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To: House Committee on Finance

From: Cheryl Kakazu Park, Director

Date: March 31, 2021, 1:30 p.m.
Via Videoconference

Re: Testimony on S.B. No. 134, S.D. 1, H.D. 1
Relating to Emergency Powers

Thank you for the opportunity to submit testimony on this bill, which would prohibit the Governor or a Mayor from suspending requests for public records or vital statistics during a declared state of emergency. The Office of Information Practices **(OIP) takes no position** on this bill because it is a policy decision for the Legislature to determine what limit, if any, is appropriate for the Governor's use of emergency powers. OIP likewise takes no position on the Department of Health's suggestion that this bill allow a suspension of UIPA deadlines for a period of up to six months. However, to assist the Legislature in making this decision, OIP offers comments regarding the effect that the two and a half month suspension of the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA), and subsequent long-term suspension of only the deadlines under the UIPA, have had upon record requesters, agencies, and OIP's own work. Also, OIP offers brief comments of the effect of emergency orders upon the Sunshine Law, and summarizes the Governor's latest emergency order issued on February 12, 2021.

On March 16, 2020, the UIPA was temporarily suspended in its entirety and the Sunshine Law, part I of chapter 92, HRS, was partially suspended by

the Supplementary Proclamation of Governor Ige. The March 2020 Supplementary Proclamation was extended until May 31, 2020, by the Governor's Sixth Supplementary Proclamation dated April 25, 2020. Because the UIPA was suspended in its entirety, OIP's powers and duties found in part IV of chapter 92F, HRS, were also suspended during that time, including OIP's power to accept and issue determinations on UIPA appeals.

On May 5, 2020, with the Governor's Seventh Supplementary Proclamation for COVID-19 (see Exhibit H on pages 73-75), OIP's powers and duties found in part IV of the UIPA were restored, except that the UIPA and OIP's rules "are suspended to the extent they contain any deadlines for agencies, including deadlines for the OIP, relating to requests for government records and/or complaints to OIP." The partial suspensions of the Sunshine Law and UIPA were continued in subsequent proclamations through the Governor's Seventeenth Supplementary Proclamation (SP17) at Exhibit F, dated December 16, 2020, which continued the modified suspension through February 14, 2021.

The Governor's latest proclamation dated February 12, 2021, the Eighteenth Proclamation Related to the COVID-19 Emergency (SP18), at Exhibit F, modified the prior partial suspension of the UIPA, and mostly retained the partial suspension of the Sunshine Law. SP18 now imposes minimum requirements on agencies receiving record requests such that UIPA response deadlines are suspended for agencies only if:

(A) Compliance requires review of hard copy files that are not accessible during the COVID-19 emergency;

(B) Tasking staff to comply with the deadline will directly impair the agency's COVID-19 response efforts; or

(C) The agency is processing backlogged requests for government records in good faith with reasonable effort.

SP18 also includes a new requirement that agencies respond to communications from requesters on the status of their UIPA Request, and if the agency is able, provide a requester with a non-binding inclination of whether a request will be granted or denied and any suggestions to narrow or modify the request to expedite processing.

Effect Upon UIPA Cases

During the two and a half months the UIPA was fully suspended, OIP could not accept UIPA appeals, even on record requests made and denied prior to March 16, but instead had to inform would-be appellants to wait and ask again after the suspension was lifted. OIP likewise was unable to issue opinions during the time its powers were suspended. Nevertheless, OIP did continue to work on appeal files and prepare opinions for later issuance, and OIP continued to advise agencies and the public primarily through correspondence and email due to the COVID-19 restrictions in effect at that time.

