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House Committee on Judiciary & Hawaiian Affairs
Honorable Mark M. Nakashima, Chair
Honorable Scot Z. Matayoshi, Vice Chair

RE: Testimony Supporting H.B. 347, Relating to Judicial Enforcement of the Uniform Information Practices Act
Hearing: February 4, 2021 at 2:00 p.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 H.B. 347. 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 H.B. 347.

LEAGUE OF WOMEN VOTERS®

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HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Thursday, February 4, 2021, 2 pm, State Capitol Room 325
HB 347, Relating to Judicial Enforcement of the Uniform Information Practices Act
Douglas Meller, Legislative Committee, League of Women Voters of Hawaii

Chair Nakashima and Committee Members:

The League of Women Voters of Hawaii supports HB 347. When a lawsuit is filed to compel an agency to disclose a government record, we believe there should be reasonable time limits for that agency to file motions which request a circuit court to dismiss the lawsuit or for that agency to appeal a circuit court order which compels disclosure of the government record. And when an agency appeals a circuit court order to disclose a government record, we do not think prolonged de novo appellate review is necessary or appropriate.

Thank you for the opportunity to present testimony.

OFFICE OF INFORMATION PRACTICES

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To: House Committee on Judiciary & Hawaiian Affairs

From: Cheryl Kakazu Park, Director

Date: February 4, 2021, 2:00 p.m.
Via Videoconference

Re: Testimony on H.B. No. 347
Relating to Judicial Enforcement of the Uniform Information Practices Act
(Opportunity for oral testimony requested)

The Office of Information Practices (OIP) appreciates the opportunity to offer the following comments on this bill, which proposes to apply the "palpably erroneous" standard of appellate review to a circuit court decision. Moreover, this bill appears to bypass the Intermediate Court of Appeals (ICA) and implicitly provides for a direct appeal to the Supreme Court from circuit court decisions compelling disclosure of records under the Uniform Information Practices Act (UIPA), HRS Chapter 92F. **OIP is very concerned that the wrong legal standard of review is being applied to appeals from circuit court decisions and that there will be unintended consequences that will ultimately be to the detriment of the public.**

Specifically, with respect to the standard of review, H.B. 347 proposes to amend the UIPA to require an appellate court to uphold a circuit court decision to compel the disclosure of government records unless that decision was "palpably erroneous." (Bill page 3 lines 14-16.) Any circuit court decision or portion thereof

that affirms the agency's denial of access shall be reviewed "de novo." (Bill page 3, lines 16-18.) Enforcement of a circuit court's decision is stayed upon an agency's petition to the Supreme Court to determine if that decision is "palpably erroneous." (Bill page 3, line 18 to page 4, line 1.)

The standard of review is a fundamental issue that appellate courts address in all opinions to explain how they will review the facts and law in the case being appealed and what deference, if any, they will accord to the decision being reviewed. There are different standards of review and they can be applied only to legal issues, or only to factual issues, or to both. The standard of review can also differ, depending on whether the decision has been made by a court or by an administrative agency. **The two standards of review discussed in the bill are typically applied in different contexts and have stark differences,** which are generally described below:

1. **De novo** – where the appellate court reviews the case anew and does not defer to the decision of the lower court or administrative agency. The de novo standard can be applied just to legal conclusions or to both factual findings and legal conclusions. For instance, it is typically applied by appellate courts when reviewing lower courts' orders relating to motions for summary judgment or motions to dismiss. See Molfino v. Yuen, 134 Haw. 181, 184, 339 P.3d 679, 682 (2014) (applying the de novo standard to review an ICA judgment affirming the circuit court's summary judgment order); Mott v. City and County of Honolulu, 146 Haw. 210, 458 P. 3d 921 (Haw. Ct. App. 2020) (applying the de novo standard to review a circuit court's order on a motion to dismiss a complaint under the UIPA).
2. **Palpably erroneous** – applied by an appellate court when reviewing a decision by an administrative agency, not a decision by a lower court.

