

# 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

To: House Committee on Finance

From: Cheryl Kakazu Park, Director

Date: March 30, 2012, 4:00 p.m.  
State Capitol, Room 308

Re: Testimony on S.B. No. 2858, S.D. 1, H.D. 1  
Relating to Open Government

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Thank you for the opportunity to submit testimony on S.B. No. 2858, S.D. 1, H.D. 1. OIP strongly supports this Administration bill, which would create a uniform process under the Uniform Information Practices Act ("UIPA," HRS Chapter 92F) and the Sunshine Law (HRS Chapter 92, Part I) to clarify an agency's right to judicially appeal an OIP decision that either mandates the disclosure of public records under the UIPA, or concludes that an action is prohibited or required by the Sunshine Law.

The UIPA currently allows record-requesting members of the public to challenge an agency's denial of records through OIP's informal resolution process. Whether or not a requester goes through this informal resolution process, the law allows a requester to go to court to seek de novo review of an OIP decision upholding a denial of access to records by a government agency.

In contrast to a requester's right to appeal, Hawaii's UIPA has never contained a provision allowing a government agency to appeal an OIP decision in the requestor's favor that mandates the disclosure of records. Rather, the UIPA expressly directs agencies that it "shall make the record available" when required by OIP. (HRS 92F-15.5(b).) Moreover, the UIPA's legislative history indicates that the lack of a process for agency appeals was an intentional omission, designed to

prevent lawsuits between agencies, which is why OIP has argued that its decisions could not be appealed to the courts by an agency. Nevertheless, Hawaii's courts in County of Kauai v. OIP, 120 Haw. 34, 200 P.3d 403 (2009), allowed an agency to appeal OIP's decision requiring the disclosure of the agency's executive meeting minutes and rejected OIP's arguments against appellate jurisdiction. Instead, the Intermediate Court of Appeals, in a decision that was summarily affirmed by the Supreme Court, reasoned that the agency's appeal could proceed under the Sunshine Law, even though the agency was actually appealing a separate UIPA determination. Although the Sunshine Law allows "any person" to go to court to determine the law's applicability to a board's discussions or decisions, the law does not specifically permit an agency's appeal of an OIP decision nor does it specify who the opposing party should be if such a lawsuit is brought by a board. The court, however, allowed the County to sue OIP to overturn OIP's decision made under the UIPA by instead challenging OIP's earlier decision that had interpreted the Sunshine Law.

Rather than continuing to litigate whether OIP opinions should ultimately be reviewable by the courts under either law, which could result in "agencies suing agencies" contrary to the UIPA's express legislative intent, OIP is seeking legislative clarification of agencies' appeal rights regarding OIP opinions under both the UIPA and the Sunshine Law. OIP proposes the creation of a uniform procedure applicable to both the UIPA and the Sunshine Law, which would strictly define and limit agencies' right to appeal OIP opinions.

Judicial Review Would be Limited to the Record Before OIP

Under OIP's proposal, the judicial appeal would essentially be a review of OIP's opinion and be limited to the record that was before OIP. By limiting the court's review to the record before OIP, an agency is more likely to make a serious effort to present its facts and arguments to OIP for its consideration in reaching a decision. This will discourage the agency from summarily denying the requester's

argument; hoping for a favorable decision from OIP; and, if the decision goes against the agency, going to court where it will, for the first time, present a full explanation of its position with supporting facts and legal authorities. Encouraging agencies to instead put their best case before OIP is consistent with the Legislature's original intent to have OIP resolve disputes and that the agencies would comply. See HRS Sec. 92F-15.5(b) (mandating that agencies "shall make the record available" pursuant to OIP's decision to compel disclosure under the UIPA). Additional concerns over what will be included in the record reviewable by the court will be addressed when OIP adopts administrative rules to implement the new appeals process.

OIP and the Public Are Not Required to be Parties in an Agency's Appeal

The bill provides that neither OIP nor the requester would be required to appear in an agency's appeal, thus eliminating the agency's ability to win simply by default. The judicial review would be of the OIP decision itself, rather than a suit against OIP or the requester personally. Just as a judge is not sued or required to appear in a case challenging his or her decision, neither OIP nor a requester would be named as parties to the appeal, and therefore, need not hire attorneys to represent them in an appeal by an agency. OIP and the requester would be given notice of the suit and would have the right to intervene, but they would not be required to appear in the case or risk losing by default.