With the substantial restoration of its powers and duties last May, OIP was able to open certain new cases and issue opinions again. However, **OIP still could not accept appeals based on causes of action dependent on alleged violations of the portions of the UIPA that were suspended and therefore not in effect,** such as an agency's failure to respond to or denial of a record request made while the UIPA was fully suspended, or an agency's failure to make a timely response to a record request made while the UIPA's deadlines were suspended. Moreover, because for almost a year agencies have not been required, and still are not required, to follow the deadlines for responses to OIP's inquiries, **OIP has been**

unable to compel agencies to provide the substantive response required by OIP's appeal rules and necessary for OIP to resolve the appeal. Although agencies are theoretically required to provide this response, **the suspension of deadlines has made it optional to actually provide the response that OIP needs before it can resolve a case.**

The latest modifications of the deadline suspension to require that agencies meet one of three conditions to delay their responses may improve this situation; however, the change is still **too recent for OIP to be able to assess its impact.** For instance, if OIP and an agency disagree over whether the agency is entitled to suspension of its deadlines under SP18, it is not clear whether OIP could apply a deadline over the agency's objection.

While UIPA deadlines have been suspended, many agencies have nonetheless continued to respond to newly opened appeals even without the spur of an enforceable deadline, but other agencies have not responded – they have not declined to respond, but simply have not responded. OIP cannot make a substantive determination on whether records were properly withheld without the agency's response in an appeal. OIP also cannot determine that an agency's failure to respond was a failure to meet its UIPA burden to justify its denial of access when, due to the suspension of deadlines, the agency has not yet missed any response deadline even after six months or more. For older files opened before the emergency orders were in effect, too, if OIP finds in the course of working on the file that the agency's response was incomplete or needs to be supplemented, OIP cannot set any deadline for the agency to do so. **Thus, if the agency does not choose to respond to OIP's request, OIP's resolution of the file is necessarily delayed until after the laws and deadlines are fully reinstated. And for those cases that OIP has resolved, it is uncertain whether the agency's deadline to**

request reconsideration has been tolled by the emergency orders, such that OIP may see an influx of reconsideration requests when the orders end.

The suspension of the UIPA and, subsequently, agency deadlines under the UIPA, have certainly not been the only or even the biggest challenge to OIP's ability to do its work over the last year, with the result that OIP's success in fiscal year 2019-2020 towards eliminating its backlog is now being rapidly reversed. **Unfortunately, current and proposed budget restrictions and three recent vacancies, in combination with OIP's inability to enforce any agency deadlines, portend a return to the situation in which requesters may wait for many years before appeals can be resolved.** It took over a decade since the 2008 recession for OIP to reduce its formal case backlog to an acceptable level, but only the first six months of fiscal year 2021 and the unusual loss during that time of three of its 8.5 personnel, for OIP's backlog to grow by over 40 percent. The suspension of deadlines has exacerbated the situation so that **many of OIP's appeal files, no matter how high a priority or long they've been pending, simply cannot be resolved without the agency's voluntary cooperation** until the suspension of UIPA deadlines is lifted.

With regard to the effect the suspension of deadlines has had on record requesters, OIP's observation has been that as with appeals, **many agencies have been continuing to respond to UIPA requests in a timely manner, but others have simply not responded and apparently do not intend to do so as long as the suspension of deadlines remains in effect.** Since last May, agencies have been required to at least acknowledge receipt of a UIPA request but again, with no deadline to do so, and OIP has spent much time responding to inquiries from people whose UIPA requests have gone unacknowledged as well as

unanswered. Some unanswered UIPA requests of particularly high public interest have been reported on in the media, while many other unanswered requests are of interest only to the requester. The UIPA's purpose, however, is to give the public access to government records regardless of whether the request is of high public interest or specifically of interest mainly just to the requester, and for many requesters the UIPA has not been fulfilling that purpose over the past year.

In addition, **the suspension for agency deadlines has extended so long that requesters wishing to exercise their right to appeal a denial of access to OIP may have to do so more than a year after the request, during which time the requester would have no access to the requested records, agency personnel may change, memories may fade, or records should not but could be lost.** Although a requester will still have the option to file an appeal on an old request made more than a year ago under these circumstances, **the requester could make a new request** to the agency once the deadline suspensions are lifted.

