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March 17, 2015

The Honorable Karl Rhoads, Chair
Committee on Judiciary
415 South Beretania Street, Room 302
Honolulu, Hawaii 96813

Dear Chair Rhoads and Committee Members:

Re: Testimony in Opposition to Senate Bill No. 140
Hearing: Tuesday, March 17, 2015, 2:00 p.m. Room 325

The Corporation Counsel of the City and County of Honolulu ("City") hereby submits its testimony in opposition to SB 140 because it imposes an unduly burdensome and unlimited liability on the State and County governments.

SB 140 would "create a statutory requirement that government agencies exercise reasonable care in maintaining those government records open to the public". Thus, the statutory duty of reasonable care would apply to nearly all forms of government records. In order to meet this duty, agencies would potentially have to maintain all records indefinitely. Failure to do so could expose agencies to unprecedented liability, would impose unreasonable staffing, storage and financial burdens on the agencies to maintain the records, and would render meaningless record retention policies that currently allow for the regular disposal of records that no longer need to be maintained.

The imposition of a statutory duty of reasonable care could also result in frequent litigation. Such a result will burden government with additional expenses and detract from providing public access to records, a primary purpose of HRS Chapter 92F. Limited government resources are better used for more productive purposes than indefinite maintenance of records and expensive litigation over an unprecedented legal duty.

We note that HRS § 92F-16 currently provides immunity from liability for persons participating in good faith in the disclosure or nondisclosure of a government record. We respectfully suggest that this existing statutory provision is an appropriate standard to apply to the many hardworking public servants who daily strive to carry out their important tasks, including responding to public record requests. By contrast, establishing potential liability for negligent maintenance of records is unreasonable and unduly burdensome.

For these reasons, the City opposes SB 140. Should you have any questions, please feel free to contact me.

Very truly yours,

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To: House Committee on Judiciary

From: Cheryl Kakazu Park, Director

Date: March 17, 2015, 2:00 p.m.
State Capitol, Conference Room 325

Re: Testimony on S.B. No. 140
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, which would require government agencies to exercise reasonable care in maintaining government records, but OIP opposes its present form and respectfully requests that it be amended.

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.

The UIPA in its present form only applies to records that an agency actually has, however, 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 the law requiring the agency to keep the record in question.)

Because of the 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 legal liability for the agency whenever an employee cleans out old files, deletes old e-mails, or records over an audiotape. Even assuming that deletion of old files is consistent with the exercise of reasonable care, this bill would still make the failure to follow such retention schedules a violation of the UIPA, and potentially also the basis for a claim of negligence.

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, 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 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." For this reason, the Molfino court rejected the plaintiff's tort claim against Hawaii County.

Maintaining records in "accurate, relevant, timely, and complete condition at all times" would be an extraordinarily high standard to meet, and would invite constant litigation seeking monetary damages, which the bill in its present form would place no limits on. The UIPA already imposes criminal penalties for intentional violations of confidentiality, and it provides immunity from liability only to those "participating in good faith in the disclosure or nondisclosure of a government record." Id.; HRS § 92F-16. This bill, however, would fill the gap noted by the Molfino court by creating a new "duty of reasonable care" that would, following the Molfino opinion, apparently permit tort actions for negligence and lead to additional litigation under the UIPA. Note that all state and county agencies, as well as the Legislature, would be subject to any new duty or liability placed in the UIPA.

If this bill is passed unamended, OIP fears that it will be inundated with additional complaints each time a requester is denied a record request. In addition to rights provided under the UIPA, a record requester may seek a determination from OIP that an agency violated its duty of care to maintain a record. If OIP agrees that the duty of care was violated, then the agency could appeal but be subjected to a strict standard of review to prove that OIP's finding was palpably erroneous. If OIP disagrees, then the requester has a second bite at the apple and can still bring a court case based on its tort claim.

In either event, the agency may find itself 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 agencies ("permanent" – e.g., certain appropriations and allotment reports; certain committee and conference files and legislative files), or in the case of personnel action reports, for 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. The development and adoption of new retention rules under Chapter 91, including public hearings, could take two years or more.

If it is not the Legislature's intent to create unlimited tort liability, then OIP respectfully requests that the bill be amended per the attached **Draft A** to specifically state that "nothing in this chapter shall subject an agency to liability" and to amend the purpose clause to clearly express this intent. The purpose clause in the proposed Draft A also recognizes that HRS Sec. 710-1017 already creates criminal liability for the intentional destruction or concealment of government records, and the UIPA does not provide immunity from civil or criminal liability unless a person is acting "in good faith" in the disclosure or nondisclosure of a government record. Finally, rather than placing the duty to maintain records in HRS chapter 92F, the proposed draft more appropriately places the duty in chapter 94. It is not OIP, but the Department of Accounting and General Services' Hawaii State Archives division, that sets out retention standards and record management advice for government records. Section 94-1.2 gives the State Archivist the responsibility for administering the state's records management program, advising and assisting state agencies in the preparation of record retention and disposition schedules, and providing records management training and technical assistance to agencies, as well as adopting rules to effectuate those duties. It would be inappropriate for OIP to interfere in the administration of that area by issuing opinions on whether an agency has followed the rules, training, and standards set by the State Archivist.

On the other hand, **if the Legislature does intend to allow a new cause of action** for negligence in maintaining government records, then attached **Draft B** would limit the State's liability. Draft B also makes clear in the purpose clause that the new tort actions may not be brought before the Office of Information Practices or the State Archives and can only be brought directly in court, where court opinions, rules, and procedures relating to tort actions would govern. Additionally, a limitation of damages to $2,000 per incident for breach of the new duty has been proposed in Draft B. OIP also suggests setting an effective date two years out to give agencies time to adopt new retention schedules.

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 potentially unlimited legal liability it creates, makes it an impractical solution. While OIP supports its intent, OIP cannot support this bill in its present form and hopes that this committee will either hold this bill or adopt one of OIP's proposed bill drafts.