DAVID Y. IGE
GOVERNOR

LUIS P. SALAVERIA
DIRECTOR

MARY ALICE EVANS
DEPUTY DIRECTOR

DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM

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Statement of
LUIS P. SALAVERIA
Director
Department of Business, Economic Development, and Tourism
before the
SENATE COMMITTEE ON WAYS AND MEANS

Monday, February 27, 2017
9:35 am
State Capitol, Room 211

in consideration of
SB 245, SD1
RELATING TO GOVERNMENT RECORDS.

Chair Tokuda, Vice Chair Dela Cruz, and Members of the Committee:

The Department of Business, Economic Development & Tourism (DBEDT) offers comments with concerns on SB 245, SD1, Relating to Government Records, which would require government agencies to exercise due care in maintaining government records.

This bill would make the failure to reasonably maintain records the basis for tort claims of negligence and may create a liability for damages of up to $2,000 per violation, plus legal fees and costs.

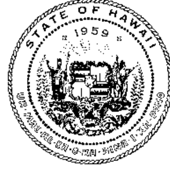
The definition of government records appears to be broader than the types of records covered by the General Records Schedule for Retention and Disposition, which would make it impossible for an employee to know what period of time they are required to exercise due care for every piece of paper or electronic file in their custody.

If this bill passes, additional time will be needed to establish a retention schedule for all records in each individual program. DBEDT has eleven attached agencies and seven divisions.

If this Committee is inclined to pass this measure, DBEDT recommends the effective date be no sooner than July 1, 2020, and additional staff positions be authorized to inventory records and create a specific records schedule for each division and attached agency.

Thank you for the opportunity to provide comments.

DAVID Y. IGE
GOVERNOR



RODERICK K. BECKER
Comptroller

AUDREY HIDANO
Deputy Comptroller

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

P.O. BOX 119, HONOLULU, HAWAII 96810-0119

WRITTEN COMMENTS OF
RODERICK K. BECKER, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
SENATE COMMITTEE ON WAYS AND MEANS
MONDAY, FEBRUARY 27, 2017
9:35 A.M.
CONFERENCE ROOM 211

S.B. 245, S.D. 1

RELATING TO GOVERNMENT RECORDS.

Chair Tokuda, Vice Chair Dela Cruz, and members of the Committee, thank you for the opportunity to submit written comments on S.B. 245, S.D. 1.

The Department of Accounting and General Services (DAGS) appreciates the intent of the measure and offers the following comments for the committee's consideration.

1. Impact on DAGS: Because the measure establishes a new monetary penalty for non-compliance, DAGS' Archives Division anticipates an increase in consultations and requests for the development of departmental or agency specific retention schedules and the review and updating of existing schedules in order to avoid the penalty. The increase in requests will tax the already minimally staffed Records Management Branch, which has suffered staff cuts over the past decade. As a result, the development of retention schedules for new record types and the review and updating of existing departmental

specific schedules will probably take time, which could expose departments and agencies to suits pending their completion.

To address the increased workload and potential law suits, DAGS requests funding and staffing for the Records Management Branch (at least one additional Archivist III (SR-20) position to work with departments and agencies in a consultative role to perform inventory, training and scheduling), and a reasonable delay in the effective date of the penalty provision in order to allow departments and agencies to develop and update their retention schedules.

Additionally, if other DAGS' divisions are subject to the penalty, the measure could pose a burden to the department in the litigation and settlement of claims, which in the case of a vexatious records requestor, could become significant.

2. Clarification of Penalty: DAGS finds that the phrase "$2,000 per violation" is vague and ambiguous, and requests that it be clarified to remove any uncertainty. For example, if the retention of a specific type of email is six years and the department or agency prematurely deleted all email of that type at the same time, if the emails are later requested by the public, would it be deemed a single violation of the duty of reasonable care resulting in a single $2,000 penalty, or would the deletion of each individual email constitute a separate and distinct violation, subject to a $2,000 penalty. In light of the potential adverse impact to departments and agencies, the penalty provision should be clarified in the measure.

Thank you for the opportunity to submit written comments on this measure.

