

THE SENATE  
THE TWENTY-SIXTH LEGISLATURE  
REGULAR SESSION OF 2012

COMMITTEE ON JUDICIARY AND LABOR

Senator Clayton Hee, Chair  
Senator Maile S.L. Shimabukuro, Vice Chair

NOTICE OF HEARING

DATE: Thursday, February 2, 2012  
TIME: 9:30 A.M.  
PLACE: Conference Room 016  
State Capitol  
415 South Beretania Street

A G E N D A

<a href="#"><u>SB 2508</u></a> <a href="#"><u>Status &amp; Testimony</u></a>	RELATING TO CAMPAIGN REPORTING LAWS. Amends filing deadlines for preliminary and supplemental disclosure reports.	JDL
<a href="#"><u>SB 2493</u></a> <a href="#"><u>Status &amp; Testimony</u></a>	RELATING TO CAMPAIGN SPENDING. Adds a new definition for matching payment period; changes report filing deadlines; requires the identification of the candidate supported or opposed by an independent expenditure; and increases the amount of expenditures a publicly financed candidate for the office of the prosecuting attorney can make.	JDL, WAM
<a href="#"><u>SB 2858</u></a> <a href="#"><u>Status &amp; Testimony</u></a>	RELATING TO OPEN GOVERNMENT. Creates a process for an agency to obtain judicial review of Office of Information Practices decisions made under either part I of chapter 92 or chapter 92F, Hawaii Revised Statutes, and clarifies standard of review.	JDL
<a href="#"><u>SB 2859</u></a> <a href="#"><u>Status &amp; Testimony</u></a>	RELATING TO OPEN GOVERNMENT. Allows board members to hear testimony for a meeting canceled for lack of quorum, to attend informational meetings, and to discuss board business via social media; provides for electronic meeting notices.	JDL
<a href="#"><u>SB 2495</u></a> <a href="#"><u>Status &amp; Testimony</u></a>	RELATING TO THE PENAL CODE. Establishes the offense of maintaining a property nuisance as a misdemeanor. Specifies conditions that constitute maintaining a property nuisance.	JDL
<a href="#"><u>SB 2496</u></a> <a href="#"><u>Status &amp; Testimony</u></a>	RELATING TO LANDOWNER LIABILITY. Creates a cause of action against any person who maintains a property nuisance that causes injury or damage to the person or property of another person.	JDL
<a href="#"><u>SB 2497</u></a> <a href="#"><u>Status &amp; Testimony</u></a>	RELATING TO THE UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT. Enacts the Uniform Interstate Depositions and Discovery Act.	JDL

**[HB 461, HD1](#)**[\(HSCR764\)](#)[Status & Testimony](#)RELATING TO THE UNIFORM MILITARY AND OVERSEAS  
VOTERS ACT.

JDL

Enacts Uniform Military and Overseas Voters Act to ensure ability of members of the military and others eligible voters who are overseas to participate in all elections for federal, state, and local offices. Authorizes ballots and balloting materials to be transmitted by facsimile or electronic mail. Effective July 1, 2020. (HB461 HD1)

**[SB 2498](#)**[Status & Testimony](#)

RELATING TO CLAIMS AGAINST THE STATE.

JDL, WAM

Allows interest to be collected on unfunded settlements against the State, its officers, or its employees.

**[SB 2491](#)**[Status & Testimony](#)MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE  
STATE, ITS OFFICERS, OR ITS EMPLOYEES.

JDL, WAM

Makes appropriations for claims against the State, its officers, and its employees.

**Decision Making to follow, if time permits.**

Click [here](#) to submit testimony to the Senate Committee on Judiciary and Labor.

**Testimony may be submitted up to 24 hours prior to the start of the hearing.**

**FOR AMENDED NOTICES:** Measures that have been deleted are stricken through and measures that have been added are underscored. If a measure is both underscored and stricken through, that measure has been deleted from the agenda.

If you require auxiliary aids or services to participate in the public hearing process (i.e. ASL or foreign language interpreter, or wheelchair accessibility), please contact the committee clerk at least 24 hours prior to the hearing so that arrangements can be made.

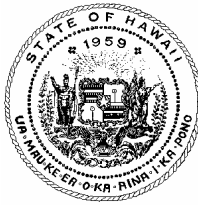
FOR FURTHER INFORMATION, PLEASE CALL THE COMMITTEE CLERK AT 586 6837.