"Palpably Erroneous" Standard for Agencies' Appeals Only

OIP's opinions would be admissible on appeal and shall be considered as precedent unless found to be "palpably erroneous." The "palpably erroneous" standard is a high standard of review that requires great deference to OIP's factual and legal findings and conclusions, and it was previously applied to an OIP decision by the Hawaii Intermediate Court of Appeals in Right to Know Committee v. City Council, 117 Haw. 1, 13, 175 P.3d 111, 123 (2007), a case involving the Sunshine

Law. Thus, this bill represents the codification of a current standard rather than a new requirement of deference to OIP's decisions, and would provide a uniform standard of review applicable to agency appeals under both the UIPA and Sunshine Law. The codification of a high standard of review for the agency appeals process, combined with the limitation of review to the record before OIP, is necessary to discourage agencies from routinely challenging or ignoring OIP's opinions and thus undermining OIP's value as an alternative to the courts in resolving UIPA and Sunshine Law disputes, not subject to the contested case requirements of HRS Chapter 91. (HRS § 92F-42(1).)

To avoid confusion as to the effect of the new review process on a record requester's existing right to go to court on a "de novo" basis after an unfavorable OIP opinion (as currently set out in HRS sections 92F-15(b) and 92F-15.5(a)), the bill would further clarify that the lesser "de novo" standard of review only applies in a requester's (not an agency's) UIPA appeal to court to compel disclosure, which was the Legislature's original intent.

#### Uniform Standards

The bill would align the standards under UIPA Parts II and III regarding a record requester's appeal to the court after an OIP decision upholding an agency's denial of access; would provide a uniform appellate process under the UIPA and Sunshine Law, which are both administered by OIP; and would codify the standard currently recognized by Hawaii's courts for admissibility and precedential weight given to OIP opinions in Sunshine Law litigation.

OIP expects to adopt new administrative rules governing its own processes for handling complaints under both the Sunshine Law and the UIPA to clarify, among other things, what constitutes the record before OIP that will be reviewable by a court under the new appeals process created by this bill. To give OIP time to adopt administrative rules, the bill's effective date is January 1, 2013.

Previous Amendments

The Senate Committee on Judiciary and Labor changed the effective date to make this bill intentionally defective so that it would necessarily go into conference before adoption. The House Committee on Judiciary then amended the bill to return the effective date to January 1, 2013, which will provide enough time for appeals rules to be adopted by OIP.

Additionally, at the request of the League of Women Voters, the Senate Committee on Judiciary and Labor amended the original bill by adding a 30-day time limit for an agency to file its appeal of an OIP decision, which is based on time limits for similar appeals in current court rules. The House Committee on Judiciary further amended the bill by adopting the League of Women Voter's proposal to clarify that if an agency has not timely appealed an OIP decision requiring disclosure but still does not disclose the records in question, and the requester thus must bring a court action to compel disclosure of the records, the agency cannot challenge the OIP decision that it failed to timely appeal in response to the requester's action to compel disclosure. OIP has no objection to either amendment.

In conclusion, OIP requests this Committee's support of S.B. 2858, S.D. 1, H.D. 1, as is. The bill will clarify when, and under what standard, judicial review of OIP's decisions is available, and will thus eliminate the public's and agencies' confusion regarding this issue and allow administration of the open records and open meeting laws to work more smoothly. Thank you for considering our proposed legislation.

NEIL ABERCROMBIE  
GOVERNOR



BARBARA A. KRIEG  
INTERIM DIRECTOR

LEILA A. KAGAWA  
DEPUTY DIRECTOR

**STATE OF HAWAII**  
**DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT**  
235 S. BERETANIA STREET  
HONOLULU, HAWAII 96813-2437

March 29, 2012

**TESTIMONY TO THE  
HOUSE COMMITTEE ON FINANCE**

For Hearing on Friday, March 30, 2012  
4:00 p.m., Conference Room 308

BY

**BARBARA A. KRIEG  
INTERIM DIRECTOR**

**Senate Bill No. 2858, S.D. 1, H.D. 1  
Relating to Open Government**

**WRITTEN TESTIMONY ONLY**

TO CHAIRPERSON MARCUS OSHIRO AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to provide testimony on S.B. No. 2858, S.D. 1, H.D. 1.

The purpose of S.B. No. 2858, S.D. 1, H.D. 1, is to create a process for an agency to obtain judicial review of a decision made by the Office of Information Practices ("OIP") relating to the Sunshine Law or the Uniform Information Practices Act ("UIPA") and to clarify the standard of review.

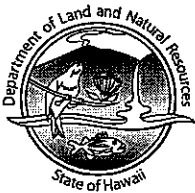
**The Department of Human Resources Development strongly supports this bill.**

We believe that this bill properly balances the competing interests of ensuring that OIP's decisions are founded on proper legal bases while also discouraging agencies from simply and routinely appealing decisions that they disagree with. On the latter point, the current iteration of this bill has the added safeguard of barring an agency from challenging an OIP decision ordering disclosure when the agency has not

made the disclosure or timely appealed the decision. As presently constructed, agencies do not have a clear avenue of redress via the courts.

