TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2020

ON THE FOLLOWING MEASURE:
S.B. NO. 2090, RELATING TO JUDICIAL ENFORCEMENT OF THE UNIFORM INFORMATION PRACTICES ACT.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY

DATE: Tuesday, January 28, 2020 **TIME:** 10:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Clare E. Connors, Attorney General, or
Stella M.L. Kam, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General appreciates the intent of this bill and provides the following comments.

This bill would amend section 92F-15(c), Hawaii Revised Statutes (HRS), to require State agencies to file a motion for summary judgment within 30 days after being served with a circuit court complaint for the agency's denial of access to government records. If the agency fails to file a motion for summary judgment within the 30 day time period, the circuit court is required to order immediate disclosure of the government record. This bill also adds a new subsection (g) to section 92F-15, HRS, to provide for appeal of the circuit court decision, and would allow an agency to petition the Hawaii Supreme Court for review of the circuit court decision.

This bill puts State agencies at a significant disadvantage. Under section 92F-15(a), HRS, there is a two year statute of limitations for a requester who is denied access to government records. This means a two-year-old denial has to be researched and a motion for summary judgment drafted within 30 days of service of the complaint. Such a lengthy statute of limitations combined with an automatic disclosure order is unfair to the agency. This places a significant burden on the agency and the Department of the Attorney General with consequences, such as disclosure of information, which cannot be undone. Additionally, this bill as written could have a

significant impact upon the resources of the Department of the Attorney General due to the short turnaround time to file a motion for summary judgment. The wording of this bill appears to penalize the agency by imposing a time disadvantage for the agency to develop an appropriate response to lawsuit over a denial of records.

We also note that this bill specifically requires the agency to file a motion for summary judgment which is a course of litigation action that might not be appropriate given the facts of the case.

If the goal of a lawsuit filed under the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA), is to expedite the review of the agency's actions, we believe this goal can be accomplished through modification of section 92F-15, HRS, by providing a process by which the court will review the agency's denial of access to records as an appeal of an administrative decision, rather than a civil lawsuit. In doing so, the statute of limitations in subsection (a) can be reduced to 60 days. We have provided suggested wording to amend section 92F-15, HRS, attached to this testimony.

For the above reasons, we respectfully ask the Committee to pass this bill with the recommended amendments.

Attachment

"**§92F-15 Judicial enforcement.** (a) A person aggrieved by a denial of access to a government record may [~~bring~~] file an [~~action~~] application for judicial review against the agency at any time within [~~two years~~] sixty calendar days after the agency denial to compel disclosure.

(b) In [~~an action to compel disclosure~~] the review, the circuit court shall hear the matter de novo; provided that if the [~~action to compel disclosure~~] application is brought because an agency has not made a record available as required by section 92F-15.5(b) after the office of information practices has made a decision to disclose the record and the agency has not appealed that decision within the time period provided by 92F-43, the decision of the office of information practices shall not be subject to challenge by the agency in the [~~action to compel disclosure.~~] application for judicial review. Opinions and rulings of the office of information practices shall be admissible and shall be considered as precedent unless found to be palpably erroneous, except that in an [~~action to compel disclosure~~] application for judicial review brought by an aggrieved person after the office of information practices upheld the agency's denial of access to the person as provided in section 92F-15.5(b), the opinion or ruling upholding the agency's denial of access shall be reviewed de novo. [~~The circuit court may examine the government record at issue, in camera, to assist in determining whether it, or any part of it, may be withheld.~~]

(c) The application for judicial review shall be scheduled as expeditiously as practicable. It shall be conducted on the record of the agency's receipt of the request for records and subsequent denial of access to those records, the records of the office of information practices reviewing the request for records, if applicable, the record or records at issue, and briefs and oral argument. The circuit court may examine the government record at issue, in camera, to assist in determining whether it, or any part of it, may be withheld. The agency has the burden of proof to establish justification for nondisclosure.

(d) If the complainant prevails in an action brought under this section, the court shall assess against the agency reasonable attorney's fees and all other expenses reasonably incurred in the [~~litigation.~~] application for judicial review.

