OFFICE OF INFORMATION PRACTICES

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To: Senate Committee on Ways and Means

From: Cheryl Kakazu Park, Director

Date: February 24, 2016, 1:15 p.m.
State Capitol, Conference Room

Re: Testimony on S.B. No. 2294, S.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. 2294, S.D. 1, which would require government agencies to exercise reasonable care in maintaining government records, **but OIP requests that its effective date be delayed to give agencies time to prepare.**

This bill was amended by the Committee on Judiciary and Labor to, among other things, place the proposed new statute outside the Uniform Information Practices Act, chapter 92F, HRS ("UIPA"); create a rebuttable presumption that an agency adhering to its record retention schedule is exercising reasonable care in its record maintenance; and set a limitation on damages for a breach of the new duty of care. These amendments take care of the major concerns OIP previously had with this bill. The bill, however, will still create a new duty and potential liability that agencies will need time to prepare for, which is why OIP recommends delaying the effective date.

"Government records" is not specifically defined in the current version of the bill, but since the proposed language applies to "government records under

[an agency's] control that are required by chapter 92F to be available for public inspection," the term presumably has the same meaning as in the UIPA. The UIPA 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 press 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.

Because of the broad definition of "government record," this bill 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. T**his bill potentially would make the failure to reasonably maintain records the basis for a tort 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. **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 against state and county agencies and would lead to additional litigation and potential liability for damages, settlements, and legal fees and costs.**

Under the proposed bill, an agency may find itself liable for damages of up to $2,000 per violation if it cannot produce a requested record that was supposed to be kept for a certain period of time under its record retention policy, which can be as long as forever for some agencies ("permanent" retention required for 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 and destruction policy. Moreover, while DAGS has a general record retention schedule, **each agency has its own agency-specific records for which policies must be adopted or amended.** The development and adoption of new retention and destruction policies could take a year or more. Therefore, **OIP would recommend that the effective date for this bill be set at least a year out** to allow agencies to amend existing record

retention policies or adopt new internal policies. Further, **if** this Committee intends that record retention policies should in the future be **adopted by administrative rule, rather than as internal policies, this should be made clear in the bill and the effective date should be set two to three years out to allow for the chapter 91 rulemaking process**. This Committee may also want to **consider additional appropriations** for agencies to meet the hearings and publication requirements of chapter 91.

In summary, OIP believes that encouraging agencies to be attentive to existing retention schedules and to take care with their "official" files is a laudable goal, and to give agencies time to ensure their retention and destruction policies are appropriate in light of this new law, **OIP recommends that the effective date be no sooner than July 1, 2017.** Thank you for considering OIP's testimony.

DEPARTMENT OF THE CORPORATION COUNSEL
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February 23, 2016

The Honorable Jill N. Tokuda, Chair
and Members of the Committee on Ways and Means
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Tokuda and Committee Members:

Re: Testimony in Opposition to Senate Bill No. 2294, S.D.1
Hearing: Wednesday, February 24, 2016, 1:15 p.m. Room 211

The Corporation Counsel of the City and County of Honolulu ("City") hereby submits its testimony in opposition to S.B. 2294, S.D.1, because it imposes an unduly burdensome and unprecedented liability on the State and County governments.

S.B. 2294, S.D.1, would "create a statutory requirement that government agencies exercise reasonable care in maintaining those government records open to public inspection." This statutory duty of reasonable care would apply to all forms of government records subject to public inspection under the Uniform Information Practices Act ("UIPA") set forth in Chapter 92F of the Hawaii Revised Statutes ("HRS"). Failure to maintain records beyond what is presently required of agencies under the UIPA or applicable record retention policies could expose governmental agencies to unprecedented liability.

The imposition of a statutory duty of reasonable care could result in frequent litigation. As noted by the Hawaii Supreme Court in Molofino v. Yuen, 134 Haw. 181 (Nov. 16, 2014), HRS Chapter 92F does not require agencies to maintain all records in "accurate, relevant, timely, and complete conditions at all times," nor is it intended to impose tort liability on agencies for their negligence or failure to do so. This would be an unreasonably high standard to impose on government agencies and potentially invite claims and litigation whenever requests for records are denied. Such a result will burden government with additional litigation, staffing and record storage expenses and detract from providing reasonable public access to records, a primary purpose of HRS

Chapter 92F. Limited government resources are better used for more productive purposes than unreasonably burdensome maintenance of records and expensive litigation over an additional 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. Relying on record retention policies as proposed by the amendment to S.B. 2294 may require substantial and lengthy processes to update, by numerous government agencies, including the City and County of Honolulu which has separate retention policies for its various departments and which are subject to a City Council approval process. We respectfully suggest that the existing statutory immunity 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. While limiting damages to $2,000 per violation for any breach of the duties established under this measure is preferable to potentially unlimited liability, establishing any potential liability for negligent maintenance of records is unreasonable, unnecessary and unduly burdensome.

For these reasons, the City opposes S.B. 2294, S.D.1. Should you have any questions, please feel free to contact me.

Very truly yours,

DONNA Y. L. LEONG
Corporation Counsel

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ʻĀINA HAINA COMMUNITY ASSOCIATION

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Jeanne Ohta, President • Melia Lane-Kanahele, Vice-President • Art Mori, Treasurer • Kathy Takemoto, Secretary • Directors At Large: Jeff Carlson, Wayson Chow, Patricia Moore, Marie Riley

February 24, 2016

To: Senator Jill Tokuda, Chair
Senator Donovan Dela Cruz, Vice Chair and
Members of the Committee on Ways and Means

From: Jeanne Y. Ohta, President
ʻĀina Haina Community Association

RE: SB 2294 SD1 Relating to Government Records
Hearing: Tuesday, February 24, 2016, 1:15 p.m., Room 211

Position: Support

The Board of Directors of the ʻĀina Haina Community Association write is support of SB 2294 SD1 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. Our ability to advocate on behalf of ourselves and our community is hampered when we do not have access to documents and therefore information that we should have access to.

While in most cases, government agencies have provided us access to documents, we have also learned by experience 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.