



DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM

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

Wednesday, March 22, 2017
2:00 PM
State Capitol, Room 325

in consideration of
SB 245, SD2
RELATING TO GOVERNMENT RECORDS.

Chair Nishimoto, Vice Chair San Buenaventura, and Members of the Committee.

The Department of Business, Economic Development & Tourism (DBEDT) offers **comments with concerns** on SB 245, SD2, 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.

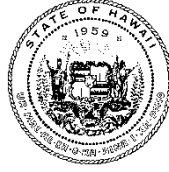
The definition of government records is broader than the types of records covered by the General Records Schedule for Retention and Disposition, which would make it impossible for an employee to know the length of the retention period they are required to exercise due care for each piece of paper or 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.

DAVID Y. IGE
GOVERNOR



RODERICK K. BECKER
Comptroller

AUDREY HIDANO
Deputy Comptroller

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

P.O. BOX 119, HONOLULU, HAWAII 96810-0119

TESTIMONY OF
RODERICK K. BECKER, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
HOUSE COMMITTEE ON JUDICIARY
ON
WEDNESDAY, MARCH 22, 2017
2:00 P.M.
CONFERENCE ROOM 325

S.B. 245, S.D. 2

RELATING TO GOVERNMENT RECORDS.

Chair Nishimoto, Vice Chair San Buenaventura, and members of the Committee, thank you for the opportunity to submit testimony on S.B. 245, S.D. 2.

The Department of Accounting and General Services (DAGS) appreciates the intent of the measure and offers the following comments for the committee's consideration.

1. Impact on DAGS: Because the measure establishes a new monetary penalty for non-compliance, DAGS' Archives Division anticipates an increase in consultations and requests for the development of departmental or agency specific retention schedules and the review and updating of existing schedules to avoid the penalty. The increase in requests will tax the already minimally staffed Records Management Branch, which has suffered staff cuts over the past decade. As a result, the development of retention schedules for new record types and the review and updating of existing departmental

specific schedules will probably take time, which could expose departments and agencies to suits pending their completion.

To address the increased workload and potential lawsuits, DAGS requests funding and staffing for the Records Management Branch (at least one additional Archivist III (SR-20) position to work with departments and agencies in a consultative role to perform inventory, training and scheduling), and a reasonable delay in the effective date of the penalty provision to allow departments and agencies to develop and update their retention schedules.

Additionally, if other DAGS' divisions are subject to the penalty, the measure could pose a burden to the department in the litigation and settlement of claims, which in the case of a vexatious records requestor, could become significant.

2. Clarification of Penalty: DAGS requests that the phrase "\$2,000 per violation" be clarified to remove uncertainty. For example, if the retention of a specific type of email is six years and the department or agency prematurely deleted all email of that type at the same time, if the emails are later requested by the public, would it be deemed a single violation of the duty of reasonable care resulting in a single \$2,000 penalty, or would the deletion of each individual email constitute a separate and distinct violation, subject to a \$2,000 penalty. Considering the potential adverse impact to departments and agencies, the penalty provision should be clarified in the measure.

Thank you for the opportunity to submit written comments on this measure.

Bernard P. Carvalho, Jr.
Mayor



Mauna Kea Trask
County Attorney

Wallace G. Rezentes, Jr.
Managing Director

Matthew M. Bracken
First Deputy

OFFICE OF THE COUNTY ATTORNEY

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March 21, 2017

The Honorable Scott Y. Nishimoto, Chair
and Members of the House Committee on Judiciary
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Nishimoto and Committee Members

Re: Testimony in **Opposition** to Senate Bill 245 SD2
Hearing: March 22, 2017 at 2:00 p.m., Room 325

The County of Kauai respectfully joins the City & County of Honolulu's testimony
in **opposition** to SB 245, SD 2.

Please contact me if you have any further questions at (808) 241-4930.

Mahalo,

/s/

Mauna Kea Trask
County Attorney

OFFICE OF INFORMATION PRACTICES

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To: House Committee on Judiciary

From: Cheryl Kakazu Park, Director

Date: March 22, 2017, 2:00 p.m.
State Capitol, Conference Room 325

Re: Testimony on S.B. No. 245, S.D. 2
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 no sooner than July 1, 2019, 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. This 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 (e.g., per email?) 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 recommends 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 considering OIP’s testimony.

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII
ASSOCIATION FOR JUSTICE (HAJ) REGARDING S.B. 245, SD 2**

March 22, 2017
2:00 pm
CR 325

To: Chairman Scott Y. Nishimoto and Members of the House Committee on Judiciary.

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in opposition to subsection (c) on page 2 of S.B. 245, SD 2, regarding damages, but support the concept in this bill, relating to Government Records.

S.B. 245, SD 2 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
Sent: Tuesday, March 21, 2017 3:22 PM
To: JUDtestimony
Cc: mendezj@hawaii.edu
Subject: *Submitted testimony for SB245 on Mar 22, 2017 14:00PM*

SB245

Submitted on: 3/21/2017

Testimony for JUD on Mar 22, 2017 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Javier Mendez-Alvarez	Individual	Support	No

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.

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