> Under the palpably erroneous standard, the appellate court will accord a **presumption of validity to the agency's decision and will defer to it unless the court has a definite and firm conviction that a mistake has been made**. Peer News LLC v. City and County of Honolulu, 138 Haw. 53, 60, 376 P.3d 1, 8 (2016).

The palpably erroneous standard of review arose out of the courts' recognition that an administrative agency has special expertise in interpreting and applying the law that governs the agency. See Peer News LLC v. City and County of Honolulu, 138 Haw. 53, 60, 376 P.3d 1, 8 (2016) (stating that "the applicable standard of review regarding an agency's interpretation of its own governing statute requires this court to defer to the agency's expertise and to follow the agency's construction of the statute unless that construction is palpably erroneous"). **This is the standard that the UIPA requires all courts to apply when reviewing OIP's factual and legal determinations when an appeal is taken from an OIP decision against an agency.[1] But this is not the standard that the appellate courts should follow when reviewing a lower court's decision in a UIPA case because the lower courts do not have the special expertise that OIP has in interpreting and administering the UIPA on a daily basis.**

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[1] The bill does not change the de novo standard of review when an OIP decision against a requester is appealed to the courts. This lower standard of review has been in the UIPA since its enactment and it essentially gives requesters a second chance for review by a court without requiring deference to OIP's opinion. In contrast, the UIPA originally did not give agencies the right to appeal from OIP decisions. Therefore, when the UIPA was amended to allow agency appeals from OIP decisions against them, the palpably erroneous standard of review was adopted to retain requesters' advantage and it requires the courts to defer to OIP's legal and factual determinations against agencies unless there is a definite and firm conviction that a mistake has been made. For a more thorough explanation of the UIPA changes and the palpably erroneous standard of review, see Cheryl Kakazu Park and Jennifer Z. Brooks, 2013 Law and Administrative Rules Governing Appeal Procedures of Hawaii's Office of Information Practices, 36 Univ. of Haw. L. Rev. 271 (2014), which is also posted on OIP's website at oip.hawaii.gov.

Instead, the usual standard of review by appellate courts of lower courts' decisions is the de novo standard, which does not require the appellate courts to defer to the lower courts' decisions being appealed. Civil Beat Law Center for the Public Interest, Inc. v. City and County of Honolulu, 144 Haw. 466, 474, 445 P.3d 47, 55 (2019); Peer News LLC v. City and County of Honolulu, 138 Haw. 53, 60, 376 P.3d 1, 8 (2016); Kanehele v. Maui County Council, 130 Haw. 228, 244, 307 P.3d 1174, 1190 (2013). **The de novo standard is the one that should be applied in the proposed bill because the proposed changes relate to appellate review of circuit court, not OIP, decisions.**

Unlike judicial review of OIP decisions interpreting and administering the UIPA or Sunshine Law, **there is no rationale for the Supreme Court to defer to the lower courts' decisions** by applying the palpably erroneous standard of review for UIPA cases. The lower courts deal with a wide variety of laws, but they generally do not have OIP's specialized expertise in daily administering the UIPA or Sunshine Law. Nor do the lower courts have the same resources to thoroughly analyze cases on appeal that the Supreme Court has, such as multiple staff attorneys and law clerks, the ability to do additional research and hold oral arguments, and more time to carefully consider appeals from lower court decisions.

Requiring the Supreme Court to defer to the lower courts' decisions under the palpably erroneous standard of review would not make sense and could eventually result in appellate decisions eroding that standard of review to become more similar to the de novo standard. Ironically, by lowering the palpably erroneous standard of review that currently applies only to appeals by agencies from OIP's decisions favoring a record requester, this bill's ultimate result may be to dilute requesters' advantage and allow more agencies to win on appeal. **While this bill does not directly affect judicial review of OIP decisions at the present time, an**

erosion of the proposed palpably erroneous standard of review could eventually lead to the more reversals of OIP's decisions against agencies, which would be to the detriment of record requesters.