Thus, when the suspension of deadlines is finally lifted, those agencies that have postponed responding during the suspension could have a large influx of new record requests along with over a year's worth of suspended requests due all at once, in addition to any pre-pandemic outstanding responses to UIPA appeals or other inquiries. It would be unfair for agencies to be given further extensions of their time to respond after having already delayed for months, and OIP has warned agencies to not expect any extensions. Nevertheless, **OIP anticipates a flood of new complaints as the agencies that have postponed all or the most difficult of their UIPA requests are unable to timely respond to them and miss deadlines, and the requesters who have already waited for months turn to OIP for assistance in getting a response.** Therefore, when the

suspensions are lifted, delays and adverse impacts will continue, and may increase, for requesters, agencies, and OIP.

Effect Upon Sunshine Law Cases

In addition to suspending all or portions of the UIPA, the emergency orders suspended portions of the Sunshine Law. **Although this bill does not currently address the suspension of the Sunshine Law's provisions, OIP will briefly address the effect of the suspension orders on such cases.**

Because the Sunshine Law requires at least one in-person meeting location, boards could not hold meetings to conduct necessary business while stay at home orders or COVID-19 testing and transportation restrictions were in place. **In order to pivot to the use of fully remote meetings using interactive conference technology (ICT) without threatening public health and safety during the COVID-19 pandemic, it was necessary to suspend certain portions of the Sunshine Law through the Governor's emergency orders.**

Boards' use of ICT to conduct remote technologies has led to an expansion of public access and participation. In order to continue this and other public benefits, OIP supports the Administration's bill, SB 1034, SD 1, HD 1, which is proceeding through this session and would amend the Sunshine Law to allow remote meetings to continue once the Governor's orders suspending the Sunshine Law are no longer in effect. Notably, however, this bill may still require at least one in-person meeting location. **If the COVID-19 pandemic continues or other emergency arises that would threaten public health and safety if in-person meetings are held or make such meetings impracticable to be held, then it may still be necessary to have the Governor issue an emergency order suspending the Sunshine Law's in-person meeting requirement or to have a Mayor issue a**

stay at home order or other requirement that would adversely impact the Sunshine Law's in-person meeting requirement.

Conclusion

In conclusion, OIP's position is that any limitation on the Governor's power to suspend the UIPA in whole or in part is a policy call for the Legislature to make, as OIP recognizes that the Legislature must balance the intent of the emergency powers statute allowing the Governor to suspend the UIPA and other laws with the intent of the UIPA itself, and determine how best to serve both purposes. As discussed in this testimony, OIP has seen a definite impact to record requesters, agencies, and OIP's own operations during the year that the UIPA has been first fully and then partially suspended and OIP anticipates further problems when the suspensions are eventually lifted.

OIP notes the Department of Health's suggestion that a three to six-month emergency suspension of UIPA should still be allowed. OIP believes that a limited suspension period would give agencies time to adjust during an emergency and have fewer adverse effects the shorter it is, provided that only deadlines, and not OIP's powers and duties, are suspended. OIP further notes that a limited time suspension of UIPA deadlines could be allowed only for the agencies directly involved with leading emergency efforts and need not be extended to all agencies subject to the UIPA. OIP, however, leaves it to the Legislature to determine whether to allow a limited-time suspension of deadlines.

Although the Sunshine Law is not addressed in this bill, OIP further recognizes that the Governor's emergency orders were necessary to allow Sunshine Law boards to continue their business using remote technology, which has led to an expansion of public access and participation. To continue to provide for expanded

public access and participation in the absence of emergency orders, amendments to the Sunshine Law are needed. Depending on what amendments may be enacted, the Governor's emergency orders may or may not be needed to allow boards to continue doing business and to expand public participation through remote meetings.

Thank you for considering OIP's testimony.

LEAGUE OF WOMEN VOTERS®

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HOUSE COMMITTEE ON FINANCE
Wednesday, March 31 2021, 1:30 pm, State Capitol Room 308
SB 134, SD 1, HD 1
Relating to Emergency Powers

TESTIMONY
Douglas Meller, Legislative Committee, League of Women Voters of Hawaii

Chair Luke and Committee Members:

The League of Women Voters of Hawaii strongly supports SB 134, SD 1, HD 1. Regardless of whether there is an "emergency", neither the Governor, Mayor, or public agencies should be authorized to suspend the public's statutory right to see public records.