(e) The circuit court in the judicial circuit in which the request for the record is made, where the requested record is maintained, or where the agency's headquarters are located shall have jurisdiction over an [~~action~~] application for judicial review brought under this section.

(f) Except as to cases the circuit court considers of greater importance, proceedings before the court, as authorized by this section, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for [~~hearing and trial or for~~] argument at the earliest practicable date and expedited in every way.

(g) Any party aggrieved by the decision of the circuit court may appeal in accordance with part I of chapter 641 and the appeal shall be given priority."

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

LATE

To: Senate Committee on Judiciary

From: Cheryl Kakazu Park, Director

Date: January 28, 2020, 10:00 a.m.
State Capitol, Conference Room 016

Re: Testimony on S.B. No. 2090
Relating to Judicial Enforcement of the Uniform Information Practices Act

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Thank you for the opportunity to submit testimony on this bill, which would (1) require an agency to file a motion for summary judgment within 30 days of being served with an appeal under the Uniform Information Practices Act (UIPA), and require the court to order disclosure if the agency fails to do so, and (2) set out an expedited appeal process from a circuit court's UIPA decision in which a petition must be made directly to the Hawaii Supreme Court and enforcement of the circuit court's decision is stayed for no more than 30 days after the petition is filed. The bill further applies the "palpably erroneous" standard of review in an appeal of a circuit court decision to compel disclosure. Although the Office of Information Practices (OIP) is not immediately and directly affected by this measure because it addresses complaints brought directly to the court and not to OIP, the following comments and recommendation are offered.

As originally enacted, the UIPA allowed a requester to go to court "de novo" after an unfavorable OIP decision, but did not allow an agency to appeal at all an OIP decision requiring disclosure. When the law was amended in 2012 to allow

an agency to appeal an OIP decision requiring disclosure, the "palpably erroneous standard" of review was statutorily codified in recognition of OIP's role as the agency charged with interpreting and administering that law. HRS Sections 92F-15(b); 92F-27(b); and 92F-43(c); see Cheryl Kakazu Park and Jennifer Z. Brooks, 2013 Law and Administrative Rules Governing Appeal Procedures of Hawaii's Office of Information Practices, 36 University of Hawaii Law Review 271 (2014) ("Law Review Article"); see also Right to Know Committee v. City Council, 117 Haw. 1, 13, 175 P.3d 111, 123 (Haw. App. 2007) (applying the palpably erroneous standard of review). The "de novo" standard of review was retained in the law for appeals to the court by a requester from an OIP decision upholding the agency's denial of access. HRS Section 92F-15(b); HRS Section 92F-27(b); see Law Review Article at 289-90.

In giving agencies the right to appeal from OIP decisions, the Legislature established the "palpably erroneous" standard of judicial review that was intended to "accord a presumption of validity and require the courts' deference to OIP's factual and legal determinations concerning the administration and interpretation of the UIPA and Sunshine Law, unless such determinations are 'palpably erroneous' and result in a definite and firm conviction that a mistake has been made." Law Review Article at 291 (citing remarks by the House Judiciary Chairman, Representative Gil Keith-Agaran, on the floor of the House of Representatives regarding final passage of S.B. 2858, S.D. 1, C.D. 1, with almost identical remarks by Senator Clayton Hee on the floor of the Senate regarding the same bill).

This bill, however, does not address appeals from OIP decisions to which the "palpably erroneous" standard of review applies. Instead, this bill addresses actions brought directly before the circuit courts and allows appeals from

those court decisions directly to the Hawaii Supreme Court. As the courts have much broader jurisdiction over many issues but do not have the specialized agency expertise of OIP or body of precedential opinions regarding the administration of the UIPA, **OIP questions whether the "palpably erroneous" standard of review should apply. OIP is also concerned that this bill's imposition of the "palpably erroneous" standard in appeals to Supreme Court from circuit court decisions would eventually confuse the application of that standard with respect to appeals to the courts from OIP opinions.**

Consequently, OIP recommends that the references to the "palpably erroneous" standard of review from a decision to compel disclosure (presumably brought by an agency) on page 3 from lines 13-20 be removed, in which case it is unnecessary to have a different "de novo" standard of review for an appeal from an agency's denial of access (presumably brought by a requester). Instead, these standards of review should be replaced by a more appropriate appellate standard of review, and OIP will defer to the Judiciary's recommendation on this issue.