OFFICE OF INFORMATION PRACTICES

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To: Senate Committee on Ways and Means

From: Cheryl Kakazu Park, Director

Date: February 27, 2017, 9:35 a.m.
State Capitol, Conference Room 211

Re: Testimony on S.B. No. 245, S.D. 1
Relating to Government Records

Thank you for the opportunity to submit testimony on this bill. The Office of Information Practices ("OIP") **supports** the intent of S.B. 245, which would require government agencies to exercise reasonable care in maintaining government records, **but OIP requests that its effective date be no sooner than July 1, 2019, to give agencies time to prepare.**

This bill would place the new statute it proposes in part V of chapter 92, outside the Uniform Information Practices Act, chapter 92F, HRS ("UIPA"), a placement which OIP supports as the duty created by the bill is beyond the scope of the UIPA. The bill would create a rebuttable presumption that an agency adhering to its record retention schedule is exercising reasonable care in its record maintenance, and it would set a limitation on damages for a breach of the new duty of care. **These provisions take care of the major concerns OIP had with versions of this bill introduced in previous sessions. The bill, however, will still create a new duty and potential liability that agencies will need time to prepare for, which is why OIP recommends delaying the effective date.**

"Government records" is not specifically defined in the current version of the bill, but since the proposed language applies to "government records under [an agency's] control that are required by chapter 92F to be available for public inspection," the term presumably has the same meaning as in the UIPA. The UIPA 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 press 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.

Because of the broad definition of "government record," this bill 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. T**his bill potentially would make the failure to reasonably maintain records 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. **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 against state and county agencies and would lead to additional litigation and potential liability for damages, settlements, and legal fees and costs.**

Under the proposed bill, an agency may find itself liable for damages of up to $2,000 per violation if it cannot produce a requested record that was supposed to be kept for a certain period of time under its record retention policy, 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 and destruction policy. Moreover, while DAGS has a general record retention schedule, **each agency has its own agency-specific records for which policies must be adopted or amended.** As OIP knows from its own recent experience, the development and adoption of new

retention and destruction policies could take two years or more. Therefore, **OIP recommends that the effective date for this bill be set at least two years out** to allow agencies to amend existing record retention policies or adopt new internal policies. Further, **if** this Committee intends that record retention policies should in the future be **adopted by administrative rule, rather than as internal policies, this should be made clear in the bill and the effective date should be set 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.

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, and to give agencies time to ensure their retention and destruction policies are appropriate in light of this new law, **OIP recommends that the effective date be no sooner than July 1, 2019.**

Thank you for the considering OIP's testimony.

Bernard P. Carvalho, Jr.
Mayor

Wallace G. Rezentes, Jr.
Managing Director

Mauna Kea Trask
County Attorney

Matthew M. Bracken
First Deputy

OFFICE OF THE COUNTY ATTORNEY
County of Kaua'i, State of Hawai'i

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February 27, 2017

The Honorable Jill N. Tokuda, Chair
and Members of the Senate Committee on Ways and Means
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Tokuda and Committee Members

Re: Testimony in Opposition to Senate Bill 245 SD1
Hearing: February 27, 2017 at 9:30 a.m., Room 211

The Office of the County Attorney, County of Kauai respectfully joins the City & County of Honolulu's testimony in opposition to SB 245 SD 1.

Please contact me if you have any further questions at (808) 241-4930.

Mahalo,

/s/

Mauna Kea Trask
County Attorney

DEPARTMENT OF THE CORPORATION COUNSEL
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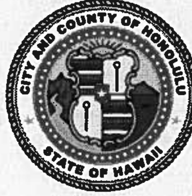
KIRK CALDWELL
MAYOR



DONNA Y. L. LEONG
CORPORATION COUNSEL

PAUL S. AOKI
FIRST DEPUTY CORPORATION COUNSEL

February 25, 2017

The Honorable Jill N. Tokuda, Chair
and Members of the Senate Committee on Ways and Means
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Tokuda and Committee Members

Re: Testimony in **Opposition** to Senate Bill 245 SD1
Hearing: February 27, 2017 at 9:35 a.m., Room 211

The Department of the Corporation Counsel ("COR"), City and County of Honolulu ("**City**"), hereby submits its testimony in **opposition** to Senate Bill 245 SD1 ("**S.B. 245**") because it imposes an unduly burdensome and unprecedented liability on the State and county governments as detailed below. This testimony also addresses the adequacy of damages raised as a proposed topic for discussion in Standing Committee Report No. 145 ("**SSCR 145**").

- **S.B. 245 Would Increase Litigation, Divert Valuable Resources and Create Unprecedented Potential Liability and Damages.**

S.B. 245 creates a new statutory standard of care upon the State and county governments in the maintenance of records under their control and allows the recovery of damages for breach of the duty. SSCR 145 regarding S.B. 245 suggests further discussion regarding the adequacy of the $2,000 cap that a court may award for damages for breaching the duty of reasonable care.[1] Whether damages are capped at $2,000 per violation or whether subsection (c) is removed to permit unlimited damages, S.B. 245 invites more litigation for monetary damages, thereby forcing the State and

[1] In its supporting testimony, the Hawaii Association for Justice suggests eliminating subsection (c), which limits damages to $2,000 per violation, on the grounds that damages from the breach of duty may be different in every situation. (*See*, Testimony of Robert Toyofuku for the Hawaii Association for Justice, dated February 6, 2017.)

county governments to redirect budgetary, personnel and other resources in the defense of such claims.

