William P. Kenoi
Mayor

Molly A. Stebbins
Corporation Counsel

Laureen L. Martin
Assistant Corporation Counsel

COUNTY OF HAWAIʻI
OFFICE OF THE CORPORATION COUNSEL

101 Aupuni Street, Suite 325 • Hilo, Hawaiʻi 96720 • (808) 961-8251 • Fax (808) 961-8622

February 4, 2015

Representative Karl Rhoads, Chair
and Members
Committee on Judiciary
State Capitol
415 South Beretania Street
Honolulu, Hawaiʻi 96813

Re: ***Testimony in Opposition to House Bill No. 786***
Hearing: Thursday, February 5, 2015, 2:00 p.m., Conference Room 325

Dear Chair Rhoads and Members of the Committee:

The County of Hawaiʻi's Office of the Corporation Counsel ("County") opposes House Bill No. 786 because it may impose unprecedented liability upon the State and Counties. Pursuant to HRS, Chapter 92F, the State and Counties are required to make a large number of records open for public inspection in order to have government business as open as possible. HRS § 92F-2.

Bill No. 786 seeks to create a duty to exercise reasonable care in the maintenance of all government records. As result, the government would be forced to keep records indefinitely despite the presence of reasonable record retention policies. This would result in additional liability to the government and hold the government to an impossible standard and burden. No entity or person is capable of keeping records and files in perfect order and condition.

Although Bill 786 only requires reasonable care, this will likely create extensive and expensive litigation and liability. Should someone file a lawsuit alleging the failure of reasonable care in maintaining a government record, the question of whether the government exercised reasonable care will likely be a question of fact precluding the dismissal. Instead, a costly jury trial would determine whether reasonable care was used in maintaining a record as well as determining what damages the Plaintiff is entitled to.

As a result, Bill 786 would force the State and Counties to devote precious resources in order to maintain every record it possesses and defend frivolous lawsuits for the alleged failure

to maintain records. Government resources are better used for core essential and important functions.

Bill 786 is also contrary to HRS §92F-16 which provides for immunity from liability for anyone who participated in good faith in the disclosure or nondisclosure of a government record. This is consistent with federal law. *See Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 100 S.Ct. 960 (1980).

Most States, as well as the Federal government, require government records to be public. However, no other State or the Federal government imposes liability for negligently maintaining a government record. Hawaii should not be the first and only State to impose liability for the failure to maintain records.

Finally, the duty referenced in *Molfino v. Yuen*, refers to a legal duty in which liability may be imposed. In determining whether to impose such a duty, an important consideration is "how far it is desirable and socially expedient to permit the loss distributing function of tort law to apply to governmental agencies, without thereby unduly interfering with the effective functioning of such agencies for their own socially approved ends." *Cootey v. Sun Inv., Inc.*, 68 Haw. 480, 485, 718 P.2d 1086, 1090 (1986). "Without a reasonable and proper limitation of the scope of duty of care owed…the County would be confronted with an unmanageable, unbearable, and totally unpredictable liability." *Id.* at 484, 718 P.2d at 1090.

"…The imposition of a duty that required absolute and completely correct information as to every detail, including the requirement that nothing be left out would establish an intolerable and probably unachievable standard of conduct (emphasis added)." *Gale v. Value Line, Inc*., 640 F.Supp. 967, 971-972 (D.R.I.,1986), *see also*, *Chanoff v. U.S. Surgical Corp*., 857 F.Supp. 1011, 1022 (D.Conn.,1994)(recognizing duty to general public would result in indeterminate amount for an indeterminate time to an indeterminate class would be contrary to the language and intent of Section 552); *In re Delmarva Securities Litigation*, 794 F.Supp. 1293, 1310-1311 (D.Del.,1992); *Layton v. Florida Dept. of Highway Safety & Motor Vehicles*, 676 So.2d 1038, 1040 (Fla.App. 1 Dist.,1996) (creating a duty to maintain and provide accurate information would open for multitudinous litigation with respect to the accuracy of information provided by the government concerning a wide range of public records); *Association of Apartment Owners of Newtown Meadows ex rel. its Bd. of Directors v. Venture 15, Inc.*, 115 Hawai'i 232, 263, 167 P.3d 225, 256 (2007); *White v. Sabatino*, 526 F.Supp.2d 1143, 1158 (D.Hawai'i,2007) (finding "unmanageable and unpredictable liability, which would inhibit and interfere with the… promulgation and enforcement of beneficial rules and thus hurt the public's interest"); *Friedberg v. Town of Longboat Key*, 504 So.2d 52

(Fla.App. 2 Dist.,1987) (no duty to individual because it would open door to multitudinous litigation).

For all of the above reasons, the County respectfully opposes Bill 786. Should you have any questions, please do not hesitate to contact me at (808) 961-8251.

Sincerely,

Feb 4 2015 1:54 PM

MOLLY A. STEBBINS
Corporation Counsel

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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: February 5, 2015, 2:00 p.m.
State Capitol, Conference Room 325

Re: Testimony on H.B. No. 786
Relating to Government Records

Thank you for the opportunity to submit testimony on this bill. The Office of Information Practices ("OIP") supports the intent of H.B. 786, which would require government agencies to exercise reasonable care in maintaining government records, but OIP is concerned that the requirement in its present form is impractical and overbroad and would lead to increased litigation.