We respectfully request that this Committee move this bill forward.

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

**Testimony of  
WILLIAM J. AILA, JR  
Chairperson**

**Before the House Committee on  
FINANCE**

**Friday, March 30, 2012  
4:00 PM  
State Capitol, Conference Room 308**

**In consideration of  
SENATE BILL 2858, SENATE DRAFT 1, HOUSE DRAFT 1  
RELATING TO OPEN GOVERNMENT**

Senate Bill 2858, Senate Draft 1, House Draft 1 proposes to establish a process for an agency to obtain judicial review of Office of Information Practices decisions related to the Sunshine Law or Uniform Information Practices Act (UIPA), and also clarifies the judicial standard of review. The Department of Land and Natural Resources is subject to both Sunshine Law and UIPA, and thus strongly supports this bill.

**WILLIAM J. AILA, JR.  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT**

**GUY H. KAULUKUKUI  
FIRST DEPUTY**

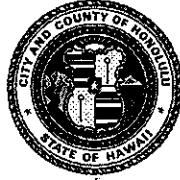
**WILLIAM M. TAM  
DEPUTY DIRECTOR - WATER**

**AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS**



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CITY AND COUNTY OF HONOLULU**

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PETER B. CARLISLE  
MAYOR

DOUGLAS S. CHIN  
MANAGING DIRECTOR  
  
CHRYSTN K. A. EADS  
DEPUTY MANAGING DIRECTOR

March 30, 2012

The Honorable Marcus Oshiro, Chair  
House Committee on Finance  
Twenty-Sixth Legislature  
Regular Session of 2012  
State of Hawaii

**RE: Testimony of Managing Director Douglas S. Chin on S.B. 2858, S.D. 1, H.D. 1,  
Relating to Open Government**

Chair Oshiro and members of the House Committee on Finance, Managing Director Douglas Chin submits the following testimony in opposition to S.B. 2858, S.D. 1, H.D. 1.

The City and County of Honolulu opposes S.B. 2858, S.D. 1, H.D. 1, because it unduly restricts the rights of agencies to appeal advisory opinions issued by the Office of Information Practices ("OIP"), without affording any process for agencies to present facts and arguments in support of their position. We believe the bill does not give proper weight to the privacy and public policy interests recognized in statute that limit the application of the Sunshine Law and the Uniform Information Practices Act.

We understand the purpose of the bill is to strictly define and limit an agency's right to appeal an opinion issued by OIP under both HRS Chapter 92 ("Sunshine Law") and HRS Chapter 92F ("Uniform Information Practice Act"). The bill limits an agency's right to appeal in two major areas. First, it limits the agency appealing an OIP opinion to the record before the OIP, and prohibits an agency from submitting additional information and argument in its appeal to the Circuit Court, except in "extraordinary circumstances." This is problematic because it presumes that the agency had a full and fair opportunity and incentive to develop a complete record before the OIP, which is not the case. OIP does not have any rules or procedures for agencies to submit evidence, facts, or arguments in support of their positions. As a result, what the parties submit, and what OIP considers, for purposes of an OIP advisory opinion is too random and unreliable to serve as an exclusive record.

Second, the bill would give OIP's opinion undue weight and deference in agency appeals. It creates a new review standard whereby the Court would have to uphold an OIP opinion unless

the agency can demonstrate that it was “palpably erroneous.” This is in contrast to the abuse of discretion standard that is used to review actions of all other agencies as required under HRS §91-14(g). Moreover, agencies would be required to meet this “palpably erroneous” standard based only on the record before the OIP, without the benefit of any procedures for the agency to submit evidence, present argument, and ensure the development of a full record. For these same reasons, the law should not require, as this bill proposes, that courts consider advisory opinions and rulings of OIP as precedent without the procedural safeguards to ensure that they are reliable.

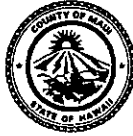
Before an agency can be bound by an OIP opinion, and before an agency’s right to appeal can be restricted, there must be an established procedure whereby agencies are afforded an opportunity to present information and argument in support of their position. Rather than legislate deference to OIP advisory opinions in an appeal to Circuit Court, we believe the proper course would be for OIP to promulgate rules for a fair and equal administrative process whereby both individuals and agencies are allowed to present information and argument to OIP. Alternatively, agencies should be allowed to present information and argument in their appeal to the Circuit Court, similar to the rights afforded individuals, where the OIP advisory opinion would be subject to a de novo review. Without a process to ensure that the legal, public policy, and privacy reasons underlying an agency’s position are heard and considered, the City and County of Honolulu strongly opposes this bill at this time.

Thank you for the opportunity to testify on S.B. 2858, S.D. 1, H.D. 1.

