

Chair Hee, Vice Chair Shimabukuro, and members of the Committee:

The Office of the Governor strongly supports S.B. No. 2858.

This bill amends chapter 92F, Hawaii Revised Statutes, to create a process for an agency to obtain judicial review of the Office of Information Practices (OIP) decisions.

The Uniform Information Practices Act (Modified) presently allows members of the public whose record requests are denied by an agency to challenge that denial by asking the OIP to review the agency's denial, and to bring an action for a *de novo* review of an adverse OIP decision, in the circuit court. 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. This bill makes clear that an agency can appeal an adverse OIP ruling. Government agencies, just like members of the public, ought to have an opportunity to have a judicial review of an adverse OIP ruling. This bill provides that opportunity. However, when an agency files an appeal, the court must uphold OIP's decision unless the court determines that the decision is palpably erroneous.

This bill also makes the palpably erroneous standard of review applicable to appeals agencies bring from OIP decisions issued under part I of chapter 92, Hawaii Revised Statutes, the State's Sunshine Law. Adopting a uniform standard of review makes sense and will remove confusion over the matter.

Thank you for allowing us the opportunity to present this testimony in support of this bill.



LATE TESTIMONY

NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR

**STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS**

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KEALI'I S. LOPEZ
DIRECTOR

DEPUTY DIRECTOR

**PRESENTATION OF THE
PROFESSIONAL AND VOCATIONAL LICENSING DIVISION**

TO THE SENATE COMMITTEE ON JUDICIARY AND LABOR

TWENTY-SIXTH LEGISLATURE
Regular Session of 2012

Thursday, February 2, 2012
9:30 a.m.

WRITTEN TESTIMONY ONLY

TESTIMONY ON SENATE BILL NO. 2858, RELATING TO OPEN GOVERNMENT.

TO THE HONORABLE CLAYTON HEE, CHAIR,
AND MEMBERS OF THE COMMITTEE:

My name is Celia Suzuki, Licensing Administrator for the Professional and Vocational Licensing Division ("Division"), Department of Commerce and Consumer Affairs ("Department"). The Department appreciates the opportunity to testify in support of Senate Bill No. 2858, Relating to Open Government.

The purpose of Senate Bill No. 2858 is to clarify current law and would create a uniform process under the Uniform Information Practices Act and the Sunshine Law that would allow government agencies and boards, and not just requesters, to judicially challenge certain decisions of the Office of Information Practices ("OIP").

Testimony on Senate Bill No. 2858
Thursday, February 2, 2012
Page 2

The Division is responsible for implementing the licensing regulations for forty-seven (47) boards, commissions, and programs. There are twenty-five (25) boards and commissions that are administratively attached to the Department. The bill sets a fair standard for the courts to review OIP's decisions under both laws. While it is not the practice of the boards to routinely challenge OIP decisions, the bill would allow the courts to review OIP decisions in extraordinary cases.

Thank you for the opportunity to testify in support of Senate Bill No. 2858.

NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR



STATE OF HAWAII
DEPARTMENT OF TAXATION
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FREDERICK D. PABLO
DIRECTOR OF TAXATION

RANDOLF L. M. BALDEMOR
DEPUTY DIRECTOR

LATE TESTIMONY

To: The Honorable Suzanne Clayton Hee, Chair
and Members of the Senate Committee on Judiciary and Labor

Date: Tuesday, February 2, 2012
Time: 9:30a.m.
Place: Conference Room 016, State Capitol

From: Frederick D. Pablo, Director
Department of Taxation

Re: S. B. 2858, Relating to Open Government

The Department of Taxation (Department) supports the adoption of S.B. 2858.

S.B. 2858 creates a uniform process for judicial review of an Office of Information Practices (OIP) ruling for governmental agencies. Currently, governmental agencies have no opportunity to appeal a ruling from OIP.

The Department agrees with the intent of the bill, as it is consistent with case law, and provides government agencies with an opportunity to have a third party review OIP's rulings. At the same time, sufficient safeguards are in place to insure that agencies will not be able to use the appeal process to frustrate information requests by the public.

Thank you for the opportunity to provide comments.

