DAVID Y. IGE
GOVERNOR

LUIS P. SALAVERIA
DIRECTOR

MARY ALICE EVANS
DEPUTY DIRECTOR

DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM

No. 1 Capitol District Building, 250 South Hotel Street, 5th Floor, Honolulu, Hawaii 96813
Mailing Address: P.O. Box 2359, Honolulu, Hawaii 96804
Web site: dbedt.hawaii.gov

Telephone: (808) 586-2355
Fax: (808) 586-2377

Statement of
LUIS P. SALAVERIA
Director
Department of Business, Economic Development, and Tourism
before the
SENATE COMMITTEE ON JUDICIARY and LABOR

Monday, February 6, 2017
9:30 am
State Capitol, Room 016

in consideration of
SB 245
RELATING TO GOVERNMENT RECORDS.

Chair Keith-Agaran, Vice Chair Rhodes, and Members of the Committee:

The Department of Business, Economic Development & Tourism (DBEDT) offers comments on SB 245, Relating to Government Records, which would require government agencies to exercise due care in maintaining government records.

This bill would make the failure to reasonably maintain records the basis for tort claims of negligence and may create a liability for damages of up to $2,000 per violation, plus legal fees and costs.

The definition of government records appears to be broader than the types of records covered by the General Records Schedule for Retention and Disposition, which would make it impossible for an employee to know what period of time they are required to exercise due care for every piece of paper or electronic file in their custody.

If this bill passes, additional time will be needed to establish a retention schedule for all records in each individual program. DBEDT has eleven attached agencies and seven divisions.

If this Committee is inclined to pass this measure, DBEDT recommends the effective date be no sooner than July 1, 2020, and additional staff positions be authorized to inventory records and create a specific records schedule for each division and attached agency.

Thank you for the opportunity to provide comments.

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: Senate Committee on Judiciary and Labor

From: Cheryl Kakazu Park, Director

Date: February 6, 2017, 9:30 a.m.
State Capitol, Conference Room 016

Re: Testimony on S.B. No. 245
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. 245, 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 would place the new statute it proposes in part V of chapter 92, outside the Uniform Information Practices Act, chapter 92F, HRS ("UIPA"), a placement which OIP supports as the duty created by the bill is beyond the scope of the UIPA. The bill would create a rebuttable presumption that an agency adhering to its record retention schedule is exercising reasonable care in its record maintenance, and it would set a limitation on damages for a breach of the new duty of care. **These provisions take care of the major concerns OIP had with versions of this bill introduced in previous sessions. 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.** As OIP knows from its own recent experience, the development and adoption of new

retention and destruction policies could take two years or more. Therefore, **OIP would recommend that the effective date for this bill be set at least two years 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 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, 2019.**

Thank you for the opportunity to testify.

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
530 SOUTH KING STREET, ROOM 110 * HONOLULU, HAWAII 96813
PHONE: (808) 768-5193 * FAX: (808) 768-5105 * INTERNET: www.honolulu.gov

KIRK CALDWELL
MAYOR

DONNA Y. L. LEONG
CORPORATION COUNSEL

PAUL S. AOKI
FIRST DEPUTY CORPORATION COUNSEL

February 3, 2017

The Honorable Gilbert S. C. Keith-Agaran, Chair
and Members of the Committee on Judiciary and Labor
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Keith-Agaran and Committee Members

Re: Testimony in Opposition to Senate Bill 245
Hearing: February 6, 2017 at 9:30 a.m., Room 016

The Department of the Corporation Counsel ("COR") of the City and County of Honolulu ("City") hereby submits its testimony in **opposition** to Senate Bill 245 ("S.B. 245") because it imposes an unduly burdensome and unprecedented liability on the State and County governments for the reasons set forth below.

- **S.B. 245 Would Increase Litigation, Divert Valuable Resources and Permit Unprecedented Potential Liability and Damages.**

S.B. 245 creates a new statutory standard of care upon the State and county governments in the maintenance of records under their control and allows the recovery of damages for breach of the duty. S.B. 245 invites more litigation for monetary damages, thereby forcing the State and county governments to redirect budgetary, personnel and other resources in the defense of such claims.