Council Chair  
Danny A. Mateo

Vice-Chair  
Joseph Pontanilla

Council Members  
Gladys C. Baisa  
Robert Carroll  
Elle Cochran  
Donald G. Couch, Jr.  
G. Riki Hokama  
Michael P. Victorino  
Mike White




Director of Council Services  
Ken Fukuoka

**COUNTY COUNCIL**  
COUNTY OF MAUI  
200 S. HIGH STREET  
WAILUKU, MAUI, HAWAII 96793  
[www.mauicounty.gov/council](http://www.mauicounty.gov/council)

March 29, 2012

TO: The Honorable Marcus R. Oshiro, Chair  
House Committee on Finance

FROM: Danny A. Mateo  
Council Chair 

SUBJECT: **HEARING OF MARCH 30, 2012; TESTIMONY IN OPPOSITION TO SB 2858,  
SD1, HD1, RELATING TO OPEN GOVERNMENT**

Thank you for the opportunity to testify in opposition to this important measure. The purpose of this measure is to create a process for the judicial review of decisions made by the Office of Information Practices (OIP).

The Maui County Council has not had the opportunity to take a formal position on this measure. Therefore, I am providing this testimony in my capacity as an individual member of the Maui County Council.

I oppose this measure for the following reasons:

1. This measure goes too far by limiting the circuit court's review of OIP decisions to the record that was before the OIP when it rendered the decision, except in "extraordinary circumstances". This raises two concerns. First, a quick review of Chapter 2-71, Hawaii Administrative Rules, reveals that the OIP does not have any procedures established to allow for a full and fair hearing before the OIP makes a decision. Without any established procedures for parties to present their case to the OIP, it is incorrect to assume that the record before the OIP would be complete. Second, the measure contains no guidelines on what circumstances would constitute "extraordinary circumstances". Such broad and vague language may result in very different interpretations.
2. The OIP is not a court. It is not bound by rules of civil procedure, rules of evidence, due process, or any of the other standards designed to ensure fairness and accuracy in an American tribunal. Therefore, the OIP's opinions should not be given the unusually high level of deference required by the "palpably erroneous" standard. Establishing such a high standard of review would effectively give the OIP the lawmaking power of the legislature, and the interpretive power of the judiciary.
3. Without a full and fair opportunity for a county council to present its case, the OIP, who has little practical experience with *and no incentive* to consider the demands placed on county councils, may interpret the law in an impractical and unreasonable way. Those questionable legal interpretations unjustifiably obstruct the councils' ability to fulfill its legislative responsibilities. The OIP's influence should not be unduly extended.

For the foregoing reasons, I oppose this measure.

Council Chair  
Danny A. Mateo

Director of Council Services  
Ken Fukuoka



Vice-Chair  
Joseph Pontanilla

Council Members  
Gladys C. Baisa  
Robert Carroll  
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March 29, 2012

TO: Honorable Marcus R. Oshiro, Chair  
House Committee on Finance

FROM: Joseph Pontanilla, Council Vice-Chair

A handwritten signature in cursive script, appearing to read "Joseph Pontanilla".

DATE: Friday March 30, 2012

SUBJECT: **OPPOSITION TO SB 2858, SD1, HD1 RELATING TO OPEN  
GOVERNMENT**

Thank you for the opportunity to testify in opposition of this measure. I provide this testimony as an individual member of the Maui County Council.

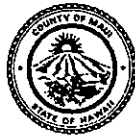
I oppose **SB 2858, SD1, HD1** for the reasons cited in testimony submitted by Maui County Council Chair Danny A. Mateo and urge you to oppose this measure.

12:03:29:kbn/JP: SB 2858 SD1 HD1

Council Chair  
Danny A. Mateo

Vice-Chair  
Joseph Pontanilla

Council Members  
Gladys C. Baisa  
Robert Carroll  
Elle Cochran  
Donald G. Couch, Jr.  
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Michael P. Victorino  
Mike White



Director of Council Services  
Ken Fukuoka

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March 29, 2012

The Honorable Marcus Oshiro, Chair  
House Committee on Finance  
Hawaii State Capitol, Conference Room 308  
Honolulu, Hawaii 96813

Dear Chair Oshiro and Committee Members:

**Re: Testimony in Opposition to SB 2858, SD1, HD1 relating to Open Government  
(Public Hearing: March 30, 2012 at 4:00 pm in Conference Room 308)**

As the Lana'i member on the Maui County Council, I would like to testify in opposition to SB 2858, SD 1, HD1. This measure creates a process for an agency to obtain judicial review of a decision made by the Office of Information Practices relating to the Sunshine Law or the Uniform Information Practices Act and clarifies standard of review. Effective January 1, 2013.

I concur with testimony in opposition submitted by Maui County Council Chair Danny A. Mateo on this measure.