Thank you for the opportunity to submit testimony.

Common Cause
Hawaii
Holding Power Accountable

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Statement Before The
HOUSE COMMITTEE ON FINANCE
Wednesday, March 31, 2021
1:30 PM
Via Video Conference, Conference Room 308

in consideration of
SB 134, SD1, HD1
RELATING TO EMERGENCY POWERS.

Chair LUKE, Vice Chair CULLEN, and Members of the House Finance Committee

Common Cause Hawaii provides written comments in support of SB 134, SD1, HD1 which prohibits the governor or the mayor from suspending requests for public records or vital statistics during a declared state of emergency.

Common Cause Hawaii is a nonprofit, nonpartisan, grassroots organization dedicated to reforming government and strengthening democracy through promoting ethics, accountability, and transparency in our democratic form of government.

When the COVID-19 pandemic first impacted Hawaii, Governor Ige partially suspended the Sunshine Law (Hawaii Revised Statutes (HRS) Chapter 92) and completely suspended the public records law (HRS Chapter 92F). See Supplementary Proclamation Related to the COVID-19 Emergency dated March 16, 2020 https://governor.hawaii.gov/wp-content/uploads/2020/03/2003109-ATG_COVID-19-Supplementary-Proclamation-signed.pdf. By Governor Ige's Seventh Emergency Proclamation, guidance was provided for the Sunshine Law to allow for remote meetings but the public records law was still suspended "to the extent they contain any deadlines for agencies, including deadlines for the OIP, relating to requests for government records and/or complaints to OIP." See Seventh Supplementary Proclamation Related to the COVID-19 Emergency dated May 5, 2020 https://governor.hawaii.gov/wp-content/uploads/2020/05/2005024-ATG_Seventh-Supplementary-Proclamation-for-COVID-19-distribution-signed-1.pdf at Exhibit H. Currently, there is a Eighteenth Emergency Proclamation Related to the COVID-19 Emergency dated February 12, 2021 which will expire on April 13, 2021. Remote meetings are still permitted under the Eighteenth Emergency Proclamation in the same manner since the Seventh Emergency Proclamation. However, under the Eighteenth Proclamation, public records may now be requested but timelines for responding may still be suspended under certain limited parameters. See https://governor.hawaii.gov/wp-content/uploads/2021/02/2102078-ATG_Eighteenth-Proclamation-Related-to-the-COVID-19-Emergency-distribution-signed.pdf at Exhibit F.

During regular times and especially during these pandemic times, it is vitally important that the people be able to have access to their government and know that their government is functioning properly

and in the best interest of the people. Without being able to request public records and timely receive them, government is shutoff from public oversight and accountability, which are necessary for a functioning democracy. HRS Chapter 92F, the public records law, must be completely and fully restored if we are to have any trust and confidence in our government.

Thank you for the opportunity to provide comments in support of SB 134, SD1, HD1. If you have questions of me, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii

THE CIVIL BEAT
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House Committee on Finance
Honorable Sylvia Luke, Chair
Honorable Ty J.K. Cullen, Vice Chair

RE: Testimony Supporting S.B. 134 S.D. 1 H.D. 1, Relating to Emergency Powers
Hearing: March 31, 2021 at 1:30 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 **supporting** S.B. 134.

The public records law serves a fundamental role even in emergencies. In crisis, we must reaffirm, not abandon our most basic democratic principles. When government boldly declares that it will hide information and conceal decision-making, rumor, innuendo, and special interests thrive, while democracy withers.

Suspension of the public records law for emergencies is unnecessary because the rules that govern record requests already provide flexibility for agencies to address other priorities.[1] The two week deadline for an initial response may be extended two more weeks for an agency "to avoid an unreasonable interference with its other statutory duties and functions" or for a "natural disaster or other situation beyond the agency's control." HAR §§ 2-71-13(c), -15(a). And if response would be burdensome within that extended period, disclosure may occur in monthly batches to accommodate other priorities. *Id.* § 2-71-15(b).