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

LORETTA FUDDY, ACSW, MPH
DIRECTOR OF HEALTH



STATE OF HAWAII
EXECUTIVE OFFICE ON AGING
NO. 1 CAPITOL DISTRICT
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WESLEY LUM, PhD, MPH
DIRECTOR

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LATE TESTIMONY

Committee on Judiciary and Labor

SB2858, RELATING TO OPEN GOVERNMENT

**Testimony of Wes Lum
Director, Executive Office on Aging
Attached Agency to Department of Health**

Thursday, February 2, 2012; Conference Room 016

9:30 a.m.

- 1 **Department's Position:** The Executive Office on Aging (EOA) strongly supports this measure.
- 2 SB2858 is part of Governor Abercrombie's Administrative Bill Package.
- 3 **Fiscal Implications:** None.
- 4 **Purpose and Justification:** This proposal would clarify an agency's right to judicially appeal an
- 5 Office of Information Practices' decision on a request for access to a record, where no appeal
- 6 process was previously allowed. EOA supports this measure because it would allow fairness for all
- 7 parties involved through the judicial process. Thank you for the opportunity to testify.

NEIL ABERCROMBIE
GOVERNOR



HAKIM OUANSAFI
EXECUTIVE DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES
HAWAII PUBLIC HOUSING AUTHORITY
1002 NORTH SCHOOL STREET
Honolulu, Hawaii 96817

BARBARA E. ARASHIRO
EXECUTIVE ASSISTANT

LATE TESTIMONY

Statement of
David J. Gierlach
Hawaii Public Housing Authority
Before the

SENATE COMMITTEE ON JUDICIARY AND LABOR

February 2, 2012 9:30 A.M.
Room 016, Hawaii State Capitol

In consideration of
Senate Bill 2858
Relating to Open Government

Honorable Chair and Members of the Senate Committee on Judiciary and Labor, thank you for the opportunity to provide you with comments regarding Senate Bill 2858, relating to Open Government.

The Hawaii Public Housing Authority (HPHA) strongly **supports** this bill, which would clarify current law and would create a uniform process under the Uniform Information Practices Act and the Sunshine Law that would allow government agencies and boards, and not just the requesters, to judicially challenge certain decisions of the Office of Information Practices (OIP). The bill sets a strong, yet fair, standard for the courts to review OIP's decisions under both laws. While it is not the board's practice or intent to routinely challenge OIP decisions, this bill would allow the courts to review OIP decisions in an extraordinary case.

The HPHA appreciates the opportunity to provide the Senate Committee on Judiciary and Labor with the agency's position regarding S.B. 2858. We respectfully request this Committee to act favorably upon this bill.

NEIL ABERCROMBIE
GOVERNOR



HAKIM OUANSAFI
EXECUTIVE DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES
HAWAII PUBLIC HOUSING AUTHORITY
1002 North School Street
Honolulu, Hawaii 96817

BARBARA E. ARASHIRO
EXECUTIVE ASSISTANT

IN REPLY REFER TO:

TO Senator Maile S.L. Shimabukuro, Vice Chair
Senate Committee on Judiciary and Labor
State Capitol Room 223
RE Testimony re: Senate Bill 2858

DATE February 1, 2012
ATTENTION Committee Clerk

WE ARE SENDING YOU Attached
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1	2/1/2012		Hawaii Public Housing Authority Testimonial Submission

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REMARKS Hawaii Public Housing Authority (HPHA) is providing the Senate Committee on Judiciary and Labor with written testimony for Senate Bill 2858, scheduled for public hearing on February 2, 2012 at 9:30 A.M.

IF THERE ARE ANY QUESTIONS PLEASE CONTACT: Nicholas Birck, Chief Planner, 832-4673

SIGNED:

COPY TO _____

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 Senate Committee on
JUDICIARY AND LABOR**

**Thursday, February 2, 2012
9:30 AM
State Capitol, Conference Room 016**

**In consideration of
SENATE BILL 2858
RELATING TO OPEN GOVERNMENT.**

Senate Bill 2858 establishes a process for an agency to obtain judicial review of Office of Information Practices (OIP) decisions made under either part I of chapter 92 or chapter 92F, Hawaii Revised Statutes, and also clarifies the standard of review. The Department of Land and Natural Resources (Department) strongly supports this Administration bill.