Thank you for the opportunity to offer this testimony in opposition.

Sincerely,

A handwritten signature in black ink, appearing to read "Riki Hokama".

Riki Hokama, Councilmember- Lana'i

cc: Council Chair Danny A. Mateo



HAWAII

AMERICANS FOR DEMOCRATIC ACTION

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		Josh Frost (Alt)	
		Marsha Schweitzer (Alt)	

March 29, 2012

TO: Chair Marcus Oshiro and Vice Chair Marilyn Lee  
Members of the House Committee on Finance

FROM: Americans for Democratic Action/Hawaii  
Barbara Polk, Legislative Chair

SUBJECT: Opposition to SB 2858 Relating to Open Government

Americans for Democratic Action/Hawaii opposes SB 2858 that would allow public agencies to contest rulings by the Office of Information Practices in court. This change will substantially undermine the effectiveness and authority of OIP, as well as be a disservice to the public in their attempts to access public information or exercise their rights under the Sunshine laws.

While we sympathize with the problems OIP has gone through in a recent court case, we believe that this bill is moving in exactly the wrong direction. At present, the law bars agencies from suing OIP over rulings on open records, and to our knowledge, the only challenge made was decided under the Sunshine Law, which has no bar to agency challenges. Rather than changing the law to allow court challenges to both areas of OIP's responsibilities, it would make better sense to change it to make clear that government agencies cannot contest any OIP rulings in court.

The impact of allowing these suits is that the public is likely to experience long delays in receiving information when an agency does not want to comply with the OIP ruling. The bill would give an agency 30 days to appeal, then give OIP 30 days to respond, before the court could consider it for an unknown length of time. There is the likelihood that in many cases, the need for the information would be long past before a court would rule, and even if the ruling were in favor of OIP, access would have been effectively denied. Worse yet, if the appeal were that a board had denied public access to its meetings, the areas under discussion at closed meetings would be far in the past before a ruling would occur. ("Justice delayed is justice denied.")

We are aware that OIP believes that it will save itself substantial time that can be devoted to its regular duties by allowing the type of court challenge described in SB 2858. Certainly that would be desirable from the point of view of the public. However, we are not aware that there have been other court challenges of rulings in recent memory. Opening the possibility of a challenge may take considerably more of OIP time, if they would need up to 30 days to answer each challenge and agencies suddenly felt free to delay response to OIP rulings by frequent challenges. Not to mention jamming up an already over-full court docket.

OIP has also argued that changing the law to bar all court challenges by agencies would not work it's not possible to tell the court what to do. However, SB 2858 contains considerable direction to the courts about how to handle these cases. If it is true that it's not possible to tell the courts what to do, OIP may find itself enmeshed in endless litigation by opening the possibility of court challenges to its rulings.

The public needs a strong, effective Office of Information Practices. Diluting their authority does not protect the public interest. We urge you to hold SB 2858.



House FIN Committee  
Chair Marcus Oshiro, Vice Chair Marilyn Lee

Friday 3/30/12 at 4:00PM in Room 308  
SB 2858 SD1 HD1 – Open Government

TESTIMONY

Nikki Love, Executive Director, Common Cause Hawaii

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Chair Oshiro, Vice Chair Lee, and Committee Members:

**Common Cause Hawaii offers the following comments on SB2858 SD1 HD1**, which sets up a process for judicial review of decisions by the Office of Information Practices.

We understand the desire to prevent agencies from suing other agencies. However, we have reviewed points made recently by testifiers and in the news media, and we would like to echo some of the concerns about this bill.

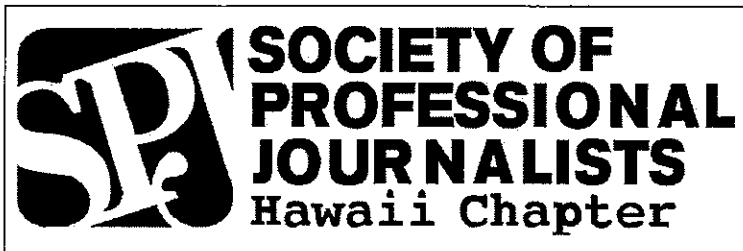
The ordinary citizen always faces an uphill battle in the fight for open government. Unfortunately, a possible unintended consequence of this bill is that it may put the citizen at an even greater disadvantage.

One of the arguments for this bill is that, under current law, any member of the public can go to court to appeal a decision by OIP, but government agencies cannot. But the reality is that few members of the public can actually do this – most ordinary citizens are not able to afford the funds for an attorney, not to mention the time to pursue it.