Subsection (b) 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 county governments may have a difficult burden of proving adherence to earlier records retention and destruction policies, especially for those records that have an extended or "forever" retention date. Current and former employees who participated in the collection, maintenance, or use of the records may not have a present recollection of old records and past retention policies applicable to the records in question. Former employees may have moved or passed away. Or simply, as in Molfino v. Yuen, 134 Haw. 181, 339 P.3d 679 (2014), where the document was maintained but temporarily missing from the file being produced,[2] a document may be inadvertently misfiled, incompletely scanned or mistakenly written over by other data. Under such circumstances, the State and county governments are essentially left defenseless and potentially exposed to frequent litigation as well as unprecedented, unpredictable and potentially significant liability, damages, fees and costs.

- **S.B. 245 Imposes an Unreasonable Burden Upon State and County Governments in the Maintenance of All Government Records.**

COR concurs with the testimony of the State Office of Information Practices ("**OIP**") and the State Department of Business, Economic Development & Tourism submitted to the Senate Committee on Judiciary and Labor dated February 6, 2017, that S.B. 245 seems to apply an overly broad definition to the phrase "government record." By tethering "government records" to Chapter 92F, Hawaii Revised Statutes ("**HRS**") OIP suggests that subsection (a) "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. (OIP 2/6/17 Testimony, at p. 6.) Thus, S.B. 245 appears to impose an unreasonable duty of care to maintain government records that is well beyond what state and federal laws require or what a records retention and destruction policy provides.[3] The imposition of such a duty to maintain with reasonable care all

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[2] In Molfino v. Yuen, 134 Haw. 181, 339 P.3d 679 (2014), the issue was whether a requester under HRS § 92F could assert a negligence action against the County's Planning Department for failure to provide access to a May 2000 pre-existing lot determination which was temporarily missing from a particular property's tax map key (TMK) file. The Supreme Court rejected plaintiff's claim that the government had a duty to maintain its records in its property files at all times.

[3] The Uniform Information Practices ("**UIPA**") does not impose an affirmative duty or obligation upon a government agency to maintain all records, only a duty to make records that are actually maintained accessible to the general public. See Nuuanu Valley Ass'n v. City & County of Honolulu, 119 Hawai'i 90, 97, 194 P.3d 531, 538 (2008), citing State of Hawai'i Org. of Police Officers (SHOPO) v. Soc'y of Prof'l Journalists- Univ. of Hawai'i Chapter, 83 Hawai'i 378, 393, 927 P.2d 386, 401 (1996).

government records that are required to be accessible for public inspection under HRS Chapter 92F, interferes with effective government functions, reorders governmental priorities, and diverts governmental resources, while increasing government exposure to tort liability and damages. See, Molfino, 134 Haw. at 683, citing Cootey, 68 Haw. at 485. Moreover, the provision of subsection (b) that provides for a rebuttable presumption, instead of an irrebuttable presumption, only prolongs further litigation by allowing plaintiffs to undermine the very basis and policy reasons for the duly adopted records retention and destruction policy.

- **S.B. 245 Conflicts With HRS § 92F-16, Which Provides Immunity from Liability to Persons Acting in Good Faith.**

Requiring proof by the State and county governments of an unqualified "[a]dherence to a duly adopted records retention and destruction policy" in order to establish a rebuttable presumption of reasonable care is too rigid and holds the State and county governments to a stricter and higher standard than the reasonable care standard set forth in subsection (a)(1) of the bill. For example, there may be events beyond the State's or counties' control which may have damaged or even destroyed records. The State and county governments should be allowed to establish an irrebuttable presumption of reasonable care simply by showing reasonable or good faith adherence to an existing and duly adopted records retention and destruction policy.

This would be consistent with HRS § 92F-16, which provides 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." (Emphasis added.) Maintenance of government records is necessarily a part of the process of disclosing or not disclosing a government record under HRS § 92F et seq. S.B. 245, however, creates a direct conflict to the immunity granted under HRS § 92F-16 by imposing upon the State and county governments a duty of care in maintaining government records required to be available for public inspection under HRS § 92F et. seq., and allowing damages for potential violations in the breach of such duty of care.