Senate Bill 2858 will provide a uniform system that allows agencies the option to challenge an OIP opinion under either the Sunshine Law or the Uniform Information Practices Act (UIPA). This will clarify when, and under what standard, judicial review of OIP's decisions is available, and will eliminate any agency confusion regarding this issue, thus allowing administration of the open records and open meetings law to work more smoothly and efficiently.

The Department is subject to both Sunshine Law and UIPA, and supports Senate Bill 2858 for the aforementioned reasons.

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

LATE TESTIMONY

NEIL ABERCROMIE
GOVERNOR



DWIGHT TAKAMINE
DIRECTOR

AUDREY HIDANO
DEPUTY DIRECTOR

SERAFIN P. COLMENARES JR.
EXECUTIVE DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
OFFICE OF LANGUAGE ACCESS

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LATE TESTIMONY

To: Senate Committee on Judiciary and Labor

From: Serafin Colmenares Jr.
Executive Director, Office of Language Access

Date: February 2, 2012, 9:30 a.m.
State Capitol, Room 016

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

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

The Office of Language Access strongly supports this bill, which would clarify current law and would create a uniform process under the Uniform Information Practices Act and the Sunshine Law that would allow government agencies and boards, and not just the requesters, to judicially challenge certain decisions of the Office of Information Practices (OIP). The bill sets a strong, yet fair, standard for the courts to review OIP's decisions under both laws. While it is not the board's practice or intent to routinely challenge OIP decisions, this bill would allow the courts to review OIP decisions in an extraordinary case. Therefore, we urge this Committee to act favorably upon this bill.



LATE TESTIMONY

NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR

**STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS**

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KEALI'I S. LOPEZ
DIRECTOR

DEPUTY DIRECTOR

**PRESENTATION OF THE
PROFESSIONAL AND VOCATIONAL LICENSING DIVISION**

TO THE SENATE COMMITTEE ON JUDICIARY AND LABOR

TWENTY-SIXTH LEGISLATURE
Regular Session of 2012

Thursday, February 2, 2012
9:30 a.m.

WRITTEN TESTIMONY ONLY

TESTIMONY ON SENATE BILL NO. 2858, RELATING TO OPEN GOVERNMENT.

TO THE HONORABLE CLAYTON HEE, CHAIR,
AND MEMBERS OF THE COMMITTEE:

My name is Celia Suzuki, Licensing Administrator for the Professional and Vocational Licensing Division ("Division"), Department of Commerce and Consumer Affairs ("Department"). The Department appreciates the opportunity to testify in support of Senate Bill No. 2858, Relating to Open Government.

The purpose of Senate Bill No. 2858 is to clarify current law and would create a uniform process under the Uniform Information Practices Act and the Sunshine Law that would allow government agencies and boards, and not just requesters, to judicially challenge certain decisions of the Office of Information Practices ("OIP").

NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR



STATE OF HAWAII
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FREDERICK D. PABLO
DIRECTOR OF TAXATION

RANDOLF L. M. BALDEMOR
DEPUTY DIRECTOR

LATE TESTIMONY

To: The Honorable Suzanne Clayton Hee, Chair
and Members of the Senate Committee on Judiciary and Labor

Date: Tuesday, February 2, 2012
Time: 9:30a.m.
Place: Conference Room 016, State Capitol

From: Frederick D. Pablo, Director
Department of Taxation

Re: S. B. 2858, Relating to Open Government

The Department of Taxation (Department) supports the adoption of S.B. 2858.

S.B. 2858 creates a uniform process for judicial review of an Office of Information Practices (OIP) ruling for governmental agencies. Currently, governmental agencies have no opportunity to appeal a ruling from OIP.

The Department agrees with the intent of the bill, as it is consistent with case law, and provides government agencies with an opportunity to have a third party review OIP's rulings. At the same time, sufficient safeguards are in place to insure that agencies will not be able to use the appeal process to frustrate information requests by the public.

Thank you for the opportunity to provide comments.