If this bill passes, agencies would be more easily able to appeal decisions than ordinary citizens – because agencies have access to government attorneys (funded by taxpayers) to pursue an appeal, while citizens don't. This sets up a situation where government agencies will have the resources to fight to keep records and meetings closed, whereas most ordinary citizens won't have the resources to fight to keep them open.

We ask the Committee to consider these possible implications. If the bill moves forward, we would urge that a sunset date be included, to allow the legislature and the public an opportunity to review and analyze the impacts of this new process.

Mahalo for the opportunity to submit testimony.



P.O. Box 3141  
Honolulu, HI 96802  
March 30, 2012

Rep. Marcus Oshiro, Chairman  
Finance Committee  
State Capitol  
Honolulu, HI

Re: Senate Bill 2858 HD1, Relating to Open Government

Chairman Oshiro and Committee Members:

We ask that you shelve this bill.

We believe it will add more burden on the public to get access to records and will create more time delays from agencies that balk at releasing records.

When the law was passed – we believe – the Legislature intended to level the playing field between big agencies and regular people who were seeking records. The law intentionally did not allow agencies to appeal OIP decisions to keep access open, costs down and avoid delays.

We thank you for your time and consideration.

A handwritten signature in black ink, which appears to read 'Stirling Morita'. The signature is written in a cursive style with some loops and flourishes.

Stirling Morita  
Hawaii Chapter  
Society of Professional Journalists



TESTIMONY OPPOSING S.B. 2858, SD1, HD1  
PRESENTED TO THE HOUSE COMMITTEE ON FINANCE  
BY PROFESSOR EMERITA BEVERLY ANN DEEPE KEEVER  
ON MARCH 30, 2012, CAPITOL ROOM 308

Thank you for permitting me to testify. I am a retired professor who taught journalism and communications for 29 years at the University of Hawaii at Manoa.

I oppose this administration-backed bill because it goes in the wrong direction. It provides for a cumbersome, costly court process as a poor way of providing uniformity to two separate statutes, Chapter 92F on public records and Chapter 92 on public meetings—the Sunshine Law. Since the 1990s both statutes are administered by the Office of Information Practices (OIP).

Instead of the costly, cumbersome process proposed in this bill, the Legislature should apply to the Sunshine Law (Chapter 92) the same language that it clearly applied to the public-records law (Chapter 92F).

That clear-sighted language of 1989 reads: "...a government agency dissatisfied with an administrative ruling by the OIP does not have the right to bring an action in circuit court to contest the OIP ruling. The legislative intent for expediency and uniformity in providing access to government records would be frustrated by agencies

**records would be frustrated by agencies suing each other."** (See my attachment that follows.)

However, no such language is included in the legislative history of the Sunshine Law. Passed in 1975, the Sunshine Law provides that any person can bring a lawsuit in circuit court to enforce the open-meetings provisions—and that person includes a public agency, the Intermediate Court of Appeals held in 2009.

That Court also held that OIP erred in basing its decision on the open-records statute instead of the more specific Sunshine Law statute, which is silent on whether boards or city/county councils can bring suit against OIP for its decision. (County of Kauai v OIP, 120 Hawaii 34).

By applying to the Sunshine Law the same language it had applied to the open-records law, the Legislature would be giving OIP the legislative clarity it badly needs to stave off future lawsuits under either statute and to administer uniformly both statutes.

This language barring lawsuits against OIP would enable it to continue using an informal dispute resolution procedure to administer Sunshine Law contested issues rather than having parties resort to lawsuits.

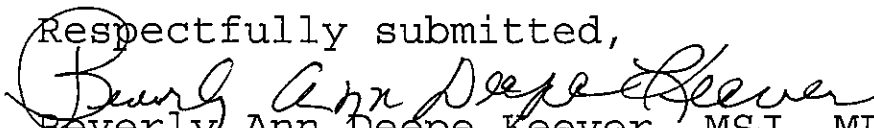
In short, SB 2858, as amended, is **costly to Hawaii's taxpayers and public because it:**

1. risks one taxpayer-funded government attorney fighting another taxpayer-funded attorney in already clogged state courts,
2. diminishes the authority of the Office of Information Practices (OIP), which the Legislature in 1988 intended "to provide a place where the public can get assistance on records questions at no cost and within a reasonable amount of time." And it was a place for agencies to consult on increasingly complex issues as computers were just beginning to revolutionize government operations and citizen usage,
3. denies a taxpayer unable to hire his/her own lawyer the means to join the complex court process outlined in SB2858 in order to gain access to a government record that OIP has directed an agency to disclose under H.R.S. Chapter 92F.

I urge you to hold this bill this session.

Thank you for considering these comments.