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Senator Clayton Hee  
Chair

SB2858

NEIL ABERCROMBIE  
GOVERNOR



STATE OF HAWAII  
**DEPARTMENT OF PUBLIC SAFETY**

919 Ala Moana Boulevard, 4th Floor  
Honolulu, Hawaii 96814

**JODIE F. MAESAKA-HIRATA**  
DIRECTOR

**Martha Torney**  
Deputy Director  
Administration

**Joe W. Booker, Jr.**  
Deputy Director  
Corrections

**Keith Kamita**  
Deputy Director  
Law Enforcement

TESTIMONY ON SENATE BILL 2858  
RELATING TO OPEN GOVERNMENT  
by

Jodie F. Maesaka-Hirata, Director  
Department of Public Safety

Senate Committee on Judiciary and Labor  
Senator Clayton Hee, Chair  
Senator Maile S.L. Shimabukuro, Vice Chair

Thursday, February 2, 2012; 9:30 A.M.  
State Capitol, Room 016

Chair Hee, Vice Chair Shimabukuro, and Members of the Committee:

The Department of Public Safety (PSD) supports Senate Bill (SB) 2858, because it provides a uniform process for agencies seeking to challenge an Office of Information Practices opinion under either the Sunshine Law or the statutory provision of the Uniform Information Practices Act. This measure essentially improves transparency in government and will help to enhance public confidence in government.

Thank you for the opportunity to present this testimony.



**STATE OF HAWAII  
BOARD OF EDUCATION**  
P.O. BOX 2360  
HONOLULU, HAWAII 96804

**Senate Committee on Judiciary and Labor**  
Senator Clayton Hee, Chairperson  
Senator Maile S.L. Shimabukuro, Vice Chairperson

Wednesday, February 2, 2012  
9:30 a.m.  
Hawai'i State Capitol, Room 016

**Testimony in SUPPORT of SB 2858, Relating to Open Government**

Thank you for the opportunity to submit testimony.

The Board of Education SUPPORTS SB 2858.

The bill creates a process for agencies to appeal Office of Information Practices' decisions where none existed. The Board supports the intent to clarify the law.

Thank you for the opportunity to provide testimony in support of SB 2858.



**STATE OF HAWAII**  
**DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT**  
235 S. BERETANIA STREET  
HONOLULU, HAWAII 96813-2437

January 31, 2012

**TESTIMONY TO THE  
SENATE COMMITTEE ON JUDICIARY AND LABOR**

For Hearing on Thursday, February 2, 2012  
9:30 a.m., Conference Room 016

BY

BARBARA A. KRIEG  
INTERIM DIRECTOR

**Senate Bill No. 2858**  
**Relating to Open Government**

**WRITTEN TESTIMONY ONLY**

TO CHAIRPERSON CLAYTON HEE AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to provide testimony on S.B. No. 2858.

The purpose of S.B. No. 2858 is to create a process for an agency to obtain judicial review of Office of Information Practices ("OIP") decisions made under either the Sunshine Law or the Uniform Information Practices Act ("UIPA") and to clarify the standard of review.

**The Department of Human Resources Development strongly supports this bill.**

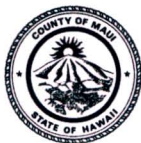
We believe that this bill properly balances the competing interests of ensuring that OIP's decisions are founded on proper legal bases while also discouraging agencies from simply and routinely appealing decisions that they disagree with. As presently constructed, agencies do not have a clear avenue of redress via the courts.

We respectfully request that this Committee move this bill forward.

Council Chair  
Danny A. Mateo

Vice-Chair  
Joseph Pontanilla

Council Members  
Gladys C. Baisa  
Robert Carroll  
Elle Cochran  
Donald G. Couch, Jr.  
G. Riki Hokama  
Michael P. Victorino  
Mike White



Director of Council Services  
Ken Fukuoka

**COUNTY COUNCIL**  
COUNTY OF MAUI  
200 S. HIGH STREET  
WAILUKU, MAUI, HAWAII 96793  
[www.mauicounty.gov/council](http://www.mauicounty.gov/council)

February 1, 2012

TO: Honorable Clayton Yee, Chair  
Senate Committee on Judiciary and Labor

FROM: Joseph Pontanilla, Council Vice- Chair *Joseph Pontanilla*

DATE: Thursday February 2, 2012

SUBJECT: **OPPOSITION TO SB 2858, RELATING TO OPEN GOVERNMENT**

Thank you for the opportunity to testify in opposition of this measure. I provide this testimony as an individual member of the Maui County Council.

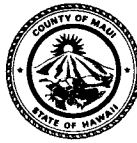
I oppose SB 2858 for the reasons cited in testimony submitted by Maui County Council Chair Danny A. Mateo and urge you to support this measure.

