

# 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: April 7, 2015, 2:30 p.m.  
State Capitol, Conference Room 308

Re: Testimony on S.B. No. 140, H.D. 1  
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 S.B. 140, H.D. 1, which would require government agencies to exercise reasonable care in maintaining government records, but OIP has serious concerns regarding the increased litigation and unlimited tort liability it would create for county and state agencies, including the Legislature.

The duty of care proposed by HD 1 has been appropriately placed in chapter 94, which deals with retention and record management. The new duty of care, however, would apply to all government records that are open to public inspection under the Uniform Information Practices Act, chapter 92F, HRS (“UIPA”), which requires an agency to provide public access to government records the agency maintains, unless an exception to disclosure applies. The UIPA’s definition of government record (which the bill apparently incorporates) 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

emails 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. Thus, the proposed duty of care would apply to essentially every piece of paper in an agency's office and every file on its computers, and could create potentially unlimited legal liability for the agency whenever an employee fails to follow retention schedules in filing new documents, cleaning out old files, deleting old e-mails, or recording over an audiotape.

This bill 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, 134 Haw. 181 (Nov. 16, 2014), where a particular letter was not in the file at the time the agency reviewed the file and erroneously informed an owner that his property was approved for only two, not seven, lots.

As the Hawaii Supreme Court recognized in Molfino, the UIPA currently does not "impose tort liability upon a government agency for its failure to maintain government records" because it does not "create a statutory legal duty, flowing from the Planning Department to Molfino, to maintain a property's TMK file in accurate, relevant, timely, and complete condition at all times." Because neither the UIPA nor any other statute created a legal duty of care in maintaining records, the Molfino court rejected the plaintiff's tort claim against Hawaii County.

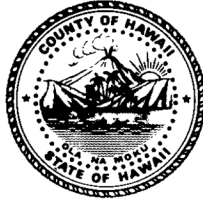
This bill, however, would create a new duty of care and thus expose state and county agencies, including the Legislature, to additional litigation for tort claims.

Because this bill sets no limit on the amount of damages that may be sought for a failure to use reasonable care in maintaining records, an agency may find itself potentially liable for an unlimited amount of damages if it cannot produce a requested record that was supposed to be kept for a certain period of time under its record retention schedule, which can be as long as forever for some records (*e.g.*, “permanent” retention required for certain appropriations and allotment reports; certain committee and conference files and legislative files). Other extraordinarily lengthy retention periods apply to personnel action reports, where the retention period is 30 years after termination of employment. Existing retention schedules were created on the assumption that a failure to follow them would **not** be penalized, so they may need to be amended to reflect any new liability for failure to follow a retention schedule. Agencies will need considerable time to develop and adopt new retention rules under Chapter 91, including public hearings.

The bill’s creation of new tort liability for monetary damages would be in addition to the existing criminal penalties found in Section 710-1017, which prohibits intentional tampering with a government record. Moreover, the UIPA already imposes criminal penalties for intentional violations of confidentiality and provides immunity from liability only to those “participating in good faith in the disclosure or nondisclosure of a government record.” *Id.*; HRS § 92F-16.

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 the new tort liability, combined with increased litigation and unlimited monetary damages, will create practical and fiscal difficulties that will strain the State’s resources.

William P. Kenoi  
Mayor



Molly A. Stebbins  
Corporation Counsel

William V. Brillhante, Jr.  
Assistant Corporation  
Counsel

COUNTY OF HAWAI‘I  
OFFICE OF THE CORPORATION COUNSEL

101 Aupuni Street, Suite 325 • Hilo, Hawaii 96720-4262 • (808) 961-8251 • Fax (808) 961-8622

April 6, 2015

Representative Sylvia Luke, Chair  
Representative Scott Y. Nishimoto, Vice-Chair  
Committee on Finance  
State Capitol  
415 South Beretania Street  
Honolulu, Hawai‘i 96813

Re: ***Testimony in Opposition to Senate Bill 140; HD1  
Hearing: Tuesday, April 7, 2015, Conference Room 308***

Dear Chair Luke, Vice-Chair Nishimoto and Members of the Committee:

The County of Hawai‘i’s Office of the Corporation Counsel (“County”) opposes Senate Bill 140, HD 1 because it may impose unprecedented liability upon the State and Counties.