Respectfully submitted,



Beverly Ann Deepe Keever, MSJ, MLIS, PH.D

Professor Emerita

Department of Journalism and

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University of Hawaii at Manoa

(Attachments follow)

# Don't let agencies fight public's right to records

By Beverly Ann Deepe Keever

Thanks to the Star-Advertiser for publishing Rep. Cynthia Thielen's insightful commentary on Sunday ("Short-sighted bills endanger our government," Star-Advertiser, Island Voices, March 18).

That alarming article gave the public an inside peek at how the Legislature is lessening Hawaii's longstanding environmental protections by exempting pricey government projects from the public environmental review process.

And, I'd like to add, environmental protections are not the only area where the public risk being cut out of the loop. Another even broader area is one that risks shortcircuiting the public's access to all state and city/county records that the Legislature 24 years ago presumed — with specific exceptions — to be disclosed to Hawaii's residents.

That risk of closing off public access is contained in a Senate-passed bill that this week is wending its way toward the House Finance Committee.

That committee should summar-

ily kill this bill, Senate Bill 2858, as amended. Sponsored by Gov. Neil Abercrombie, the bill raises the frightening specter for Hawaii residents: One government attorney fighting another government attorney, with the taxpayer paying for both of them, while they unnecessarily clog up the already overburdened courts and while the public requester is still being denied records to which he or she is entitled under the law.

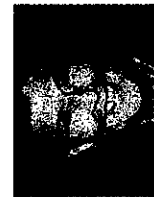
SB 2858 would eviscerate a unique feature of the open-records law: the Office of Information Practices (OIP). The Legislature declared that OIP was intended "to provide a place where the public can get assistance on records questions at no cost and within a reasonable amount of time." Establishing OIP in 1988 was so innovative that several other states have copied Hawaii's model.

OIP's opinions were declared to be binding on government agencies

in order to perform this service for the public. The Legislature declared: "A government agency dissatisfied with an administrative ruling by OIP does not have the right to bring an action in Circuit Court to contest the OIP ruling. The legislative intent for expediency and uniformity in providing access to government records would be frustrated by agencies suing each other."

SB 2858 would reverse this longstanding legislative intent. The bill would permit a state or city/county agency to sprint to court when it was unwilling to release a record that OIP directed it to disclose to the public under the open-records law.

The court process outlined in the bill is complex and cumbersome and risks one taxpayer-funded government attorney contesting another government attorney. And the record-requesting member of the public who is unable or unwilling to hire his or her own attorney is shut



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out of the court proceeding. In addition, SB 2858 is so carelessly crafted that it covers parts of another statute — Hawaii's open-meetings law. In 1975, in the aftermath of the Watergate scandal, the Legislature passed this so-called Sunshine Law to declare that government meetings in Hawaii are to be open to the public. Later OIP was made responsible for administering this law.

Under this law, Hawaii's Intermediate Court of Appeals held that OIP's decision could be contested in court by any party, including a government entity.

To stave off future lawsuits and overcome uncertainty for OIP, the Legislature should simply state that OIP's opinions rendered under the Sunshine Law cannot be contested in court by government entities, the same language it applied decades ago to government records.

Instead SB 2858 moves in the opposite direction. It should be killed. A new Legislature next year will hopefully address this issue in a way that protects the authority of OIP and safeguards the public interest.

# REGULAR SESSION OF 1989

**Conf. Com. Rep. 167 on S.B. No. 1799**

The purpose of this bill is to amend Chapter 92F, Hawaii Revised Statutes (HRS), the Uniform Information Practices Act (Modified), to ensure its smooth implementation when it takes effect on July 1, 1989.

Your Committee has made the following amendments to the bill:

- (1) Two new sections in the original bill were consolidated and restructured into one new section in Part II of Chapter 92F, HRS, which clarifies that when an agency denies a person access to a government record, the person may appeal the denial to the Office of Information Practices (OIP) as an alternative and optional method of appeal but without prejudice to the person's right to appeal directly to circuit court. Exhaustion of administrative remedies is not required before appealing a denial of access to government records to the court.
- (2) A proposed new section in Part III of Chapter 92F, HRS, will clarify that for an individual who is denied access to that individual's own personal record, appeal to the OIP is also an alternative to appealing to circuit court. The section was amended to make consistent the alternative appeal methods for access denied to individuals as to their own personal records, under Part III of Chapter 92F, HRS, and the alternative appeal methods for access denied as to government records about others, under Part II of Chapter 92F, HRS.
- (3) The bill was amended to remove the proposed statutory provisions of a ninety-day time limitation for the filing of an appeal to the OIP concerning denial of access to a government record. The bill was also amended to set, instead of the previously proposed time limitation of ninety days, a limitation of two years, within which a person can bring a civil action to compel disclosure of a government record after a denial of a request for access. This time limitation, as amended, is consistent with the two-year limitation, established in Part III of Chapter 92F, HRS, and further clarified in the bill, within which an individual can bring a civil action to compel disclosure of that individual's own personal record after a denial of a request for access.
- (4) The House draft of the bill had added a codified time schedule for the progressive completion by all agencies of their respective public records reports required under Chapter 92F, HRS. The bill was amended to remove the time schedule from the statutory provision and to make the time schedule a provision in the session laws. This amendment would eliminate the need to later repeal a codified time schedule at some time after the agencies' full completion of their public records reports. Your Committee retained in the bill the requirement that each government agency supplement or amend its public records report annually.
- (5) The bill was also amended to remove recommendation of criminal prosecution from the functions of the OIP and to make the effective date of the act on July 1, 1989, when the remaining Chapter 92F, HRS, goes into effect. The bill was also amended to make technical and nonsubstantive changes for purposes of clarity, style and form.