12:02:01:kbm/JP: SB 2858

Council Chair  
Danny A. Mateo

Vice-Chair  
Joseph Pontanilla

Council Members  
Gladys C. Baisa  
Robert Carroll  
Elle Cochran  
Donald G. Couch, Jr.  
G. Riki Hokama  
Michael P. Victorino  
Mike White




Director of Council Services  
Ken Fukuoka

**COUNTY COUNCIL**  
COUNTY OF MAUI  
200 S. HIGH STREET  
WAILUKU, MAUI, HAWAII 96793  
[www.mauicounty.gov/council](http://www.mauicounty.gov/council)

January 31, 2012

TO: The Honorable Clayton Hee, Chair  
Senate Committee on Judiciary and Labor

FROM: Danny A. Mateo   
Council Chair

SUBJECT: **HEARING OF FEBRUARY 2, 2012; TESTIMONY IN OPPOSITION TO SB 2858,  
RELATING TO OPEN GOVERNMENT**

Thank you for the opportunity to testify in opposition to this important measure. The purpose of this measure is to grant the State Office of Information Practices (OIP) quasi-judicial authority to enforce the Sunshine Law.

The Maui County Council has not had the opportunity to take a formal position on this measure. Therefore, I am providing this testimony in my capacity as an individual member of the Maui County Council.

I oppose this measure for the following reasons:

1. The OIP is an Oahu-based agency that has little practical experience with and no incentive to consider the demands placed on county councils. It is unwise to give the OIP the effective authority to penalize the county councils for differing interpretations of the vague Sunshine Law.
2. The OIP is not a court. It is not bound by rules of civil procedure, rules of evidence, due process, or any of the other standards designed to ensure fairness and accuracy in an American tribunal. Therefore, the OIP's opinions should not be given the weight provided by this bill.
3. This bill would have the effect of making the Sunshine Law even more burdensome than it already is. By granting the OIP the power to dictate how the Sunshine Law is interpreted and administered, the county councils will need to incur substantial taxpayer funds to satisfy the demands of the agency.

For the foregoing reasons, I oppose this measure.



**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDL Testimony](#)  
**Cc:** [gshiromahi@hotmail.com](mailto:gshiromahi@hotmail.com)  
**Subject:** Testimony for SB2858 on 2/2/2012 9:30:00 AM  
**Date:** Monday, January 30, 2012 5:46:13 PM

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Testimony for JDL 2/2/2012 9:30:00 AM SB2858

Conference room: 016  
Testifier position: Support  
Testifier will be present: No  
Submitted by: Glenn Shiroma  
Organization: Individual  
E-mail: [gshiromahi@hotmail.com](mailto:gshiromahi@hotmail.com)  
Submitted on: 1/30/2012

Comments:

Chair Hee, Vice Chair Shimabukuro, and members of the Committee:

LATE TESTIMONY

The Office of the Governor strongly supports S.B. No. 2858.

This bill amends chapter 92F, Hawaii Revised Statutes, to create a process for an agency to obtain judicial review of the Office of Information Practices (OIP) decisions.

The Uniform Information Practices Act (Modified) presently allows members of the public whose record requests are denied by an agency to challenge that denial by asking the OIP to review the agency's denial, and to bring an action for a *de novo* review of an adverse OIP decision, in the circuit court. There is some question as to whether agencies can file a similar appeal from an OIP decision that directs an agency to disclose a requested record, in the circuit court. This bill makes clear that an agency can appeal an adverse OIP ruling. Government agencies, just like members of the public, ought to have an opportunity to have a judicial review of an adverse OIP ruling. This bill provides that opportunity. However, when an agency files an appeal, the court must uphold OIP's decision unless the court determines that the decision is palpably erroneous.

This bill also makes the palpably erroneous standard of review applicable to appeals agencies bring from OIP decisions issued under part I of chapter 92, Hawaii Revised Statutes, the State's Sunshine Law. Adopting a uniform standard of review makes sense and will remove confusion over the matter.

Thank you for allowing us the opportunity to present this testimony in support of this bill.



