

# OFFICE OF INFORMATION PRACTICES

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To: Senate Committee on Judiciary and Government Operations

From: Paul T. Tsukiyama, Director

Date: March 2, 2009, 10:00 a.m.  
State Capitol, Room 016

Re: Testimony on S.B. No. 1652  
Relating to Government Records.

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Thank you for the opportunity to submit testimony on S.B. No. 1652. The Office of Information Practices ("OIP") administers the State's public records law, the Uniform Information Practices Act (Modified), chapter 92F, HRS ("UIPA"). OIP opposes this bill to the extent that it proposes to alter the definition of "government record" under the UIPA.

At the outset we note that the bill appears to incorrectly refer to chapter 92 at page 1, lines 13 and 16, instead of chapter 92F, HRS. The intent of the language appears to be to provide reference to a definition of "government agency." "Government agency" is a defined term under chapter 92F, not chapter 92.

OIP strongly opposes the bill's proposed amendment to the definition of the term "government record" under the UIPA. The current definition of the term is nearly identical to that in the Uniform Information Practices Code upon which the UIPA was substantially modeled. In construing that term, OIP has relied upon the commentary to the code to define that term to expansively to include all information maintained by an agency that exists in a physical form. Consistent with the model

code and its commentary, OIP has consistently construed the term maintain to sweep as broadly as possible to include physical possession of as well as administrative control over a record.

Given the current breadth of the definition, the proposed amendment to list specific types of discrete records, as opposed to all information in any physical form, appears to narrow the definition to information in forms similar to the discrete records listed. For example, under the current definition, OIP believes it is clear that information contained on the government's computer servers would constitute a "government record," whereas this type of information is not similar to the discrete types of records proposed to be listed and so may not be a "government record" under the amended definition.

The bill also amends the definition of "government record" to state that it includes information submitted to an agency under a legal authority or process regardless of whether the information is accepted by the agency or is valid. This amendment appears to be an attempt to address the Hawaii Supreme Court's decision in Nuuanu Valley Association v. City and County. However, we do not believe that the proposed amendment to the definition would have altered the outcome of that case.

Although the court confirmed the broad interpretation of "government record" under the UIPA, it implicitly found that the records at issue were not "government records" because the City and County apparently had not kept a copy and therefore did not possess the record at the time a request was made. In other words, the problem was not a narrow interpretation of what types of information are a government record, but rather the factual issue of whether the agency had a copy of the record available to it.

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As we read it, the proposed language would not -- and should not -- create an independent duty to retain a record. The UIPA, like the federal freedom of information act, is a disclosure statute that obligates agencies to provide access to records that are actually maintained: it does not place an affirmative duty on agencies to either create or retain documents. Because of the possibility that the proposed language could be used to limit the expansive definition of “government record” as it now exists, and because we believe that a duty to retain a record is not properly created within that definition within a disclosure statute, OIP strongly recommends that section 3 of the bill amending the definition of “government record” be deleted.

Thank you for the opportunity to testify.



# UNIVERSITY OF HAWAII SYSTEM

## Legislative Testimony

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Testimony Presented Before the  
Senate Committee on Judiciary and Government Operations  
March 2, 2009 at 10:00am

by  
David Lassner  
Vice President for Information Technology/CIO, University of Hawai'i

### SB 1652 – RELATING TO GOVERNMENT RECORDS

Chair Taniguchi, Vice Chair Takamine, and Members of the Committee:

The University of Hawai'i appreciates the importance of the orderly and appropriate management of government records. However, we must respectfully oppose this bill in its current form.

Compliance with this measure would cost millions of dollars and thousands of hours of staff time throughout the State and Counties. In the current environment of budget reduction rather than expansion, the imposition of such a complex and far-reaching unfunded mandate would result in a substantial diversion of human and financial resources from public service to administrative processing.

The University believes the public interest will be better served if we can continue to maximize the use of our scarce resources to meet the educational needs of the people of Hawai'i. We therefore request that this measure be deferred.



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**Senate JGO Committee  
Monday 3/2/09 at 10:00 AM in Room 016  
Senate Bill 1652**

**TESTIMONY**

Nikki Love, spokesperson, Common Cause Hawaii

Chair Taniguchi, Vice Chair Takamine, and Committee Members,

I am testifying in **support of SB1652** relating to government records.

This bill requires government agencies to comply with records retention policies.

Currently records retention policies are voluntary, and this presents a significant risk of potential loss of important government documents. Mandatory compliance with retention policies is so important if we are to carry out a meaningful sunshine law. Especially in the event of potential controversy, the public needs to be assured that government records cannot be destroyed and information will not be hidden from public scrutiny.

Put simply, what is the point of having “open records” laws if there are no records retained for citizens to review?

We urge you to pass this measure and improve open government in Hawaii.

**Mahalo.**