Senate Bill No. 140, HD 1 imposes on agencies a duty of reasonable care in the maintenance of all records under their control that are required to be made available for public inspection. Government records are generally presumed to be open for public inspection, and include information maintained in written, auditory, visual, electronic, or other physical forms. HRS 92F-3. Thus, the scope of this duty of care is vast indeed and would apply to nearly all forms of government records.

Despite the amendment to create a rebuttable presumption of reasonable care if an agency has adhered with a duly adopted records retention schedule, the imposition of this statutory duty will still expose the State and Counties to unprecedented and extensive 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 any applicable damages.

Bill 140 HD1 would force the State and Counties to devote precious resources in order to perfectly maintain nearly every record it possesses and defend itself in expensive litigation. This

Chair Sylvia Luke, Vice-Chair Nishimoto  
and Members of the Finance Committee  
April 6, 2015  
Page 2

is an unreasonable burden to place upon the State and Counties. Government resources are better used for core essential and important functions.

It is important to note that no other State or the Federal government imposes liability for negligently maintaining a government record. Hawai'i 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.

For all of the above reasons, the County respectfully opposes Bill 140, HD1. Should you have any questions, please do not hesitate to contact me at (808) 961-8251.

Sincerely,

MOLLY A. STEBBINS  
Corporation Counsel

LLM:emc/mar



## 'ĀINA HAINA COMMUNITY ASSOCIATION

c/o 'Āina Haina Library, 5246 Kalanianaʻole Highway, Honolulu, HI 96821  
ainahainaassoc@gmail.com; www.ainahaina.org

Jeanne Ohta, President • Anson Rego, Vice-President • Art Mori, Treasurer • Kathy Takemoto,  
Secretary • Directors At Large: Wayson Chow, Devon James, Melia Lane-Kanahela, Gregg Kashiwa

---

January 27, 2015

To: Representative Sylvia Luke, Chair  
Representative Scott Nishimoto, Vice Chair and  
Members of the Committee on Finance

From: Jeanne Y. Ohta, President  
'Āina Haina Community Association

RE: SB 140 HD1 Relating to Government Records  
Hearing: Tuesday, April 7, 2015, 2:30 p.m., Room 308

Position: Support

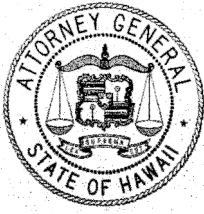
The Board of Directors of the 'Āina Haina Community Association write in support of SB 140 HD1 Relating to Government Records which would create a statutory requirement that government agencies exercise reasonable care in maintaining government records that are open to public inspection.

Government agencies need to be held accountable for the maintenance of documents. We believe further that a breach of this responsibility must have a remedy. As a community group, access to all relevant documents are necessary to our ability to be informed and to take action on a variety of community concerns.

While in most cases, government agencies have provided us access to documents, we have also learned that there are problems with the maintenance of these documents. As an example, we made numerous requests for a file from a city agency. These requests were made over several months and the file was never provided. We received the following reasons: "the file was missing," "the file must have been misplaced," "the file is lost;" and the most concerning reason: "the file never existed." Since we requested the file by its number, we are puzzled as to why a number was given to a non-existent file.

It's these kind of situations that are of concern and why we ask that government agencies be given the responsibility of exercising reasonable care in the maintenance of all government records under its control that are required to be made available for public inspections.

We respectfully request that the committee pass this measure. Thank you for the opportunity to provide testimony today.



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-EIGHTH LEGISLATURE, 2015**

---

**ON THE FOLLOWING MEASURE:**

S.B. NO. 140, H.D. 1, RELATING TO GOVERNMENT RECORDS.

**BEFORE THE:**

HOUSE COMMITTEE ON FINANCE

**LATE**

**DATE:** Tuesday, April 7, 2015

**TIME:** 2:30 p.m.

**LOCATION:** State Capitol, Room 308

**TESTIFIER(S):** Douglas S. Chin, Attorney General, or  
Stella M.L. Kam, Deputy Attorney General

---

Chair Luke and Members of the Committee:

The Department of the Attorney General provides the following comments on Senate Bill No. 140, H.D.1.