**LATE TESTIMONY**

NEIL ABERCROMBIE  
GOVERNOR

BRIAN SCHATZ  
LT. GOVERNOR

STATE OF HAWAII  
OFFICE OF THE DIRECTOR  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
335 MERCHANT STREET, ROOM 310  
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Fax Number: 586-2856  
[www.hawaii.gov/dcca](http://www.hawaii.gov/dcca)

KEALI'I S. LOPEZ  
DIRECTOR

DEPUTY DIRECTOR

**PRESENTATION OF THE  
PROFESSIONAL AND VOCATIONAL LICENSING DIVISION**

**TO THE SENATE COMMITTEE ON JUDICIARY AND LABOR**

**TWENTY-SIXTH LEGISLATURE  
Regular Session of 2012**

**Thursday, February 2, 2012  
9:30 a.m.**

**WRITTEN TESTIMONY ONLY**

**TESTIMONY ON SENATE BILL NO. 2858, RELATING TO OPEN GOVERNMENT.**

**TO THE HONORABLE CLAYTON HEE, CHAIR,  
AND MEMBERS OF THE COMMITTEE:**

My name is Celia Suzuki, Licensing Administrator for the Professional and Vocational Licensing Division ("Division"), Department of Commerce and Consumer Affairs ("Department"). The Department appreciates the opportunity to testify in support of Senate Bill No. 2858, Relating to Open Government.

The purpose of Senate Bill No. 2858 is to clarify current law and would create a uniform process under the Uniform Information Practices Act and the Sunshine Law that would allow government agencies and boards, and not just requesters, to judicially challenge certain decisions of the Office of Information Practices ("OIP").

The Division is responsible for implementing the licensing regulations for forty-seven (47) boards, commissions, and programs. There are twenty-five (25) boards and commissions that are administratively attached to the Department. The bill sets a fair standard for the courts to review OIP's decisions under both laws. While it is not the practice of the boards to routinely challenge OIP decisions, the bill would allow the courts to review OIP decisions in extraordinary cases.

Thank you for the opportunity to testify in support of Senate Bill No. 2858.

NEIL ABERCROMBIE  
GOVERNOR

BRIAN SCHATZ  
LT. GOVERNOR



STATE OF HAWAII  
DEPARTMENT OF TAXATION  
P.O. BOX 259  
HONOLULU, HAWAII 96809  
PHONE NO: (808) 587-1540  
FAX NO: (808) 587-1560

FREDERICK D. PABLO  
DIRECTOR OF TAXATION

RANDOLF L. M. BALDEMOR  
DEPUTY DIRECTOR

LATE TESTIMONY

To: The Honorable Suzanne Clayton Hee, Chair  
and Members of the Senate Committee on Judiciary and Labor

Date: Tuesday, February 2, 2012  
Time: 9:30a.m.  
Place: Conference Room 016, State Capitol

From: Frederick D. Pablo, Director  
Department of Taxation

Re: S. B. 2858, Relating to Open Government

The Department of Taxation (Department) supports the adoption of S.B. 2858.

S.B. 2858 creates a uniform process for judicial review of an Office of Information Practices (OIP) ruling for governmental agencies. Currently, governmental agencies have no opportunity to appeal a ruling from OIP.

The Department agrees with the intent of the bill, as it is consistent with case law, and provides government agencies with an opportunity to have a third party review OIP's rulings. At the same time, sufficient safeguards are in place to insure that agencies will not be able to use the appeal process to frustrate information requests by the public.

Thank you for the opportunity to provide comments.



NEIL ABERCROMBIE  
GOVERNOR OF HAWAII

LORETTA FUDDY, ACSW, MPH  
DIRECTOR OF HEALTH



STATE OF HAWAII  
EXECUTIVE OFFICE ON AGING  
NO. 1 CAPITOL DISTRICT  
250 SOUTH HOTEL STREET, SUITE 406  
HONOLULU, HAWAII 96813-2831

WESLEY LUM, PhD, MPH  
DIRECTOR

Telephone  
(808) 586-0100

Fax  
(808) 586-0185

LATE TESTIMONY

**Committee on Judiciary and Labor**

**SB2858, RELATING TO OPEN GOVERNMENT**

**Testimony of Wes Lum  
Director, Executive Office on Aging  
Attached Agency to Department of Health**

**Thursday, February 2, 2012; Conference Room 016**

**9:30 a.m.**

- 1 **Department's Position:** The Executive Office on Aging (EOA) strongly supports this measure.
- 2 SB2858 is part of Governor Abercrombie's Administrative Bill Package.
- 3 **Fiscal Implications:** None.
- 4 **Purpose and Justification:** This proposal would clarify an agency's right to judicially appeal an
- 5 Office of Information Practices' decision on a request for access to a record, where no appeal
- 6 process was previously allowed. EOA supports this measure because it would allow fairness for all
- 7 parties involved through the judicial process. Thank you for the opportunity to testify.