OIP further notes that the tight deadlines set by this measure, which are presumably intended to ensure an expedited court review and appeal, do not appear to allow either a circuit court or the Supreme Court any room to set its own schedule, either to accommodate the parties' needs or the court's own scheduling needs. Rather, it appears in new section 92F-15(c) on page 2 that if a deadline is missed by the defending agency or even by the Supreme Court, no matter how justifiable the reason, the result will always be that the court is mandated by law to order disclosure of the contested record. Moreover, the bill in new section 92F-15(g) on pages 3-4 does not allow enforcement of the circuit court's decision to compel disclosure to be stayed more than 30 days after a petition to appeal to the Supreme

Court is filed, which essentially gives the Court less than 30 days to decide the appeal before the record must be disclosed, regardless of the merits of the case or any conflicting state or federal confidentiality statute. Finally, the bill does not provide any limitation on the time within which a record requester may appeal to the Supreme Court from a circuit court decision.

Thank you for considering OIP's comments and recommendation.

UNIVERSITY OF HAWAIʻI SYSTEM
Legislative Testimony

LATE

Testimony Presented Before the
Senate Committee on Judiciary
January 28, 2020 at 10:00 a.m.
by
Carrie K.S. Okinaga
Vice President for Legal Affairs and University General Counsel
University of Hawaiʻi System

SB 2090 – RELATING TO JUDICIAL ENFORCEMENT OF THE UNIFORM INFORMATION PRACTICES ACT

Chair Rhoads, Vice Chair Keohokalole, and members of the committee:

The University strongly opposes SB 2090. This measure is overly prejudicial to State and county agencies for failing to comply with a proposed procedural deadline. The measure provides that if the agency fails to file a motion for summary judgment within thirty days of service of process, the circuit court "shall order the immediate disclosure of the government record, except to the extent prohibited by law."

First, this measure encroaches into the Judiciary's constitutional power to promulgate its own procedural rules. Article VI, Section 7 of the Hawaiʻi State Constitution provides, "The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law." *Id*. In addition, Article VI, Section 1 of the Hawaiʻi State Constitution provides, "The several courts shall have original and appellate jurisdiction as provided by law and shall establish time limits for disposition of cases in accordance with their rules." *Id*.

Under Rule 56(a) of the Hawaiʻi Civil Rules of Procedure ("HRCP"), the procedural deadline to file a motion for summary judgment is *fifty days prior to trial* as opposed to thirty days after service of process. In addition, HRCP Rule 56(a) allows for a party to file a motion for summary judgment beyond this deadline with the court's permission and a showing of good cause. *Id*.

The Hawaiʻi Supreme Court has established a deadline for parties, including governmental agencies, to file motions for summary judgment. This measure encroaches upon the Hawaiʻi Supreme Court's constitutional power to promulgate its own rules and procedural deadlines for the disposition of cases.

Second, the harshness of this measure would likely encourage individuals to file civil actions in circuit court upon the agency's denial of the production of the requested records. The increase in litigation would impose a strain on the agency's time and resources to defend these actions in court rather than have the issue addressed by the Office of Information Practices.

In light of the above, the University of Hawai‘i strongly opposes this measure and asks that it be held in committee.

Thank you for the opportunity to testify.