Subsection (b) provides that the "adherence to a duly adopted records retention and destruction policy" creates a rebuttable presumption of the exercise of reasonable care. However, the State and county governments may have a difficult burden of proving adherence to earlier records retention and destruction policies for those records with an extended or "forever" retention policies. Current and former employees who participated in the collection, maintenance, or use of the records may not have a

present recollection of past retention policies and adherence to such policies for the records in question. Former employees may have moved or passed away. Or simply, as in Molfino v. Yuen, 134 Haw. 181, 339 P.3d 679 (2014), where the document was maintained but temporarily missing from the file being produced,[1] a document may be misfiled, incompletely scanned or mistakenly written over by other data. Under such circumstances, the State and county governments are essentially left defenseless and potentially exposed to frequent litigation as well as unprecedented, and potentially significant liability.

- **S.B. 245 Conflicts With HRS § 92F-16 Which Provides Immunity from Liability to Persons Acting in Good Faith.**

Requiring proof by the State and county governments of an unqualified "[a]dherence to a duly adopted records retention and destruction policy" to establish a rebuttable presumption of reasonable care is too rigid and holds the State and county governments to a stricter and higher standard than the reasonable care standard set forth in subsection (a)(1) of the bill. Because there may be events beyond the State's or counties' control which may have damaged or even destroyed records, the State and county governments should be allowed to establish a rebuttable presumption of reasonable care simply by showing reasonable or good faith adherence to an existing and duly adopted records retention and destruction policy.

This would be consistent with HRS § 92F-16, which provides that "any person participating in good faith in the disclosure or non-disclosure of a government record shall be immune from any liability, civil or criminal, that might otherwise be incurred, imposed or result from such acts or omissions." Maintenance of government records is necessarily a part of the process of disclosing or not disclosing a government record under HRS § 92F et seq. S.B. 245, however, creates a direct conflict to the immunity granted under HRS § 92F-16 by imposing upon the State and county governments a duty of care in maintaining government records required to be available for public inspection under HRS § 92F et seq., and allowing damages for potential violations in the breach of said duty of care.

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[1] In Molfino v. Yuen, 134 Haw. 181, 339 P.3d 679 (2014), the issue was whether a requester under HRS § 92F could assert a negligence action against the County's Planning Department for failure to provide access to a May 2000 pre-existing lot determination which was temporarily missing from a particular property's TMK file. The Supreme Court rejected plaintiff's claim that the government had a duty to maintain its records in its property files at all times.

- **The Policy Considerations in Molfino Disfavor the Imposition of a Statutory Duty of Care In the Maintenance of Government Records.**

Before adding a new section in HRS § 92 to impose a duty of care regarding the maintenance of government records open for public inspection, we urge consideration of the policies cited by Molfino and Cootey v. Sun. Inv. Inc., 68 Haw. 480, 485, 718 P.2d 1086, 1090 (1986). Both Molfino and Cootey noted that the imposition of a statutory duty of care upon the government in the maintenance of its records would result in the reordering of priorities and reallocation of resources from the actual purpose of HRS § 92F, to document management and forestalling potential litigation or liability. Public policy considerations guard against holding government as an insurer against all injuries to private persons resulting from its activities, because government agencies should be allowed to effectively function to achieve "socially approved ends." (Molfino, 134 Haw. at 185, 339 P.3d at 683, Cootey, id., 68 Haw. at 485-86, 718 P.2d at 1090.) S.B. 245 allows for the mere possibility that the State or county governments can be held liable for damages from good faith human error in the maintenance of their records. Limited government resources are better used for more productive purposes than for redirecting those resources towards an unreasonably burdensome maintenance of records standard and expensive litigation over an additional duty.

- **An Effective Date Upon Approval Does Not Afford Governmental Units to the Ability to Comply with All of the Provisions of § 92-__ (a).**

We also note that S.B. 245 is effective upon approval. Because S.B. 245 states that "adherence to a duly adopted records retention and destruction policy" would create a rebuttable presumption that the governmental unit exercised reasonable care in the maintenance of its records, the effective date for this bill should be set at least 2 years out to allow departmental agencies to adopt new or amend existing agency specific record retention policies, and to complete the process of obtaining Council approval, where necessary, or through the Chapter 91 rulemaking process, if appropriate.

For these reasons, the City **opposes** S.B. 245. Should you have any questions, please feel free to contact me.