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: Senate Committee on Judiciary and Labor
From: Cheryl Kakazu Park, Director
Date: February 2, 2012, 9:30 a.m.
State Capitol, Room 016
Re: Testimony on S.B. No. 2858
Relating to Open Government

LATE TESTIMONY

Thank you for the opportunity to submit testimony on S.B. No. 2858.

OIP strongly supports this 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), which would 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. The Sunshine Law does not specifically permit an agency's appeal of an OIP decision, but it does allow "any person" to go to court to determine the law's applicability to a board's discussions or decisions, and it does not specify who the opposing party should be if such a lawsuit is brought by a board. The court therefore concluded that a board could sue OIP when it disagreed with OIP's interpretation of the 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.

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

Under OIP's proposal, OIP or a member of the public affected by the decision shall not be required to participate in the judicial appeal, which would essentially

be a review of OIP's opinion and be limited to the record that was before OIP. 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). The codification of a high standard of review for the agency appeals process 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.

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, 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.

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. To give OIP time to adopt administrative rules, the bill's effective date would be January 1, 2013.

In conclusion, OIP requests this Committee's support of S.B. 2858, 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.

Thank you for considering our proposed legislation.



LATE TESTIMONY

HAWAII COMMUNITY
DEVELOPMENT AUTHORITY



STATEMENT OF

ANTHONY J. H. CHING, EXECUTIVE DIRECTOR
HAWAII COMMUNITY DEVELOPMENT AUTHORITY

BEFORE THE

SENATE COMMITTEE ON JUDICIARY AND LABOR

Thursday, February 2, 2012

9:30 A.M.

State Capitol, Conference Room 016

in consideration of

S. B. 2858 – RELATING TO OPEN GOVERNMENT.

The Hawaii Community Development Authority supports this bill as it seeks to give government agencies the right to obtain judicial review of an Office of Information Practices (“OIP”) opinion under a ‘palpably erroneous’ standard by bringing suit against the decision itself, rather than the OIP or member of the public who originally requested the opinion.

Thank you for the opportunity to testify in support of this proposal.

Neil Abercrombie
Governor

Joseph L. Dwight, IV
Chairperson

Anthony J. H. Ching
Executive Director

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G. Riki Hokama
Michael P. Victorino
Mike White



Director of Council Services
Ken Fukuoka

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LATE TESTIMONY

February 1, 2012

The Honorable Clayton Hee, Chair
Senate Committee on Judiciary and Labor
State Capitol, Room 407
Honolulu, Hawaii 96813

Dear Chair Hee:

**SUBJECT: HEARING OF FEBRUARY 2, 2012; TESTIMONY IN
OPPOSITION TO SB 2858 RELATING TO OPEN
GOVERNMENT**

As the Lanai representative on the Maui County Council, I would like to offer testimony in opposition to the subject bill. The purpose of this measure is to grant the State Office of Information Practices (OIP) quasi-judicial authority to enforce the Sunshine Law.

I oppose the measure, because it would establish the OIP as a "judge and jury". The agency would have the authority to render opinions of law and to adjudicate challenges to these opinions. This situation would create the potential for abuse, particularly in a contentious challenge between OIP and an agency. It is particularly disconcerting that an appointed State agency could dictate to an elected county council how to conduct business before the community it serves and is accountable to.

I understand that Maui County Council Chair Danny A. Mateo has also submitted testimony in opposition to this measure.

Thank you for the opportunity to offer testimony in opposition.

Sincerely,

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

RIKI HOKAMA
Council Member-Lanai seat

cc: Council Chair Danny A. Mateo



LEAGUE OF
WOMEN VOTERS*

League of Women Voters of Hawaii

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LATE TESTIMONY

Senate Committee on Judiciary and Labor
Chair Sen. Clayton Hee, Vice Chair Sen. Maile S.L. Shimabukuro

Thursday 2/2/12 at 9:30 AM in Room 016
SB 2858 — RELATING TO OPEN GOVERNMENT

TESTIMONY

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

Chair Hee, Vice Chair Shimabukuro, and Committee Members:

The League of Women Voters supports this bill but requests two amendments.

First, we recommend that the bill set a reasonable time limit within which an agency may appeal a decision by the Office of Information Practices (OIP). Appeals would be prohibited unless filed within the time limit.