The Uniform Information Practices Act, chapter 92F, HRS ("UIPA"), requires an agency to provide public access to government records the agency maintains, unless an exception to disclosure applies. The definition of government record is a broad one, encompassing essentially all the information the agency keeps in tangible form. It is not limited to records an agency is required by law to maintain, or to what an agency might consider its "official" records; rather, it includes everything from e-mails to handwritten notes to clippings files, in addition to an agency's more formal correspondence files or case or contract files. Under the UIPA, unless an exception to disclosure applies, any government record is required to be available for public inspection upon request, and where an exception applies to only part of the record, a redacted version of the record must be provided.

Despite its broad definition of a government record, the UIPA in its present form only applies to records that an agency actually has, and not to records that an agency should have but does not keep. Even when another law requires an agency to keep a certain record, if the agency can demonstrate that it does not have the record, the agency's failure to produce it does not violate the UIPA. (It may, of course, violate another law requiring the agency to keep the record in question.)

Because of the current law's broad definition of "government record," this bill as written would apply to essentially every piece of paper in an agency's office and every file on its computers, and could create potential legal liability for the agency whenever an employee cleans out old files, deletes old e-mails, or records over an audiotape. This bill would make the failure to follow a retention schedule the basis for a claim of negligence, subject to damages.

It may also create liability if a document is maintained by an agency, but has been temporarily removed from a file for review by a government employee, and the rest of the file is provided for public inspection or is reviewed by another employee as the basis for a governmental decision. That is apparently what happened in Molfino v. Yuen, 339 P.3d 679 (2014), where a particular letter was not in the file at the time the agency reviewed the file and erroneously, but not in bad faith, informed an owner that his property was approved for only two, not seven, lots.

As the Hawaii Supreme Court recognized in Molfino, the UIPA does not "impose tort liability upon a government agency for its failure to maintain government records in accurate, relevant, timely, and complete condition at all times" and "when read as a whole, does not reflect a legislative intent to impose tort liability for merely negligent acts or omissions of government agencies in the maintenance of public records." Id. at 684-85. While the UIPA imposes criminal

penalties for intentional violations of confidentiality, the Court recognized that HRS § 92F-16 provides immunity from liability to those "participating in good faith in the disclosure or nondisclosure of a government record" and expressly imposes criminal, not civil, liability. Id. at 685. This bill, however, creates a new "duty of reasonable care" that would apparently permit civil actions grounded in tort for negligence and would lead to additional litigation under the UIPA.

If a new duty of care, which provides the basis for a cause of action for negligence, is being added to the UIPA, then the law should be clear that complaints alleging a breach of that duty may not be brought before the Office of Information Practices and can only be brought directly in court, where court opinions, rules and procedures relating to tort actions would govern. Additionally, the duty of care and records that would be subject to such action should be clearly and narrowly defined. Moreover, any damages that are recoverable under the new tort being created by this bill should also be clearly defined and limited.

OIP believes that encouraging agencies to be attentive to existing retention schedules and to take care with their "official" files is a laudable goal, but the broad application of this bill, combined with the legal liability it creates, makes the proposal an impractical solution as currently written. OIP has been asked by the Senate Judiciary and Labor Committee to provide suggestions to amend the companion bill, SB 140. OIP has requested the input of the Executive Branch departments and hopes to have a draft ready during the week of February 17, which it will also share with the House Judiciary Committee for its consideration.

ALAN M. ARAKAWA
Mayor

PATRICK K. WONG
Acting Corporation Counsel

EDWARD S. KUSHI
Acting First Deputy

LYDIA A. TODA
Risk Management Officer
Tel. No. (808) 270-7535
Fax No. (808) 270-1761

LATE

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET, 3RD FLOOR
WAILUKU, MAUI, HAWAII 96793
EMAIL: CORPCOUN@MAUICOUNTY.GOV
TELEPHONE: (808) 270-7740
FACSIMILE: (808) 270-7152

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Representative Karl Rhoads, Chair
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415 South Beretania Street
Honolulu, HI 96813

Re: Testimony in opposition to House Bill No. 786
Hearing: Thursday, February 5, 2015, Conference Room 325

Dear Chair Rhoads and Members of the Committee:

The County of Maui's Office of the Corporation Counsel opposes House Bill No. 786. As detailed in the letters submitted by the County of Hawaii's Office of the Corporation Counsel and the Office of Information Practices, this bill will expose the State and Counties to unprecedented liability. This exposure will lead to increased litigation and the expenditure of precious resources.

The Uniform Information Practices Act ("UIPA") currently provides public access to governmental records under Hawaii Revised Statutes Section 92. Unless there is an exception to the disclosure requirement, governmental entities are required to permit access to the records it maintains. If access is requested under the UIPA to records that the entity does not maintain, there is no violation of the UIPA.

Bill No. 786 would alter the UIPA requirement by forcing the entity to maintain every single piece of paper, every computer file and every audiotape. If every single piece of paper, every computer file and every audiotape has not been maintained, the potential for litigation exists. This is simply not a burden that should be imposed on any governmental entity. As such, the County of Maui respectfully opposes Bill 786.

If you have any questions, please contact me at (808) 270-7741.

Sincerely,

Patrick K. Wong
Acting Corporation Counsel

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