- **The Policy Considerations in Molfino Disfavor the Imposition of a Statutory Duty of Care In the Maintenance of Government Records.**

In considering this proposed new section in HRS § 92-__ that would impose a duty of care regarding the maintenance of government records open for public inspection, we urge consideration of the policies cited by Molfino and Cootey v. Sun. Inv. Inc., 68 Haw. 480, 485, 718 P.2d 1086, 1090 (1986). Both Molfino and Cootey noted that the imposition of a statutory duty of care upon the government in the maintenance of its records would result in the reordering of priorities and reallocation of resources from the actual purpose of HRS § 92F, which is to allow public scrutiny of and

participation in the government process, to document management and forestalling potential litigation or liability. Public policy considerations guard against holding government as an insurer against all injuries to private persons resulting from its activities, because government agencies should be allowed to effectively function to achieve "socially approved ends." (Molfino, 134 Haw. at 185, 339 P.3d at 683, Cootey, id., 68 Haw. at 485-86, 718 P.2d at 1090.) S.B. 245 allows for the mere possibility that the State or county governments can be held liable for damages from good faith human error in the maintenance of their records. Limited government resources are better used for more productive purposes than for redirecting those resources towards an unreasonably burdensome maintenance of records standard and expensive litigation over an additional duty.

- **An Effective Date Upon Approval Does Not Afford Governmental Units to the Ability to Comply with All of the Provisions of § 92-__ (a).**

S.B. 245 requires the State and the county governments to issue instructions and guidelines and to take steps to ensure all employees and officers are informed of the requirements under S.B. 245. It also provides that "adherence to a duly adopted records retention and destruction policy" would create a rebuttable presumption that the governmental unit exercised reasonable care in the maintenance of its records. In order to comply with the provisions of S.B. 245, the effective date for this bill should be set at least 2 to 3 years out to allow departmental agencies to adopt new or amend existing agency specific record retention policies and to complete the process of obtaining Council approval, where necessary, or through the HRS Chapter 91 rulemaking process, if appropriate. Financial resources will need to be diverted to implement the Council approved retention policies, the budgeting of which will necessarily require City Council approval.

For these reasons, the City **opposes** S.B. 245. Should you have any questions, please feel free to contact me.

Very truly yours,

DONNA Y. L. LEONG
Corporation Counsel

THE SENATE
THE TWENTY-NINTH LEGISLATURE
REGULAR SESSION OF 2017

COMMITTEE ON WAYS AND MEANS
Senator Jill N. Tokuda, Chair
Senator Donovan M. Dela Cruz, Vice Chair

NOTICE OF DECISION MAKING

DATE: Monday, February 27, 2017
TIME: 9:30 AM
PLACE: Conference Room 211
State Capitol
415 South Beretania Street

SB 425, SD1 (SSCR512) Status & Testimony

RELATING TO LABOR.
Requires certain employers with fifty or more employees to provide sick leave to service workers for specified purposes under certain conditions. Defines the terms "service worker" and "employer". Provides that an employee need not exhaust all family leave benefits prior to using victim leave benefits. Takes effect 1/7/2059. (SD1)

Saturday, February 25, 2017

Letter to the Chair:

We are a small family owned business employing 60 employees on the island of Kauai. In the current environment restaurant businesses such as ours are struggling with rising costs all around us. We strive to provide a healthy workplace and enjoy longevity and loyalty from our employees.

We strongly oppose SB245. In our type of business, if someone is not at work someone else must come in to replace them. We simply cannot afford to pay someone to be at work and pay another person not to be at work. Restaurant industry margins are tight, profit percentages are low, and overheads are high.

We pay high premiums for the various types of insurances we are required to and choose to carry. Our temporary disability insurance covers employee's wages up to 60% if they are out of work for seven days or more and are otherwise eligible, so employees are not left without.

[Type text]

In the event that companies such as ours became required to pay sick leave, the wage burden would essentially switch to the employer from the insurance company, although the employer would still be required to pay to carry said insurance.

A bill such as this will force employers to cut costs elsewhere. A business can only raise prices so much. As our costs and expenses continue to rise, increases in revenues cannot keep up. In the end monies that are used for employee raises and business improvements that are necessary to keep a business successful and running will be the dollars that suffer.

This bill stands among others affecting our industry, and while the ideas seem noble enough with the interests of the employees at heart, I believe that the reality is that many business with 20-100 employees will not be able to shoulder the financial burden and will close.

We sincerely hope that the committee will carefully weigh the effects that the passing of SB245 will have on the employers providing the workplaces as well as on the individual employees.

We strongly oppose SB 245 and sincerely thank you for your time and attention.

Kristine Miller
General Manager/Owner
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