In addition to OIP's concerns about the standard of review being applied in the bill, OIP notes that the bill appears to implicitly give an agency the right to appeal directly to the Supreme Court by automatically staying enforcement of a circuit court decision for 14 days, during which time the agency may "petition the supreme court for a determination that the circuit court's decision to compel disclosure is palpably erroneous." (Bill page 3, line 18 to page 4, line 1.) If a timely petition is filed, then enforcement of the circuit court's decision is stayed pending the Supreme Court's decision. (Bill page 4, lines 3-5.) The bill provides no time for an appeal to the ICA.

Supporters of a previous version of this bill have claimed that it would provide for faster judicial review of UIPA cases. **Current law, however, already provides for expedited review by the circuit courts of UIPA cases**. HRS § 92F-15(f).

By implicitly granting direct appeals to the Supreme Court, this bill does not guarantee faster judicial resolution, may increase the wait time for other important decisions pending before the Court, leaves many questions unanswered, and could lead to additional unintended adverse consequences. For example, even after direct appeal, what time will be saved if the Supreme Court must remand the case to the circuit court to make further factual findings? What will happen if the case also involves a related Sunshine Law issue or other issue for which the law does not provide a direct appeal -- will those non-UIPA issues also be decided so that plaintiffs will be encouraged to routinely incorporate a UIPA claim into every case in order to take advantage of the direct

appeal to the Supreme Court? Will this bill encourage more litigation of UIPA cases, thereby further straining the courts' resources? What other appeals of real and important legal significance will have to be displaced or delayed by the Court to resolve appeals, even if meritless, that will be allowed by this bill?

While OIP appreciates the public's desire for faster judicial resolutions of UIPA cases, the proposed bill may actually have the opposite result due to unanticipated consequences. Moreover, the attempted speedy resolution of the relatively few cases that are currently being litigated should not come at the expense of carefully reasoned judicial review and decisions that could affect all rights and responsibilities under the UIPA. **Because of the various unintended consequences that could result, OIP urges the Legislature to give greater scrutiny to this bill.**

Thank you for considering OIP's concerns and comments.

WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2021

ON THE FOLLOWING MEASURE:
H.B. NO. 347, RELATING TO JUDICIAL ENFORCEMENT OF THE UNIFORM INFORMATION PRACTICES ACT.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Thursday, February 4, 2021 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Via Videoconference Room 325

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact Stella M.L. Kam,
Deputy Attorney General, at 586-0618)

Chair Nakashima and Members of the Committee:

The Department of the Attorney General opposes this bill.

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 under the Uniform Information Practices Act (UIPA), chapter 92F, HRS. 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, unless the court has extended the 30-day deadline in the interest of justice. 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.

Section 1 of article VI, the Constitution of the State of Hawaii, specifically states that "[t]he 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." Section 7 of Article VI states that "[t]he 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 have the force and effect of law."

Rule 56 of the Hawaii Rules of Civil Procedure (HRCP) sets the parameters for motions for summary judgment and the deadline for filing a motion for summary judgment is fifty days prior to trial. See HRCP Rule 56(a). This conflicts with this bill's amendment to section 92F-15(c), HRS, which would require government agencies to file a motion for summary judgment within 30 days after service in a lawsuit under the UIPA. We believe this bill is vulnerable to constitutional challenge as an encroachment on the Judiciary's powers under the Constitution of the State of Hawai‘i. Even if this bill survives such a challenge, a statute in direct conflict with a rule of practice and procedure in a civil case, both of which have the force and effect of law, would cause considerable confusion.

This bill also 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 would have 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. It places a significant burden on the agency and the Department of the Attorney General, and has irreversible consequences, such as improper disclosure of sensitive information. Additionally, the 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 a lawsuit challenging the agency's denial of records.

In addition, 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 UIPA is to expedite the review of the agency's actions, the bill does not accomplish this goal. For example, if an agency files a timely motion for summary judgment, but loses, the case will go to trial which could

take months if the plaintiff does not file and succeed on a motion for summary judgment on all counts in the complaint.

We believe the proposed legislation's goal of expediency in a UIPA lawsuit may be accomplished by providing a process by which the court's review of an agency's denial of access to records equates to an appeal of an administrative decision, rather than a civil lawsuit. In doing so, the statute of limitations in subsection (a) would 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 hold this bill or 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."