NEIL ABERCROMBIE  
GOVERNOR



HAKIM OUANSAFI  
EXECUTIVE DIRECTOR

**STATE OF HAWAII**  
DEPARTMENT OF HUMAN SERVICES  
HAWAII PUBLIC HOUSING AUTHORITY  
1002 NORTH SCHOOL STREET  
Honolulu, Hawaii 96817

BARBARA E. ARASHIRO  
EXECUTIVE ASSISTANT

LATE TESTIMONY

Statement of  
**David J. Gierlach**  
Hawaii Public Housing Authority  
Before the

**SENATE COMMITTEE ON JUDICIARY AND LABOR**

February 2, 2012 9:30 A.M.  
Room 016, Hawaii State Capitol

In consideration of  
**Senate Bill 2858**  
**Relating to Open Government**

Honorable Chair and Members of the Senate Committee on Judiciary and Labor, thank you for the opportunity to provide you with comments regarding Senate Bill 2858, relating to Open Government.

The Hawaii Public Housing Authority (HPHA) strongly **supports** this bill, which would clarify current law and would create a uniform process under the Uniform Information Practices Act and the Sunshine Law that would allow government agencies and boards, and not just the requesters, to judicially challenge certain decisions of the Office of Information Practices (OIP). The bill sets a strong, yet fair, standard for the courts to review OIP's decisions under both laws. While it is not the board's practice or intent to routinely challenge OIP decisions, this bill would allow the courts to review OIP decisions in an extraordinary case.

The HPHA appreciates the opportunity to provide the Senate Committee on Judiciary and Labor with the agency's position regarding S.B. 2858. We respectfully request this Committee to act favorably upon this bill.

NEIL ABERCROMBIE  
GOVERNOR



HAKIM OUANSAFI  
EXECUTIVE DIRECTOR

**STATE OF HAWAII**  
DEPARTMENT OF HUMAN SERVICES  
HAWAII PUBLIC HOUSING AUTHORITY  
1002 North School Street  
Honolulu, Hawaii 96817

BARBARA E. ARASHIRO  
EXECUTIVE ASSISTANT

IN REPLY REFER TO:

TO Senator Maile S.L. Shimabukuro, Vice Chair  
Senate Committee on Judiciary and Labor  
State Capitol Room 223  
RE Testimony re: Senate Bill 2858

DATE February 1, 2012  
ATTENTION Committee Clerk

WE ARE SENDING YOU

☒ Attached

☐ Under separate cover via \_\_\_\_\_ the following items:

COPIES	DATE	NO.	DESCRIPTION
1	2/1/2012		Hawaii Public Housing Authority Testimonial Submission

THESE ARE TRANSMITTED AS CHECKED BELOW:

☐ For approval  
☐ For your use  
☒ As requested/required  
☐ For review and comment

☐ Approved as submitted  
☐ Approved as noted  
☐ Returned for corrections  
☐ For signature

☐ Resubmit \_\_\_\_\_ copies for approval  
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☐ Return \_\_\_\_\_ corrected prints

☐ FOR BIDS DUE \_\_\_\_\_ 20\_\_

☐ PRINTS RETURNED AFTER LOAN TO US

REMARKS Hawaii Public Housing Authority (HPHA) is providing the Senate Committee on Judiciary and Labor with written testimony  
for Senate Bill 2858, scheduled for public hearing on February 2, 2012 at 9:30 A.M.

IF THERE ARE ANY QUESTIONS PLEASE CONTACT: Nicholas Birk, Chief Planner, 832-4673

SIGNED: Nicholas Birk

COPY TO \_\_\_\_\_



NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

**Testimony of  
WILLIAM J. AILA, JR  
Chairperson**

**Before the Senate Committee on  
JUDICIARY AND LABOR**

**Thursday, February 2, 2012  
9:30 AM  
State Capitol, Conference Room 016**

**In consideration of  
SENATE BILL 2858  
RELATING TO OPEN GOVERNMENT.**

Senate Bill 2858 establishes a process for an agency to obtain judicial review of Office of Information Practices (OIP) decisions made under either part I of chapter 92 or chapter 92F, Hawaii Revised Statutes, and also clarifies the standard of review. The Department of Land and Natural Resources (Department) strongly supports this Administration bill.

Senate Bill 2858 will provide a uniform system that allows agencies the option to challenge an OIP opinion under either the Sunshine Law or the Uniform Information Practices Act (UIPA). This will clarify when, and under what standard, judicial review of OIP's decisions is available, and will eliminate any agency confusion regarding this issue, thus allowing administration of the open records and open meetings law to work more smoothly and efficiently.

The Department is subject to both Sunshine Law and UIPA, and supports Senate Bill 2858 for the aforementioned reasons.

