

OFFICE OF INFORMATION PRACTICES

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To: Senate Committee on Judiciary and Labor

From: Cheryl Kakazu Park, Director

Date: January 27, 2015, 9:00 a.m.
State Capitol, Conference Room 016

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 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.

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 when permitted by the relevant state or county retention schedule 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, __ Haw. __ ((Nov. 16, 2014, WL 5905007), 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 in accurate, relevant, timely, and complete condition at all times." While the UIPA imposes criminal penalties for intentional violations of

confidentiality, it provides immunity from liability to those “participating in good faith in the disclosure or nondisclosure of a government record.” Id.; HRS § 92F-16. This bill, however, creates a new “duty of reasonable care” that would apparently permit tort actions for negligence and lead to additional litigation under the UIPA.

If a new cause of action for negligence is being added to the UIPA, then it should be clear that such actions 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.

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 it an impractical solution. While OIP supports its intent, OIP cannot support this bill in its present form.



Kokua Council

The **Kokua Council** is one of Hawaii's oldest advocacy groups. Kokua Council seeks to empower seniors and other concerned citizens to be effective advocates in shaping the future and well-being of our community, with particular attention to those needing help in advocating for themselves.

Legislative Testimony

Senate Committee on Judiciary and Labor

DATE: Tuesday, January 27, 2015
TIME: 9:00 am
PLACE: Conference Room 016

RE: SB 140 RELATING TO GOVERNMENT RECORDS.

Requires agencies to exercise reasonable care in the maintenance of all government records under its control that are required to be made available for public inspection.

***Kokua Council** supports the intent of SB 140. **However** we would like to point out that the availability of government records for public inspection for all Hawaii citizens requires more than taking care of hard copies. It requires those records to be posted on a web page for all to see. To date, Hawaii has not considered Internet access to be required for public access. Here are some reasons to change this policy:*

- 1. **For all residents of our Neighbor Islands, if it is not on the web, it is not, for practical purposes, available to the public.***
- 2. **For all residents who work during the day and cannot travel to a department to personally inspect records, if it is not on the web, it is not, for practical purposes, available to the public.***
- 3. **For any students or researchers, if it is not on the web, it is not, for practical purposes, available to the public.***
- 4. **For any resident who is not mobile, a driver, or in any way disabled, if it is not on the web, it is not, for practical purposes, available to the public.***
- 5. **For many seniors, if it is not on the web, it is not, for practical purposes, available to the public.***
- 6. **For attorneys or citizens who pay for attorneys, if it is not on the web, it is not, for practical purposes, available to the public – and thus an additional cost***

***Kokua Council** would respectfully point out that many important supposedly public documents are not available in *digital* form at all. Maintenance of records should, as matter of routine procedure, preservation in digital form and posting on the web.*

Mahalo for your sincere consideration of our testimony.

For more information, please contact our President Mr. Larry Gellar at gellar@igc.org



'ĀINA HAINA COMMUNITY ASSOCIATION

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

January 27, 2015

To: Senator Gilbert Keith-Agaran, Chair
Senator Maile Shimabukuro, Vice Chair and
Members of the Committee on Judiciary and Labor

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

RE: SB 140 Relating to Government Records
Hearing: Tuesday, January 27, 2015, 9:00 a.m., Room 016

Position: Support

The Board of Directors of the 'Āina Haina Community Association write in support of SB 140 Relating to Government Records.

Government agencies need to be held accountable for the maintenance of documents. 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 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.