This bill proposes to add a new section to chapter 94, Hawaii Revised Statutes (HRS), that would require all state agencies to issue instructions and guidelines to its employees on the reasonable care in the maintenance of the agency's records that are subject to public disclosure under chapter 92F, HRS. We believe this new section may be unnecessary and serve to create confusion and needless litigation. First, requiring each agency to create its own instructions and guidelines for the maintenance of government records may result in widely varying standards among the agencies. Second, all state agencies are already required to maintain their records in accordance with the records retention schedules that are established by the agency and the State Archives pursuant to chapter 94, HRS, and there may be confusion and conflict between the agency's new "instructions and guidelines" and the already established records retention schedules.

We also note that placement of this bill's proposed provision in chapter 94, HRS, appears to be inappropriate. Chapter 94 is entitled, "Public Archives; Disposal of Records", whereas this bill addresses the maintenance of all government records that are required by chapter 92F to be available for public inspection. We understand the range of documents referenced in this bill to be far broader than that for which the public archives is responsible. Section 94-1, HRS, states the duties of the public archives are to "collect all public archives, arrange, classify, and inventory the same; provide for their safekeeping; and compile and furnish information

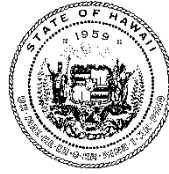
concerning them.” The public archives, established to be a repository of only those government records deemed to be archival material, does not appear to be the appropriate body to monitor and police whether all chapter 92F public government records have been properly maintained.

Finally, there is a criminal offense in the Hawaii Penal Code that may address the legislative concerns and the apparent objective of this bill. Section 710-1017, HRS, tampering with government records, makes it a misdemeanor if a person “intentionally destroys, mutilates, conceals, removes, or otherwise impairs the availability of any government records.” The commentary to this section states, “This section is intended to penalize conduct which undermines confidence in the accuracy of public records.”

We respectfully ask the Committee to hold this bill.



DAVID Y. IGE  
GOVERNOR



DOUGLAS MURDOCK  
Comptroller

AUDREY HIDANO  
Deputy Comptroller

**STATE OF HAWAII**  
**DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES**  
P.O. BOX 119, HONOLULU, HAWAII 96810-0119

**LATE**

WRITTEN TESTIMONY  
OF  
DOUGLAS MURDOCK, COMPTROLLER  
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES  
TO THE  
HOUSE COMMITTEE  
ON  
FINANCE  
ON  
April 7, 2015

S.B. 140, H.D. 1

RELATING TO GOVERNMENT RECORDS

Chair Luke and members of the committee, thank you for the opportunity to submit written testimony on S.B 140, H.D. 1. The Department of the Accounting and General Services (DAGS) supports the intent of this bill but feels strongly it is misplaced in Chapter 94, Hawaii Revised Statutes (HRS).

Chapter 94, HRS, entitled "Public Archives; Disposal of Records" empowers DAGS, (delegated to the State Archives), to acquire, maintain, provide access, and preserve government records determined to be of enduring value. Additionally, section 94-3, HRS, already requires public employees to maintain all records created or received in their usual and ordinary course of business according to an approved records retention schedule.

This bill specifically addresses the maintenance of those government records that are required by Chapter 92F, HRS, to be available for public inspection. The State Archives, as empowered by Chapter 94, HRS, has neither the responsibility nor the expertise in determining

whether an agency has achieved the proposed requirements of this bill with regards to the maintenance of records for public inspection. This bill would create an undue burden on the very limited resources of the State Archives and prevent us from fulfilling our statutory responsibilities stated in Chapter 94, HRS.

Furthermore, we believe that statutory requirements for reasonable care to maintain government records is already addressed by section 710-1017 (1) (d) (i) which clearly states that a person commits the misdemeanor offense of tampering with a government record when the person “intentionally destroys, mutilates, conceals, removes, or otherwise impairs the availability of any government records” when the person lacks the authority to do so. The commentary to this section states “This section is intended to penalize conduct which undermines confidence in the accuracy of public records.”

DAGS supports the bill’s intent to educate agency employees about the importance of providing reasonable care for records, but respectfully asks that these responsibilities not be placed in chapter 94, HRS.