DAVID Y. IGE
GOVERNOR

THOMAS WILLIAMS
EXECUTIVE DIRECTOR

KANOE MARGOL
DEPUTY EXECUTIVE DIRECTOR

STATE OF HAWAII
EMPLOYEES' RETIREMENT SYSTEM

TESTIMONY BY THOMAS WILLIAMS
EXECUTIVE DIRECTOR, EMPLOYEES' RETIREMENT SYSTEM
STATE OF HAWAII

TO THE SENATE COMMITTEE ON JUDICIARY
ON
SENATE BILL NO. 2090

January 28, 2020
10:00 AM
Conference Room 016

RELATING TO JUDICIAL ENFORCEMENT OF THE UNIFORM INFORMATION PRACTICES ACT

Chair Rhoads, Vice Chair Keohokalole, and Members of the Committee,

HRS §92F-15 currently allows persons aggrieved by a denial of access to a government record, to file a lawsuit in state circuit court to compel disclosure of the record. S.B. 2090 would require that an agency in such a lawsuit must file a motion for summary judgment in support of its denial of access, no later than 30 days after service of the lawsuit. If the agency does not timely file the motion for summary judgment, the court must order immediate disclosure of the government record, except as prohibited by law.

S.B.2090 would further provide that:

1) if the circuit court decides to compel disclosure, that decision should be upheld by the appellate courts unless it is found "palpably erroneous";
2) circuit court decisions affirming denial of disclosure are not upheld unless found "palpably erroneous" but are reviewed "de novo" without such an inclination toward validity;
3) a circuit court decision to compel disclosure is stayed automatically for only 14 days after entry. The agency must "petition the supreme court" arguing that the

circuit court order is "palpably erroneous" within that 14 days, or the circuit court decision is then enforceable.

4) If the agency files such a petition to the supreme court within 14 days, enforcement of the circuit court decision is stayed pending the supreme court's decision for up to 30 days after the petition is filed, but no more.

The Board of Trustees of the Employees' Retirement System (ERS) has not had the opportunity to review this bill, nor to determine their position on this legislation. The ERS staff has reviewed S.B. 2090 and appreciates its intent. It finds, however, that S.B. 2090 presents the following concerns:

1) It is unreasonable to require all agencies to file, within 30 days, a "motion for summary judgment" to preserve the ability to defend from a lawsuit to compel disclosure. Summary judgment requires that the movant be able to claim, in good faith, that there are no genuine issues of material fact, and that the movant is entitled to win as a matter of law. It may not be feasible for agencies to research up to two years of past records (based on the statute of limitations), conduct discovery, and otherwise prepare a "summary judgment" case within 30 days. In some cases, a motion for summary judgment may not be appropriate.
2) It is not in the public interest to rush the careful balancing of the public interest in transparency against other interests such as personal privacy and agency legitimate government functions. Such balancing is often required for proper decision-making regarding disclosure of public records.
3) The new, high "palpably erroneous" standard for review of circuit court decisions is usually applied to decisions made by administrative bodies which have specialized expertise in the subject matter. See, e.g., HRS §92F-15(b)
4) A circuit court decision is already required to be appealed to the appellate courts within 30 days. The public interest is not served by requiring agencies to hastily file petitions urging that the circuit court be found "palpably erroneous."
5) The proposed 30-day limitation on stays of enforcement of circuit court orders would deprive the appellate courts of the ability to take such time as necessary to make a fully researched and considered, and effectual appellate ruling. Once the records are required to be disclosed, consideration of any ruling otherwise may become moot.

HRS § 92F-15 (f) already requires that the currently allowed circuit court lawsuits to compel disclosure, and appeals therefrom," ... take precedence ... and shall be assigned for hearing and trial or argument at the earliest practicable date and expedited in every way."

Based on the foregoing, the ERS staff respectfully requests the Committee to hold this bill.

Thank you for this opportunity to testify.

DAVID Y. IGE
GOVERNOR

LATE

STATE OF HAWAII
HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND
P.O. BOX 2121
HONOLULU, HAWAII 96805-2121
Oahu (808) 586-7390
Toll Free 1(800) 295-0089
www.eutf.hawaii.gov

TESTIMONY BY DEREK MIZUNO
ADMINISTRATOR, HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND
DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE SENATE COMMITTEE ON JUDICIARY
ON SENATE BILL NO. 2090

January 28, 2020
10:00 a.m.
Room 016

RELATING TO JUDICIAL ENFORCEMENT OF THE UNIFORM INFORMATION PRACTICES ACT

Chair Rhoads, Vice Chair Keohokalole, and Members of the Committee:

The Hawaii Employer-Union Health Benefits Trust Fund (EUTF) Board of Trustees has not been able to take a position on this bill. Their next meeting is scheduled for February 18, 2020. EUTF staff would like to provide information and comments.

