then the duties imposed in subsection (a)(2) and (3) to draft and issue instructions and guidelines, to create training materials and to actually train all of its thousands of employees and officers need to be completed. In addition, financial resources will be required to implement the Council-approved retention policies and those resources must be appropriated by the City Council through the executive operating budget.

Thus, the earliest that the various City agencies can reprioritize and/or revise their respective budgets for the implementation of Council approved retention policies, provide for training and seek Council approval is likely for Fiscal Year 2019, which will be approved by the City Council in June 2018. To provide for sufficient time to accomplish these tasks, COR respectfully requests an effective date of no earlier than July 1, 2019.

Thank you for your consideration of these comments.

Very truly yours,

DONNA Y. L. LEONG
Corporation Counsel

ʻĀINA HAINA COMMUNITY ASSOCIATION

c/o ʻĀina Haina Library, 5246 Kalanianaole Highway, Honolulu, HI 96821
ainahainaassoc@gmail.com; www. ainahaina.org

Jeanne Ohta, President • Melia Lane-Kanahele, Vice-President • Art Mori, Treasurer • Kathy Takemoto, Secretary • Directors At Large: Jeff Carlson, Wayson Chow, Patricia Moore, Marie Riley

March 17, 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: SB 2294 SD2 Relating to Government Records
Hearing: Thursday, March 17, 2016, 2:01 p.m., Room 325

Position: Support

The Board of Directors of the ʻĀina Haina Community Association write is support of SB 2294 SD2 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.

LATE

OFFICE OF INFORMATION PRACTICES

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

To: House Committee on Judiciary

From: Cheryl Kakazu Park, Director

Date: March 17, 2016, 2:01 p.m.
State Capitol, Conference Room 325

Re: Testimony on S.B. No. 2294, S.D. 2
Relating to Government Records

Thank you for the opportunity to submit testimony on this bill. The Office of Information Practices ("OIP") **supports S.B. 2294, S.D. 2**, which would require government agencies to exercise reasonable care in maintaining government records.

This bill, which is a companion to H.B. 2158, was amended by the Senate to place the proposed new statute outside the Uniform Information Practices Act, chapter 92F, HRS ("UIPA"); create a rebuttable presumption that an agency adhering to its record retention schedule is exercising reasonable care in its record maintenance; set a limitation on damages for a breach of the new duty of care; and establish a July 1, 2017 effective date. These amendments take care of the major concerns OIP previously had with this bill, and thus OIP supports the bill as amended.

Thank you for considering OIP's testimony.