Very truly yours,

DONNA Y. L. LEONG
Corporation Counsel

ALAN M. ARAKAWA
MAYOR

200 South High Street
Wailuku, Maui, Hawai'i 96793-2155
Telephone (808) 270-7855
Fax (808) 270-7870
E-mail: mayors.office@mauicounty.gov

OFFICE OF THE MAYOR
Ke`ena O Ka Meia
COUNTY OF MAUI – Kalana O Maui

TESTIMONY OF ALAN M ARAKAWA
MAYOR
COUNTY OF MAUI

February 3, 2017

The Honorable, Chair Gilbert S. C. Keith-Agaran
and Members of the Committee on Judiciary and Labor

Dear Chair Keith-Agaran and Committee Members

Re: Testimony in Opposition to Senate Bill 245
Hearing: February 6, 2017 at 9:30 a.m., Room 016

Thank you for the opportunity to submit this testimony in **opposition** to Senate Bill 245 ("S.B. 245") because it imposes an unduly burdensome and unprecedented liability on the State and County governments. I concur with the testimony submitted by City and County of Honolulu's Corporation Counsel Donna Leong (a copy of which is attached.)

Sincerely,

ALAN M. ARAKAWA
Mayor
County of Maui.

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
530 SOUTH KING STREET, ROOM 110 * HONOLULU, HAWAII 96813
PHONE: (808) 768-5193 * FAX: (808) 768-5105 * INTERNET: www.honolulu.gov

KIRK CALDWELL
MAYOR

DONNA Y. L. LEONG
CORPORATION COUNSEL

PAUL S. AOKI
FIRST DEPUTY CORPORATION COUNSEL

February 3, 2017

The Honorable, Chair Gilbert S. C. Keith-Agaran
and Members of the Committee on Judiciary and Labor
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Keith-Agaran and Committee Members

Re: Testimony in Opposition to Senate Bill 245
Hearing: February 6, 2017 at 9:30 a.m., Room 016

The Department of the Corporation Counsel ("COR") of the City and County of Honolulu ("City") hereby submits its testimony in **opposition** to Senate Bill 245 ("S.B. 245") because it imposes an unduly burdensome and unprecedented liability on the State and County governments for the reasons set forth below.

- **S.B. 245 Would Increase Litigation, Divert Valuable Resources and Permit Unprecedented Potential Liability and Damages.**

S.B. 245 creates a new statutory standard of care upon the State and county governments in the maintenance of records under their control and allows the recovery of damages for breach of the duty. S.B. 245 invites more litigation for monetary damages, thereby forcing the State and county governments to redirect budgetary, personnel and other resources in the defense of such claims.

Subsection (b) provides that the "adherence to a duly adopted records retention and destruction policy" creates a rebuttable presumption of the exercise of reasonable care. However, the State and county governments may have a difficult burden of proving adherence to earlier records retention and destruction policies for those records with an extended or "forever" retention policies. Current and former employees who participated in the collection, maintenance, or use of the records may not have a present recollection of past retention policies and adherence to such policies for the records in question. Former employees may have moved or passed away. Or simply, as in Molfino v. Yuen, 134 Haw. 181, 339 P.3d 679 (2014), where the document was

maintained but temporarily missing from the file being produced,[a] a document may be misfiled, incompletely scanned or mistakenly written over by other data. Under such circumstances, the State and county governments are essentially left defenseless and potentially exposed to frequent litigation as well as unprecedented, and potentially significant liability.

- **S.B. 245 Conflicts With HRS § 92F-16 Which Provides Immunity from Liability to Persons Acting in Good Faith.**

Requiring proof by the State and county governments of an unqualified "[a]dherence to a duly adopted records retention and destruction policy" to establish a rebuttable presumption of reasonable care is too rigid and holds the State and county governments to a stricter and higher standard than the reasonable care standard set forth in subsection (a)(1) of the bill. Because there may be events beyond the State's or counties' control which may have damaged or even destroyed records, the State and county governments should be allowed to establish a rebuttable presumption of reasonable care simply by showing reasonable or good faith adherence to an existing and duly adopted records retention and destruction policy.

This would be consistent with HRS § 92F-16, which provides that "any person participating in good faith in the disclosure or non-disclosure of a government record shall be immune from any liability, civil or criminal, that might otherwise be incurred, imposed or result from such acts or omissions." Maintenance of government records is necessarily a part of the process of disclosing or not disclosing a government record under HRS § 92F et seq. S.B. 245, however, creates a direct conflict to the immunity granted under HRS § 92F-16 by imposing upon the State and county governments a duty of care in maintaining government records required to be available for public inspection under HRS § 92F et seq., and allowing damages for potential violations in the breach of said duty of care.