**WILLIAM J. AILA, JR.**  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

**GUY H. KAULUKUKUI**  
FIRST DEPUTY

**WILLIAM M. TAM**  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

**LATE TESTIMONY**

NEIL ABERCROMIE  
GOVERNOR



DWIGHT TAKAMINE  
DIRECTOR

AUDREY HIDANO  
DEPUTY DIRECTOR

SERAFIN P. COLMENARES JR.  
EXECUTIVE DIRECTOR

STATE OF HAWAII  
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS  
**OFFICE OF LANGUAGE ACCESS**

830 PUNCHBOWL STREET, ROOM 322  
HONOLULU, HAWAII 96813  
[www.hawaii.gov/labor/ola](http://www.hawaii.gov/labor/ola)  
Phone: (808) 586-8730 / Fax: (808) 586-8733  
Email: [dlir.ola@hawaii.gov](mailto:dlir.ola@hawaii.gov)

LATE TESTIMONY

To: Senate Committee on Judiciary and Labor

From: Serafin Colmenares Jr.  
Executive Director, Office of Language Access

Date: February 2, 2012, 9:30 a.m.  
State Capitol, Room 016

Re: Testimony on S.B. No. 2858  
Relating to Open Government

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Thank you for the opportunity to submit testimony on S.B. No. 2858,  
Relating to Open Government.

The Office of Language Access strongly supports this bill, which would clarify current law and would create a uniform process under the Uniform Information Practices Act and the Sunshine Law that would allow government agencies and boards, and not just the requesters, to judicially challenge certain decisions of the Office of Information Practices (OIP). The bill sets a strong, yet fair, standard for the courts to review OIP's decisions under both laws. While it is not the board's practice or intent to routinely challenge OIP decisions, this bill would allow the courts to review OIP decisions in an extraordinary case. Therefore, we urge this Committee to act favorably upon this bill.



**LATE TESTIMONY**

NEIL ABERCROMBIE  
GOVERNOR

BRIAN SCHATZ  
LT. GOVERNOR

STATE OF HAWAII  
OFFICE OF THE DIRECTOR  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
335 MERCHANT STREET, ROOM 310  
P.O. Box 541  
HONOLULU, HAWAII 96809  
Phone Number: 586-2850  
Fax Number: 586-2856  
[www.hawaii.gov/dcca](http://www.hawaii.gov/dcca)

KEALI'I S. LOPEZ  
DIRECTOR

DEPUTY DIRECTOR

**PRESENTATION OF THE  
PROFESSIONAL AND VOCATIONAL LICENSING DIVISION**

TO THE SENATE COMMITTEE ON JUDICIARY AND LABOR

TWENTY-SIXTH LEGISLATURE  
Regular Session of 2012

Thursday, February 2, 2012  
9:30 a.m.

**WRITTEN TESTIMONY ONLY**

**TESTIMONY ON SENATE BILL NO. 2858, RELATING TO OPEN GOVERNMENT.**

TO THE HONORABLE CLAYTON HEE, CHAIR,  
AND MEMBERS OF THE COMMITTEE:

My name is Celia Suzuki, Licensing Administrator for the Professional and Vocational Licensing Division ("Division"), Department of Commerce and Consumer Affairs ("Department"). The Department appreciates the opportunity to testify in support of Senate Bill No. 2858, Relating to Open Government.

The purpose of Senate Bill No. 2858 is to clarify current law and would create a uniform process under the Uniform Information Practices Act and the Sunshine Law that would allow government agencies and boards, and not just requesters, to judicially challenge certain decisions of the Office of Information Practices ("OIP").



NEIL ABERCROMBIE  
GOVERNOR

BRIAN SCHATZ  
LT. GOVERNOR



STATE OF HAWAII  
DEPARTMENT OF TAXATION  
P.O. BOX 259  
HONOLULU, HAWAII 96809  
PHONE NO: (808) 587-1540  
FAX NO: (808) 587-1560

FREDERICK D. PABLO  
DIRECTOR OF TAXATION

RANDOLF L. M. BALDEMOR  
DEPUTY DIRECTOR

**LATE TESTIMONY**

To: The Honorable Suzanne Clayton Hee, Chair  
and Members of the Senate Committee on Judiciary and Labor

Date: Tuesday, February 2, 2012  
Time: 9:30a.m.  
Place: Conference Room 016, State Capitol

From: Frederick D. Pablo, Director  
Department of Taxation

Re: S. B. 2858, Relating to Open Government

The Department of Taxation (Department) supports the adoption of S.B. 2858.

S.B. 2858 creates a uniform process for judicial review of an Office of Information Practices (OIP) ruling for governmental agencies. Currently, governmental agencies have no opportunity to appeal a ruling from OIP.