The bill retains the provisions clarifying the OIP's rulemaking authority and the OIP's placement within the Department of the Attorney General for administrative purposes only. The OIP's rulemaking authority, as clarified in this bill, would ensure uniformity in the rules which all agencies will follow, without the need for all agencies to hold separate administrative hearings on rules adoption. The bill also clarifies that administrative review by the OIP on an agency denial of access is an informal dispute resolution procedure and is exempt from the contested case requirements of Chapter 91, HRS.

Your Committee wishes to emphasize that while a person has a right to bring a civil action in circuit court to appeal a denial of access to a government record, a government agency dissatisfied with an administrative ruling by the OIP does not have the right to bring an action in circuit court to contest the OIP ruling. The legislative intent for expediency and uniformity in providing access to government records would be frustrated by agencies suing each other.

Your Committee on Conference is in accord with the intent and purpose of S.B. No. 1799, S.D. 1, H.D. 1, as amended herein, and recommends that it pass Final Reading in the form attached hereto as S.B. No. 1799, S.D. 1, H.D. 1. C.D. 1.

Representatives Metcalf, Amaral, Hagino, Hiraki and Anderson,  
Managers on the part of the House.

Senators Blair, Aki, McMurdo and George,  
Managers on the part of the Senate.

## **FINTestimony**

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Thursday, March 29, 2012 2:49 PM  
**To:** FINTestimony  
**Cc:** bipc111@gmail.com  
**Subject:** Testimony for SB2858 on 3/30/2012 4:00:00 PM

Testimony for FIN 3/30/2012 4:00:00 PM SB2858

Conference room: 308  
Testifier position: Oppose  
Testifier will be present: No  
Submitted by: Big Island Press Club  
Organization: Big Island Press Club  
E-mail: [bipc111@gmail.com](mailto:bipc111@gmail.com)  
Submitted on: 3/29/2012

### Comments:

To the Honorable Marcus Oshiro, Chairman, and Members of the House Finance Committee

The Big Island Press Club is writing in OPPOSITION to SB2858 as drafted and to request that this bill be "held" or "shelved."

It appears that the intention of the bill is good, but that the bill actually creates more problems than it solves.

We understand that this bill arose, at least in part, out of a desire to clarify problems created by court decisions in Kauai County vs OIP (120 Haw 34). Those decisions established that a government agency is a "person" with the right to contest an OIP opinion, but only under the provisions of HRS 92 (open meetings).

The present bill seeks to extend that right beyond Kauai County vs OIP to newly include HRS 92F (open records). HRS 92F does not currently allow any "person" to bring a lawsuit against an OIP opinion, and creating such an allowance would be extremely contrary to the state's prevailing climate of openness.

Re the proposed application of SB2858 to HRS 92 (open meetings), we note that the apparent intent is to tighten the right to sue recognized by Kauai County vs. OIP. The bill states, inter alia:

- a. A government agency bringing suit would have to challenge an OIP decision within 30 days.
- b. The standard by which the agency appeal would be judged is whether OIP was "palpably erroneous."

As well intentioned as those provisions may be, we believe they unwisely allow a government agency a legal avenue to block release of information while a lawsuit is underway, even when a lawsuit is not well founded.

We note wording from the Conference Committee Report 112-88 on HB No. 2002, House Journal at 817-819 that the purpose of OIP is "to provide a place where the public can get assistance on records questions at no cost and within a reasonable amount of time." Creating a new provision allowing lawsuits linked to HRS 92F subverts the general intent of timeliness.

We request placing a hold on SB2858 until 2013 or shelving it permanently. We suggest that the solution in the next Legislature would be to pass a bill that adds to HRS 92 (open meetings) the solution already offered since 1989 for HRS 92F (open records): no government agency can go to court to refuse to hand over a requested record which OIP has directed it to disclose.

Sincerely,

Rodrik Thompson, Treasurer, Big Island Press Club, on behalf of and with approval of the Executive Board of the club.