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[a] In Molfino v. Yuen, 134 Haw. 181, 339 P.3d 679 (2014), the issue was whether a requester under HRS § 92F could assert a negligence action against the County's Planning Department for failure to provide access to a May 2000 pre-existing lot determination which was temporarily missing from a particular property's TMK file. The Supreme Court rejected plaintiff's claim that the government had a duty to maintain its records in its property files at all times.

- **The Policy Considerations in Molfino Disfavor the Imposition of a Statutory Duty of Care In the Maintenance of Government Records.**

Before adding a new section in HRS § 92 to impose a duty of care regarding the maintenance of government records open for public inspection, we urge consideration of the policies cited by Molfino and Cootey v. Sun. Inv. Inc., 68 Haw. 480, 485, 718 P.2d 1086, 1090 (1986). Both Molfino and Cootey noted that the imposition of a statutory duty of care upon the government in the maintenance of its records would result in the reordering of priorities and reallocation of resources from the actual purpose of HRS § 92F, to document management and forestalling potential litigation or liability. Public policy considerations guard against holding government as an insurer against all injuries to private persons resulting from its activities, because government agencies should be allowed to effectively function to achieve "socially approved ends." (Molfino, 134 Haw. at 185, 339 P.3d at 683, Cootey, id., 68 Haw. at 485-86, 718 P.2d at 1090.) S.B. 245 allows for the mere possibility that the State or county governments can be held liable for damages from good faith human error in the maintenance of their records. Limited government resources are better used for more productive purposes than for redirecting those resources towards an unreasonably burdensome maintenance of records standard and expensive litigation over an additional duty.

- **An Effective Date Upon Approval Does Not Afford Governmental Units to the Ability to Comply with All of the Provisions of § 92-__ (a).**

We also note that S.B. 245 is effective upon approval. Because S.B. 245 states that "adherence to a duly adopted records retention and destruction policy" would create a rebuttable presumption that the governmental unit exercised reasonable care in the maintenance of its records, the effective date for this bill should be set at least 2 years out to allow departmental agencies to adopt new or amend existing agency specific record retention policies, and to complete the process of obtaining Council approval, where necessary, or through the Chapter 91 rulemaking process, if appropriate.

For these reasons, the City **opposes** S.B. 245. Should you have any questions, please feel free to contact me.

Very truly yours,

DONNA Y. L. LEONG
Corporation Counsel

ALAN M. ARAKAWA
Mayor

PATRICK K.WONG
Corporation Counsel

EDWARD S. KUSHI
First Deputy

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

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

February 3, 2017

The Honorable, Chair Gilbert S. C. Keith-Agaran
and Members of the Committee on Judiciary and Labor
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Re: Testimony in Opposition to Senate Bill 245
Hearing: February 6, 2017 at 9:30 a.m., Room 016

Dear Chair Keith-Agaran and Committee Members

The Department of the Corporation Counsel of the County of Maui hereby submits its **opposition** to Senate Bill 245 ("S.B. 245"), in joinder with the City and County of Honolulu, Department of the Corporation Counsel ("City") and herein adopts the City's basis in opposition to S.B. 245 that imposes an unduly burdensome and unprecedented liability on the State and County governments for the reasons the City sets forth below:

- **S.B. 245 Would Increase Litigation, Divert Valuable Resources and Permit Unprecedented Potential Liability and Damages.**

S.B. 245 creates a new statutory standard of care upon the State and county governments in the maintenance of records under their control and allows the recovery of damages for breach of the duty. S.B. 245 invites more litigation for monetary damages, thereby forcing the State and county governments to redirect budgetary, personnel and other resources in the defense of such claims.

Subsection (b) provides that the "adherence to a duly adopted records retention and destruction policy" creates a rebuttable presumption of the exercise of reasonable care. However, the State and county governments may have a difficult burden of

proving adherence to earlier records retention and destruction policies for those records with an extended or "forever" retention policies. Current and former employees who participated in the collection, maintenance, or use of the records may not have a present recollection of past retention policies and adherence to such policies for the records in question. Former employees may have moved or passed away. Or simply, as in Molfino v. Yuen, 134 Haw. 181, 339 P.3d 679 (2014), where the document was maintained but temporarily missing from the file being produced,1 a document may be misfiled, incompletely scanned or mistakenly written over by other data. Under such circumstances, the State and county governments are essentially left defenseless and potentially exposed to frequent litigation as well as unprecedented, and potentially significant liability.