The Department agrees with the intent of the bill, as it is consistent with case law, and provides government agencies with an opportunity to have a third party review OIP's rulings. At the same time, sufficient safeguards are in place to insure that agencies will not be able to use the appeal process to frustrate information requests by the public.

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 2, 2012, 9:30 a.m.  
State Capitol, Room 016  
Re: Testimony on S.B. No. 2858  
Relating to Open Government

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LATE TESTIMONY

Thank you for the opportunity to submit testimony on S.B. No. 2858.

OIP strongly supports this bill, which would create a uniform process under the Uniform Information Practices Act ("UIPA," HRS Chapter 92F) and the Sunshine Law (HRS Chapter 92, Part I), which would clarify an agency's right to judicially appeal an OIP decision that either mandates the disclosure of public records under the UIPA, or concludes that an action is prohibited or required by the Sunshine Law.

The UIPA currently allows record-requesting members of the public to challenge an agency's denial of records through OIP's informal resolution process. Whether or not a requester goes through this informal resolution process, the law allows a requester to go to court to seek de novo review of an OIP decision upholding a denial of access to records by a government agency.

In contrast to a requester's right to appeal, Hawaii's UIPA has never contained a provision allowing a government agency to appeal an OIP decision in the requestor's favor that mandates the disclosure of records. Rather, the UIPA expressly directs agencies that it "shall make the record available" when required

by OIP. (HRS 92F-15.5(b).) Moreover, the UIPA's legislative history indicates that the lack of a process for agency appeals was an intentional omission, designed to prevent lawsuits between agencies, which is why OIP has argued that its decisions could not be appealed to the courts by an agency. Nevertheless, Hawaii's courts in County of Kauai v. OIP, 120 Haw. 34, 200 P.3d 403 (2009), allowed an agency to appeal OIP's decision requiring the disclosure of the agency's executive meeting minutes and rejected OIP's arguments against appellate jurisdiction. Instead, the Intermediate Court of Appeals, in a decision that was summarily affirmed by the Supreme Court, reasoned that the agency's appeal could proceed under the Sunshine Law, even though the agency was actually appealing a separate UIPA determination. The Sunshine Law does not specifically permit an agency's appeal of an OIP decision, but it does allow "any person" to go to court to determine the law's applicability to a board's discussions or decisions, and it does not specify who the opposing party should be if such a lawsuit is brought by a board. The court therefore concluded that a board could sue OIP when it disagreed with OIP's interpretation of the law.

Rather than continuing to litigate whether OIP opinions should ultimately be reviewable by the courts under either law, which could result in "agencies suing agencies" contrary to the UIPA's legislative intent, OIP is seeking legislative clarification of agencies' appeal rights regarding OIP opinions under both the UIPA and the Sunshine Law. OIP proposes the creation of a uniform procedure applicable to both the UIPA and the Sunshine Law, which would strictly define and limit agencies' right to appeal OIP opinions.

#### OIP and the Public Are Not Required to be Parties in an Agency's Appeal

Under OIP's proposal, OIP or a member of the public affected by the decision shall not be required to participate in the judicial appeal, which would essentially

be a review of OIP's opinion and be limited to the record that was before OIP. Neither OIP nor the requester would be required to appear in an agency's appeal, thus eliminating the agency's ability to win simply by default. The judicial review would be of the OIP decision itself, rather than a suit against OIP or the requester personally. Just as a judge is not sued or required to appear in a case challenging his or her decision, neither OIP nor a requester would be named as parties to the appeal. OIP and the requester would be given notice of the suit and would have the right to intervene, but they would not be required to appear in the case or risk losing by default.

"Palpably Erroneous" Standard for Agencies' Appeals Only

OIP's opinions would be admissible on appeal and shall be considered as precedent unless found to be "palpably erroneous." The "palpably erroneous" standard is a high standard of review that requires great deference to OIP's factual and legal findings and conclusions, and it was previously applied to an OIP decision by the Hawaii Intermediate Court of Appeals in Right to Know Committee v. City Council, 117 Haw. 1, 13, 175 P.3d 111, 123 (2007). The codification of a high standard of review for the agency appeals process is necessary to discourage agencies from routinely challenging or ignoring OIP's opinions and thus undermining OIP's value as an alternative to the courts in resolving UIPA and Sunshine Law disputes.

To avoid confusion as to the effect of the new review process on a record requester's existing right to go to court on a "de novo" basis, the bill would further clarify that the lesser "de novo" standard of review only applies in a requester's (not an agency's) UIPA appeal to court.