Although the EUTF supports the expedition of public disclosure of government records pursuant to law, the EUTF staff has concerns about the methods and timelines as outlined in this measure. In addition, HRS Section 92F15(f) already provides expedited relief by the circuit court – "Except as to cases the circuit court considers of greater importance, proceedings before the court, as authorized by this section, and appeals therefrom, **take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."** Emphasis added.

Further, the EUTF has concerns regarding the "palpably erroneous" standard of review for circuit court decisions in favor of the complainant while requiring a de novo review for its decisions in favor of the agency. The "palpably erroneous" standard of review is usually reserved for the subject matter agencies since these agencies are presumed to have superior knowledge of the subject matter.

Further, the timelines for filing of motions and for appeals to the Supreme Court do not provide adequate time to protect agencies from improper disclosure. To require an agency to file a motion for summary judgment within 30 days of the filing of the complaint is unreasonable as the agency would need time to gather information and conduct necessary discovery in support of the motion. Also, a motion for summary judgment may not be appropriate in all cases, especially those where a genuine question of material fact is disputed by the parties.

Lastly, under the measure as written, if the Supreme Court fails to render a decision within 30 days of the filing of the petition, the agency's right to judicial review, for all practical purposes, would be extinguished by no fault of the agency.

Thank you for the opportunity to testify.

HAWAII HEALTH SYSTEMS
C O R P O R A T I O N

Quality Healthcare For All

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice Chair

January 28, 2020
Conference Room 016
10:00 a.m.
Hawaii State Capitol

Testimony opposing Senate Bill 2090, Relating to Judicial enforcement of the Uniform Information Practices Act. Provides new procedural requirements for judicial review of an agency's denial of access to a government record and the standard of review upon appeal.

Linda Rosen, M.D., M.P.H.
Chief Executive Officer
Hawaii Health Systems Corporation

Hawaii Health Systems Corporation ("HHSC") opposes Senate Bill 2090 as it is duplicative of existing statutory procedures.

Specifically this testimony addresses amendments on page 2, lines 11-17.

Requiring an agency to file a motion for summary judgment when it already has the burden of proof to support a denial needlessly adds more bureaucracy to the streamlined process currently set forth in Section 92F-15.

Aggrieved persons currently have the right to seek expedited judicial review of an agency's decision to not disclose a record after the Office of Information Practices ("OIP") has determined that the government record should be disclosed.

If enacted, this bill will impact HHSC as it is both a health care provider and an agency of the state. Because of this dual role, requestors often confuse what is a government record and what is a medical record. Differentiating between these requests often requires subject matter expertise in federal law and regulations and state law and regulation, including UIPA. When the record sought is a medical record, and the decision to not disclose is for that reason, OIP should not be in the position of having to analyze the denial based on the application of UIPA or be expected to have expertise in the area of the Health Insurance Portability and Accountability Act ("HIPAA") law and HHSC policies effectuating HIPAA in its facilities.

In light of HHSC's unique status as a health care provider, an agency of the state, and the current efficient process provided under the statute, HHSC respectfully requests that the bill be deferred.

Common Cause
Hawaii
Holding Power Accountable

P.O. Box 2240
Honolulu, Hawaii 96804
808.275.6275
www.commoncause.org/hi

Statement Before The
SENATE COMMITTEE ON JUDICIARY
Tuesday, January 28, 2020
10:00 AM
State Capitol, Conference Room 016

in consideration of
SB 2090
RELATING TO JUDICIAL ENFORCEMENT OF THE UNIFORM INFORMATION PRACTICES ACT.

Chair RHOADS, Vice Chair KEOHOKALOLE, and Members of the Senate Judiciary Committee

Common Cause Hawaii supports SB 2090, which would provide (1) procedural requirements for judicial review of an agency's denial of access to a government record and (2) procedural requirements and standards of review upon appeal.