Second, unless an agency has filed a timely appeal of an OIP decision, we recommend that the bill prohibit an agency from later challenging the decision. Without such a prohibition, a member of the public filing an action to compel agency compliance with an OIP decision might find themselves fighting an agency challenge of that decision.

Thank you for the opportunity to submit testimony.

LATE TESTIMONY

Larry Geller
Honolulu, HI 96817

Committee on the Judiciary
Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

SB2858
JDL
Thursday, February 2, 2012
9:30 a.m.
Room 016

February 2, 2012

Re: SB2858—Relating to Open Government

In Opposition

Dear Senator Hee, Senator Shimabukuro, and members of the Committee:

Although OIP testimony on this bill states that it was legislative intent to prevent lawsuits between agencies, the greater purpose of the Uniform Information Practices Act, and the clear legislative intent in formulating the open meetings and open records laws was to provide for easy and expedited access by the public to government records and government process.

The UIPA requires that OIP issue opinions as appropriate and also allows for legal challenge.

This bill would allow OIP to abdicate its responsibilities under current law and force the public to go to court. Eliminating the risk of default should a party not appear appears bogus--if you want to win in court you need be there, telling it to the judge.

This seems contrary to the purpose of the UIPA and to legislative intent. It would mean, since a court challenge is expensive, that the public would be denied access to government documents.

The bill introduces a "palpably erroneous standard", but to establish that you already need to be in court.

For most people, going to court is an extreme and expensive measure. It appears that even OIP isn't fond of that option. But that's the inevitable consequence should this bill become law.

The current statute is clear on OIP's responsibility:

§92F-15.5 Alternative method to appeal a denial of access. (a) When an agency denies a person access to a government record, the person may appeal the denial to the office of information practices in accordance with rules adopted pursuant to section 92F-42(12). A decision to appeal to the office of information practices for review of the agency denial shall not prejudice the person's right to appeal to the circuit court after a decision is made by the office of information practices.

(b) If the decision is to disclose, the office of information practices **shall** notify the person and the agency, and the agency **shall** make the record available. If the denial of access is upheld, in whole or in part, the office of information practices **shall**, in writing, notify the person of the

decision, the reasons for the decision, and the right to bring a judicial action under section 92F-15(a). [L 1989, c 192, §1].

Despite this, OIP has decided that its greater responsibility is to prevent agencies from suing each other.

Instead of passing this bill, it would be a greater service to the public if this Committee would ask OIP what part of "shall" do they not understand, and if necessary, strengthen the existing law so that OIP's opinion becomes the final word, and that the agency in question has to disclose the document within a certain time.

Larry Geller

Written Testimony Only

February 1, 2012

LATE TESTIMONY

The Honorable Clayton Hee,
Chair, Senate Committee on Judiciary and Labor

The Honorable Maile Shimabukuro
Vice Chair, Senate Committee on Judiciary and Labor

Re: SB 2858 - Relating to Open Government

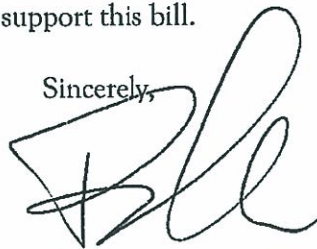
Dear Chairman Hee, Vice Chairman Shimabukuro, and Members of the JDL Committee

My name is Paul Naso. I am the General Counsel of the Hawaii Employers' Mutual Insurance Company, Inc. ("HEMIC"). I am submitting written testimony in support of SB 2858.

HEMIC believe that transparency and openness of government needs to be coupled with fairness in the procedures. The bill will improve the fairness by allowing further clarification of the appeals process.

We respectfully request this committee to support this bill.

Sincerely,



Paul Naso, General Counsel
Hawaii Employers' Mutual Insurance Company, Inc.

PN:rm

**OFFICE OF THE MAYOR
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

January 31, 2012

The Honorable Clayton Hee, Chair
and Members of the Judiciary and
Labor Committee
The Senate
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Hee and Committee Members:

Re: S.B. 2858, Relating to Open Government

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

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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.

Very truly yours,



Douglas S. Chin
Managing Director