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Requiring proof by the State and county governments of an unqualified "[a]dherence to a duly adopted records retention and destruction policy" to establish a rebuttable presumption of reasonable care is too rigid and holds the State and county governments to a stricter and higher standard than the reasonable care standard set forth in subsection (a)(1) of the bill. Because there may be events beyond the State's or counties' control which may have damaged or even destroyed records, the State and county governments should be allowed to establish a rebuttable presumption of reasonable care simply by showing reasonable or good faith adherence to an existing and duly adopted records retention and destruction policy.

This would be consistent with HRS § 92F-16, which provides that "any person participating in good faith in the disclosure or non-disclosure of a government record shall be immune from any liability, civil or criminal, that might otherwise be incurred, imposed or result from such acts or omissions." Maintenance of government records is necessarily a part of the process of disclosing or not disclosing a government record under HRS § 92F et seq. S.B. 245, however, creates a direct conflict to the immunity granted under HRS § 92F-16 by imposing upon the State and county governments a duty of care in maintaining government records required to be available for public inspection under HRS § 92F et seq., and allowing damages for potential violations in the breach of said duty of care.

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Before adding a new section in HRS § 92 to impose a duty of care regarding the maintenance of government records open for public inspection, we urge consideration of the policies cited by Molfino and Cootey v. Sun. Inv. Inc., 68 Haw. 480, 485, 718 P.2d 1086, 1090 (1986). Both Molfino and Cootey noted that the imposition of a statutory duty of care upon the government in the maintenance of its records would result in the reordering of priorities and reallocation of resources from the actual purpose of HRS § 92F, to document management and forestalling potential litigation or liability. Public policy considerations guard against holding government as an insurer against all injuries to private persons resulting from its activities, because government agencies should be allowed to effectively function to achieve "socially approved ends." (Molfino, 134 Haw. at 185, 339 P.3d at 683, Cootey, id., 68 Haw. at 485-86, 718 P.2d at 1090.) S.B. 245 allows for the mere possibility that the State or county governments can be held liable for damages from good faith human error in the maintenance of their records. Limited government resources are better used for more productive purposes than for redirecting those resources towards an unreasonably burdensome maintenance of records standard and expensive litigation over an additional duty.

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We also note that S.B. 245 is effective upon approval. Because S.B. 245 states that "adherence to a duly adopted records retention and destruction policy" would create a rebuttable presumption that the governmental unit exercised reasonable care in the maintenance of its records, the effective date for this bill should be set at least 2 years out to allow departmental agencies to adopt new or amend existing agency specific record retention policies, and to complete the process of obtaining Council approval, where necessary, or through the Chapter 91 rulemaking process, if appropriate.

For the foregoing reasons stated hereinabove, the Department of the Corporation Counsel of the County of Maui **opposes** S.B. 245. Should you have any questions, please feel free to contact me.

Very truly yours,

Patrick Wong
Corporation Counsel

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) REGARDING S.B. 245

February 6, 2017

To: Chairman Gilbert S. C. Keith-Agaran and Members of the Senate Committee on Judiciary and Labor.

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in support of S.B. 245, relating to Government Records.

S.B. 245 includes language requiring the government to exercise reasonable care when maintaining records. HAJ supports the amendment except for the provision under subsection (c):

"(c) Damages for any breach of the duty set forth under this section shall be no more than $2,000 per violation."

The amount that an individual may be harmed if the agency or other government entity fails to exercise reasonable care is different in every situation. A cap of $2,000 for a violation is arbitrary and the remedy should be determined on a case by case basis. We therefore request that subsection (c) be deleted in its entirety.

Thank you for allowing me to testify on this measure. Please feel free to contact me should you have any questions or desire additional information.

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: *Submitted testimony for SB245 on Feb 6, 2017 09:30AM*
Date: Friday, February 3, 2017 10:23:08 PM

SB245
Submitted on: 2/3/2017
Testimony for JDL on Feb 6, 2017 09:30AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Rachel L. Kailianu	Individual	Support	Yes

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov