NEIL ABERCROMBIE
GOVERNOR OF HAWAII

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

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
JUDICIARY

Friday, March 16, 2012
2:00 PM
State Capitol, Conference Room 325

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

Senate Bill 2858, Senate Draft 1, establishes 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 (Department) is subject to both Sunshine Law and UIPA, and thus strongly supports this bill.

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 12, 2012

TESTIMONY TO THE
HOUSE COMMITTEE ON JUDICIARY

For Hearing on Friday, March 16, 2012
2:00 p.m., Conference Room 325

BY

BARBARA A. KRIEG
INTERIM DIRECTOR

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

WRITTEN TESTIMONY ONLY

TO CHAIRPERSON GILBERT KEITH-AGARAN AND MEMBERS OF THE COMMITTEE:

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

The purpose of S.B. No. 2858, S.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 open meetings 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. 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.

ECD/bk

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 Judiciary

From: Cheryl Kakazu Park, Director

Date: March 16, 2012, 2:00 p.m.
State Capitol, Room 325

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

Thank you for the opportunity to submit testimony on S.B. No. 2858, S.D. 1. OIP strongly supports this administration-backed 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. S.B. 2858 is the companion bill to H.B. 2596, which this Committee previously heard.

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. Nevertheless, the court allowed the County to sue OIP to overturn OIP's decision made under the UIPA by instead challenging OIP's underlying interpretation of 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 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. 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.

Uniform Standards

The bill would align the standards under UIPA Parts II and III regarding a record requester's appeal to 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 original effective date was January 1, 2013.

Senate's 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. **OIP requests that S.B. 2858, S.D. 1 be amended to reflect a January 1, 2013 effective date, in order to 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 bill by adding a 30-day time limit for an agency to file its appeal of an OIP decision. OIP has no objection to this amendment, which is based on time limits for similar appeals in current court rules. Specifically, bill page one, lines 7-14 were amended (as highlighted) to read:

> An agency may seek judicial review of a decision rendered by the office of information practices under this chapter or part I of chapter 92, by filing a complaint within 30 days of the date of the decision to initiate a special proceeding in the circuit court of the judicial circuit where the request for access to a record was made, or the act the office determined was prohibited under part I of chapter 92 occurred.

OIP supports this amendment.

In conclusion, OIP requests this Committee's support of S.B. 2858, S.D. 1, which 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. Again, OIP requests that this Committee amend the bill's effective date to January 1, 2013.

Thank you for considering our proposed legislation.

OFFICE OF THE MAYOR
CITY AND COUNTY OF HONOLULU

530 SOUTH KING STREET, ROOM 300 * HONOLULU, HAWAII 96813
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PETER B. CARLISLE
MAYOR

DOUGLAS S. CHIN
MANAGING DIRECTOR

CHRYSTN K. A. EADS
DEPUTY MANAGING DIRECTOR

March 16, 2012

The Honorable Gilbert S.C. Keith-Agaran, Chair
House Committee on Judiciary
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, Relating to Open Government

Chair Keith-Agaran and members of the House Committee on Judiciary, Managing Director Douglas Chin submits the following testimony in opposition to S.B. 2858, S.D. 1.

The City and County of Honolulu opposes S.B. 2858, S.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.

Bernard P. Carvalho, Jr.
Mayor

Gary K. Heu
Managing Director

Alfred B. Castillo, Jr.
County Attorney

Amy I. Esaki
First Deputy

OFFICE OF THE COUNTY ATTORNEY
County of Kaua'i, State of Hawai'i
4444 Rice Street, Suite 220, Līhu'e, Hawai'i 96766-1300
TEL (808) 241-4930 FAX (808) 241-6319

Testimony of Alfred B. Castillo, Jr.

Before a Hearing of the House Committee on Judiciary
Friday, March 16, 2012
2:00 pm
Conference Room 325

Senate Bill 2858 Relating to Open Government

Thank you for the opportunity to submit testimony on S.B. No. 2858, Relating to Open Government.

The County of Kaua'i does not support S.B. No. 2858 for the following reasons: Opinions and rulings of the Office of Information Practices should be considered as positions of the office but not precedent. Also, the term "palpably erroneous" is vague and potentially ambiguous in application. Further, notice of the suit should be limited to the Office of Information Practices, since the dispute is focused on the decision of the office.

Mahalo,

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.mauicounty.gov/council

March 14, 2012

TO: The Honorable Gilbert S.C. Keith-Agaran, Chair
House Committee on Judiciary

FROM: Danny A. Mateo
Council Chair

SUBJECT: **HEARING OF MARCH 16, 2012; TESTIMONY IN OPPOSITION TO SB 2858, SD1, 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 has been mischaracterized as placing a check on the OIP's power, merely because it makes it explicit what has always been understood – i.e., OIP opinions can be challenged. But by giving secretly crafted OIP opinions the power of precedence in court, this measure would have the effect of granting the OIP the new authority to dictate – to county councils and to courts – how the Sunshine Law is interpreted and administered.

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 to be established by this measure. OIP's opinions would be treated as binding precedent unless they are "palpably erroneous" – a legal standard that requires a court to be more deferential to the rulings of the OIP than to most rulings made by actual judges.

3. The OIP is an Oahu-based State agency that has little practical experience with *and no incentive* to consider the demands placed on county councils as a result of impractical and unreasonable legal interpretations. The OIP's influence should not be unduly extended.

For the foregoing reasons, I oppose this measure.

ocs:proj:legis:12legis:12testimony:sb2858_sd1_paf12-063a_dmr

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.mauicounty.gov/council

March 15, 2012

TO: Honorable Gilbert S.C. Keith-Agaran, Chair
House Committee on Judiciary

FROM: Joseph Pontanilla, Council Vice- Chair

DATE: Friday March 16, 2012

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

12:03:15:kbm/JP: SB 2858 SD1

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.mauicounty.gov/council

March 15, 2012

The Honorable Gilbert S.C. Keith-Agaran, Chair
House Committee on Judiciary
Hawaii State Capitol, Conference Room 325
Honolulu, Hawaii 96813

Dear Chair Keith-Agaran:

Re: Testimony in Opposition to SB 2858, SD1 relating to Open Government (Public Hearing: March 16, 2012 at 2:00 pm in Conference Room 325)

As the Lana`i member on the Maui County Council, I would like to offer testimony in opposition to SB 2858, SD 1. 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 open meetings law or the Uniform Information Practices Act and clarifies standard of review.

In my view, the proposed measure is seriously flawed. The proposed measure would not require OIP to participate in the court proceeding as a party and therefore be accountable to defend its decisions. Also, OIP opinions should not be considered as "precedent" and given such weight in judicial review. I also concur with testimony in opposition submitted by Maui County Council Chair Danny A. Mateo.

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

Sincerely,

Riki Hokama, Councilmember- Lana`i

cc: Council Chair Danny Mateo

LEAGUE OF WOMEN VOTERS®

League of Women Voters of Hawaii
49 South Hotel Street, Room 314 | Honolulu, HI 96813
www.lwv-hawaii.com | 808.531.7448 | voters@lwv-hawaii.con

House Judiciary Committee
Chair Rep. Gilbert S.C. Keith-Agaran, Vice Chair Rep. Karl Rhoads

Friday 3/16/12 at 2:00PM in Room 325
SB2858, SD1 — RELATING TO OPEN GOVERNMENT

TESTIMONY

The League of Women Voters strongly supports SB 2858, SD 1, but we request amendment of the first sentence of Section 3 to use the following wording.

SECTION 3. Section 92F-15, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) In an action to compel disclosure, the circuit court shall hear the matter de novo[.]; provided, however, that if the action to compel disclosure is brought because an agency has not made a record available as required by section 92-F15.5(b) after a decision of the office of information practices to disclose, and the agency has not appealed that decision within the time period provided in section 92-F , the decision of the office of information practices shall not be subject to challenge by the agency in the action to compel disclosure. Opinions and rulings...."

This proposed amendment of SB 2858, SD 1, would establish procedures under which a member of the public could file an action to compel agency compliance with an OIP decision without risk of having to fight a belated agency challenge to the OIP decision.

Testimony for SB2858 on 3/16/2012 2:00:00 PM

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, March 13, 2012 10:16 PM

To: JUDtestimony

Cc: kimokelii@aol.com

Testimony for JUD 3/16/2012 2:00:00 PM SB2858

Conference room: 325
Testifier position: Support
Testifier will be present: No
Submitted by: Kimo Kelii
Organization: Nanakuli Neighborhood Board
E-mail: kimokelii@aol.com
Submitted on: 3/13/2012

Comments:
ALOHA KAKOU,

PLEASE SUPPORT SB 2858!

OPEN GOVERNMENT PROVIDES FOR TRANSPARENCY AND ACCOUNTABILITY WHICH ARE PARAMOUNT TO ENSURING THAT A TRUE DEMOCRATIC SYSTEM EXIST FOR CITIZENS AND LEADERS ALIKE.

MAHALO, KIMO KELII (WAIANAE COAST COMMUNITY LEADER)

TESTIMONY STRONGLY OPPOSING S.B. 2858, S.D. 1
PRESENTED TO THE HOUSE JUDICIARY COMMITTEE
BY PROFESSOR EMERITA BEVERLY ANN DEEPE KEEVER, PH.D.
ON MARCH 16, 2012, CAPITOL ROOM 325

Thank you for hearing my testimony opposing S.B. 2858, S.D.1, which covers two separate statutes—one on government records and one on government meetings. These two statutes have different legislative histories and have been confusingly mixed up in this bill. But they share a common purpose that the Legislature declared to ensure open government records and meetings uniformly throughout Hawaii at the state and city-county level so as to protect the public interest. In short: to protect the people in Hawaii against uncalled for secrecy by government agencies and boards that prevent essential public participation and knowledge of officials representing them and also to ensure personal privacy. In the 1990s the Legislature merged the administration of the open-meetings law into the Office of Information Practices.

My name is Beverly Ann Deepe Keever. I would like first to discuss the Open-Records portion, contained on the first page and half of this bill. It was 25 years ago that Gov. Waihee, the nation's first governor of part-Hawaiian ancestry, appointed a committee that laid much of the foundation for the new law. Then teaching journalism at the University of Hawaii at Manoa, I was an active participant in those discussions, in campus forums and legislative hearings that led to enactment of the law in 1988, which went into effect in 1989.

The law transformed Hawaii's government. The new law followed the federal Freedom of Information Act by presuming that the government was merely the custodian of its records that actually belonged to the people and thus should be open to them, with clearly specified and well justified exceptions.

After that, I also testified at numerous hearings as the Legislature expanded or fine-tuned what records were public and what were nondisclosable; I remember many of these sessions were heated and some lasted late into the night. It was the Legislature that decided public policy on this issue—until this ill-conceived bill arose.

THE INNOVATIVE, UNIQUE OFFICE OF INFORMATION PRACTICES

The Legislature included in the new law an innovative and unique feature: establishment of the Office of Information Practices. It was intended to serve in the long run "to provide a place where the public can get assistance on records questions at no cost and within a reasonable amount of time."[1] Since then several other states have followed Hawaii in establishing similar offices.

The Legislature also stated that OIP's decisions and advisories were binding on government agencies. Before issuing its opinions, OIP does extensive legal research and turns to the government agencies to give them a substantial opportunity to present their reasons for nondisclosure.

But, as the Legislature stated, **"Your Committee wishes to emphasize that while a person has the 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 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."**[2]

This clear expression of legislative intent undercuts the misguided testimony presented by the Office of the Governor, the Office of Information Practices and the dozen other state agencies supporting the Senate version of this bill. I read all of these testimonies and not one state agency gave one grievance at all why they needed to appeal or why they declined to seek legislative redress to include another reason for nondisclosure of their record.

These testimonies are misguided and wrong in stating, as the Governor's office did: "There is some question as to whether agencies can file a similar appeal from an OIP decision that directs an agency to disclose a requested record, in the circuit court." The legislative history is crystal clear: there is no question or ambiguity that OIP can be sued by an agency.

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[1] Conference Committee Report 112-88 on H.B. No. 2002, *House Journal* at 817-819 (1988).

[2] Conference Committee Report 167 on S.B. No. 1799, *House Journal* at 843 (1989). I will distribute at today's hearing the full text of this report.

If the Commmittee passes and the Legislature enacts this bill, it will prove disastrous in these foreseeable ways:

- **the Legislature will be abdicating its responsibilities to define public policy on this vital issue, thus reversing the legislative intent expressed 13 years ago that has stood the test of time;**
- **Enacting this bill will diminish and fragment the authority of the OIP, provide fewer assurances with its limited resources of its being able to serve the public and undercut uniformity and efficiency in government;**
- **Enacting this bill will create confusion and delay and waste taxpayer moneies by allowing government agencies to sue each other at a time when agencies are strapped for resources to provide even essential services to the public;**
- **Enactment will unnecessarily give rise to cases in the court system that is already overburdened deciding critical social, economic and criminal issues.**

SB 2858 is the Governor's bill; historically executive branch agencies at federal, state and city levels have served as roadblocks to public access to government records they hold. The public needs protection against their abuses and unnecessary refusals.

The part of bill relating to Chapter 92F on open records should simply be deleted; it is unnecessary and disastrous. It pains me to say that Governor Abercrombie is the most secretive governor in the 25 years since the inception of this landmark open-records statute -- and that includes governors of both parties during turbulent times. It is also bitterly ironic that such a bill so sabotaging the public interest is being considered during Sunshine Week that reminds us all that "sunshine is the best disinfectant."

THE SUNSHINE LAW ON OPEN GOVERNMENT MEETINGS

Now let's unravel the misguided confusion arising in the second part of this bill, the so-called Sunshine Law on open meetings in Chapter 92. This was enacted in 1975 in the aftermath of the Watergate scandal when citizens were

demanding more accountability from and access to government meetings. It predates by decades the establishment of OIP but the Legislature later directed OIP to administer it.

Confusion arose in 2005 when Kauai County brought an action in court against OIP to invalidate an OIP decision that directed the Kauai Council to disclose a redacted version of executive (closed) meeting minutes.[3]

OIP looked to the Open-Records statute and argued that it could not be sued. But the circuit court looked to the open-records statute, specifically HRS 92F-12(a)(7) stating that the County was required to disclose "minutes of all agency meetings required by law to be public."

But, the Court ruled, the "law" to be followed was found in Chapter 92—the Sunshine Law. For four years, the case wended through the courts until 2009 when the Hawaii Supreme Court decided that OIP had erred in following the open-record statute. Instead OIP should have examined at the more specific open-meetings statute, that is silent on whether boards can bring suit against OIP for its decision.

The Court held that OIP's decision to redact attorney-client portions of this closed meeting was impractical because most of the conversation during the session between council and county attorney concerned legal matters pertaining to the council's powers, duties, and immunities, i.e. the proper procedure to following conducting an investigation into the practices of the police department and the ramifications of the Sunshine Law on the investigation.

IMPORT OF COURT RULING ON S.B. 2858

The result for this bill: all the portions of this bill on Chapter 92 are unnecessary, cumbersome and deter the public from gaining access to government operations.

The Supreme Court has given OIP clear guidance on which law to follow and on giving greater latitude when a board consults with its attorney. OIP may want to provide further instruction to boards that when meeting in executive sessions they should specifically indicate in

[3] County of Kauai vs OIP. Because this case is so significant here, I'll distribute copies at it during the House hearing.

their records what provision of the Sunshine Law it is invoking to bar the public from its session.

With OIP now aware of this case law, I recommend that Legislature forestall any future confusion and potential lawsuits by adding a new section to the Sunshine Law that echoes and paraphrases the clear intent the Legislature encompassed in the open-records law:

The Legislature wishes to emphasize that while a person has the right to bring a civil action in circuit court to appeal a denial of access to a government meeting, a government board 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 meetings would be frustrated by agencies suing each other."[4]

Because this bill is also going to the Finance Committee, I further recommend that OIP be given badly needed resources that will enable it to serve the public in a timely manner.

Respectfully submitted,

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

[4] Conference Committee Report 167 on S.B. No. 1799, *House Journal* at 843 (1989). I will distribute at today's hearing the full text of this report.