Thank you again for the opportunity to testify in **support** of S.B. 134.

[1] Hawai`i agencies do not consistently respond in compliance with the administrative deadlines in any event. For example, a recent national audit of various states found that only a third of agencies contacted in Hawai`i responded within the administrative deadlines. A. Jay Wagner (Marquette University), *Probing the People's Right to Know: A 10-State Audit of Freedom of Information Laws* (Mar. 2020).

GRASSROOT
INSTITUTE OF HAWAII

March 31, 2021
1:30 p.m.
VIA VIDEOCONFERENCE
Conference Room 308

To: House Committee on Finance
Rep. Sylvia Luke, Chair
Rep. Ty J.K. Cullen, Vice Chair

From: Grassroot Institute of Hawaii
Joe Kent, Executive Vice President

RE: SB134 SD1 HD1 — RELATING TO EMERGENCY POWERS

Comments Only

Dear Chair and Committee Members:

The Grassroot Institute of Hawaii would like to offer its comments on SB134 SD1 HD1, which would prohibit the governor or mayor from suspending requests for public records or vital statistics during a declared state of emergency.

We consider this bill a step in the right direction — and not only because the existing open records statute already provides flexibility to agencies that require an extended time to respond, as in a delay caused by an emergency, making any suspension by the governor or mayors unnecessary and redundant.

Early in the COVID-19 emergency, Gov. David Ige suspended Hawaii's open records and sunshine laws — an extreme response that was not taken by any other state.

Not only did his action raise questions about the health rationale for the suspension, but it also undermined public trust in the workings of government at a time when that trust was needed more than ever.

In our recent policy brief, "Lockdowns Versus Liberty," we looked at how the state's emergency management law could be reformed in light of the lessons learned over the past year. One of the points made in that brief is that government transparency is even more important — not less — in times of emergency.

In fact, it could be argued that the lack of transparency surrounding government actions during the COVID-19 emergency created greater resistance to the regulations and guidelines being put in place by government officials. It is no stretch to say that a lack of information about governmental decision-making and processes leads to a loss of public trust.

While we understand that the executive needs leeway to handle an emergency as needed, that is not a carte blanche to suspend laws because they are merely inconvenient.

Instead, government actions during an emergency should be narrowly tailored to demonstrate a connection between the actions and the protection of public health or safety.

Open government is not only at the core of our constitutional principles, it is also essential to uphold public faith in the decision-making of our leaders and the democratic process.

Hawaii's experience with the COVID-19 pandemic has forced us to reevaluate the state's emergency management statute. This bill is a good start toward protecting civil rights and open government during an emergency.

Thank you for the opportunity to submit our comments.

Sincerely,

Joe Kent
Executive Vice President
Grassroot Institute of Hawaii

SB-134-HD-1
Submitted on: 3/30/2021 9:45:58 AM
Testimony for FIN on 3/31/2021 1:30:00 PM

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

Comments:

During an emergency, access to public records and vital statistics are more important than ever. If the governor can suspend common-sense transparency requirements during the greatest challenges to state leadership and government operation, the governor might as well be able to hide everything. This restriction shouldn't even have to be enumerated, but clearly it must, for this and all future administrations.

LATE *Testimony submitted late may not be considered by the Committee for decision making purposes.

SB-134-HD-1
Submitted on: 3/31/2021 10:11:09 AM
Testimony for FIN on 3/31/2021 1:30:00 PM

LATE

Submitted By	Organization	Testifier Position	Present at Hearing
Susan Pcola_Davis	Individual	Oppose	No

Comments:

Oppose HD1 ADDITIONS..AKA LOGROLLING

Outrageous!! SB134

When this passed through the Senate I supported this bill for public access to public records.

NOW THE HOUSE SNEAKS IN ALL THIS OTHER EMERGENCY POWER ELEMENTS.

What I am learning about the Legislative Process will be embedded in my memory forever.