SB 2090 will expedite the processing of public records disputes, which is often unnecessarily delayed. Common Cause Hawaii is a grassroots, nonpartisan, nonprofit organization that supports transparency in our government bodies. A governmental body should endeavor to promptly process public records requests and err on the side of immediate and full disclosure, as our government should be responsive and responsible to the people. SB 2090 will provide the procedural mechanisms to ensure that public records disclosures are timely made by government agencies and reviewed in accordance with this ideal.

Thank you for the opportunity to testify in support of SB 2090. If you have further questions of me, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

700 Bishop Street, Suite 1701
Honolulu, HI 96813

Office: (808) 531-4000
Fax: (808) 380-3580
info@civilbeatlawcenter.org

Senate Committee on Judiciary
Honorable Karl Rhoads, Chair
Honorable Jarrett Keohokalole, Vice Chair

RE: Testimony Supporting S.B. 2090, Relating to Judicial Enforcement of the Uniform Information Practices Act
Hearing: January 28, 2020 at 10:00 a.m.

Dear Chair and Members of the Committee:

My name is Brian Black. I am the Executive Director of the Civil Beat Law Center for the Public Interest, a nonprofit organization whose primary mission concerns solutions that promote government transparency. Thank you for the opportunity to submit testimony in support of S.B. 2090. The Law Center **strongly supports this bill because it will advance the Legislature's original intent that the Uniform Information Practices Act (UIPA) provide "timely" access to government records**.

In 1988, the Legislature stated that the public records law would "[p]rovide for accurate, relevant, timely, and complete government records." HRS § 92F-2(2). The Governor's Committee Report—which the Legislature reviewed before passing the UIPA—explained that it should be "readily apparent that unless the record is produced on a relatively contemporaneous basis, it is far less use to the public or the agency. It is also far less likely to be accurate." Report at 62.

To accomplish that objective, among other provisions, the Legislature provided that judicial enforcement of the UIPA be "expedited in every way." HRS § 92F-15(f). The Judiciary, however, has not found an effective means to achieve that statutory directive. Disputes regarding public records often languish in court for years.

This bill will provide more structure for the judicial enforcement of the UIPA consistent with the Legislature's original intent.

Thank you again for the opportunity to testify in support of S.B. 2090.

Pono Hawai'i Initiative

Josh Frost - President • Patrick Shea - Treasurer • Kristin Hamada
Nelson Ho • Summer Starr

Tuesday, January 28, 2020

Relating to Relating to Judicial Enforcement of the Uniform Information Practices Act
Testifying in Support

Aloha Chair and members of the committee,

The Pono Hawai'i Initiative (PHI) **supports SB2090 Relating to Judicial Enforcement of the Uniform Information Practices Act,** which provides timelines and procedural requirements for judicial review of an agency's denial of access to a government record.

This measure helps to create more accountability and transparency in government. When a citizen requests records they should be given a timely response and justification for their denial. If the agency that denied the record doesn't stick to the timeline that shouldn't be the fault of the requestor.

Greater transparency and clear processes will help both those requesting and those providing the records.

For all these reasons, we urge you **vote in favor of SB2090.**

Mahalo for the opportunity,
Gary Hooser
Executive Director
Pono Hawai'i Initiative

SB-2090
Submitted on: 1/27/2020 9:10:52 AM
Testimony for JDC on 1/28/2020 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
PL Fritz	Individual	Support	No

Comments:

This bill will help to provide timely access to public records. This bill shifts shift the judicial review process from its current years-long timeframe to something that may provides access contemporaneous records. Currently, by the time that records are received they are often irrelevant because of the years of appeals.

The bill helps to provide timely access to records by requiring an agency to justify its nondisclosure promptly when challenged and file motion for summary judgment within 30 days of service of complaint; (2) sets a higher standard for an agency appeal if a circuit court judge rules that disclosure is required; and (3) sets an expedited procedure for appellate review if a circuit court judge orders disclosure.

SB-2090
Submitted on: 1/26/2020 3:49:56 PM
Testimony for JDC on 1/28/2020 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Ryan	Individual	Support	No

Comments:

TImely access to public records is critical to a transparent and accountable government.