Uniform Standards

The bill would align the standards under UIPA Parts II and III regarding a record requester's appeal to court after an OIP decision upholding an agency's denial of access; would provide a uniform appellate process under the UIPA and Sunshine Law, which are both administered by OIP; and would codify the standard currently recognized by Hawaii's courts for admissibility and precedential weight given to OIP opinions in Sunshine Law litigation. To give OIP time to adopt administrative rules, the bill's effective date would be January 1, 2013.

In conclusion, OIP requests this Committee's support of S.B. 2858, which will clarify when, and under what standard, judicial review of OIP's decisions is available, and will thus eliminate the public's and agencies' confusion regarding this issue and allow administration of the open records and open meeting laws to work more smoothly.

Thank you for considering our proposed legislation.





LATE TESTIMONY

HAWAII COMMUNITY  
DEVELOPMENT AUTHORITY



Neil Abercrombie  
Governor

Joseph L. Dwight, IV  
Chairperson

Anthony J. H. Ching  
Executive Director

STATEMENT OF

ANTHONY J. H. CHING, EXECUTIVE DIRECTOR  
HAWAII COMMUNITY DEVELOPMENT AUTHORITY

BEFORE THE

SENATE COMMITTEE ON JUDICIARY AND LABOR

Thursday, February 2, 2012

9:30 A.M.

State Capitol, Conference Room 016

in consideration of

**S. B. 2858 – RELATING TO OPEN GOVERNMENT.**

The Hawaii Community Development Authority supports this bill as it seeks to give government agencies the right to obtain judicial review of an Office of Information Practices (“OIP”) opinion under a ‘palpably erroneous’ standard by bringing suit against the decision itself, rather than the OIP or member of the public who originally requested the opinion.

Thank you for the opportunity to testify in support of this proposal.

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Council Chair  
Danny A. Mateo

Vice-Chair  
Joseph Pontanilla

Council Members  
Gladys C. Baisa  
Robert Carroll  
Elle Cochran  
Donald G. Couch, Jr.  
G. Riki Hokama  
Michael P. Victorino  
Mike White



Director of Council Services  
Ken Fukuoka

**COUNTY COUNCIL**  
COUNTY OF MAUI  
200 S. HIGH STREET  
WAILUKU, MAUI, HAWAII 96793  
[www.mauicounty.gov/council](http://www.mauicounty.gov/council)

LATE TESTIMONY

February 1, 2012

The Honorable Clayton Hee, Chair  
Senate Committee on Judiciary and Labor  
State Capitol, Room 407  
Honolulu, Hawaii 96813

Dear Chair Hee:

SUBJECT: **HEARING OF FEBRUARY 2, 2012; TESTIMONY IN  
OPPOSITION TO SB 2858 RELATING TO OPEN  
GOVERNMENT**

As the Lanai representative on the Maui County Council, I would like to offer testimony in opposition to the subject bill. The purpose of this measure is to grant the State Office of Information Practices (OIP) quasi-judicial authority to enforce the Sunshine Law.

I oppose the measure, because it would establish the OIP as a "judge and jury". The agency would have the authority to render opinions of law and to adjudicate challenges to these opinions. This situation would create the potential for abuse, particularly in a contentious challenge between OIP and an agency. It is particularly disconcerting that an appointed State agency could dictate to an elected county council how to conduct business before the community it serves and is accountable to.

I understand that Maui County Council Chair Danny A. Mateo has also submitted testimony in opposition to this measure.

Thank you for the opportunity to offer testimony in opposition.

Sincerely,

A handwritten signature in black ink, appearing to read "Riki Hokama", is written over a horizontal line.

RIKI HOKAMA  
Council Member-Lanai seat

cc: Council Chair Danny A. Mateo



LEAGUE OF  
WOMEN VOTERS\*

*League of Women Voters of Hawaii*

49 South Hotel Street, Room 314 | Honolulu, HI 96813

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**LATE TESTIMONY**

Senate Committee on Judiciary and Labor  
Chair Sen. Clayton Hee, Vice Chair Sen. Maile S.L. Shimabukuro

Thursday 2/2/12 at 9:30 AM in Room 016  
SB 2858 — RELATING TO OPEN GOVERNMENT

TESTIMONY

Douglas Meller, Legislative Committee Member, League of Women Voters of Hawaii

Chair Hee, Vice Chair Shimabukuro, and Committee Members:

The League of Women Voters supports this bill but requests two amendments.

First, we recommend that the bill set a reasonable time limit within which an agency may appeal a decision by the Office of Information Practices (OIP). Appeals would be prohibited unless filed within the time limit.

Second, unless an agency has filed a timely appeal of an OIP decision, we recommend that the bill prohibit an agency from later challenging the decision. Without such a prohibition, a member of the public filing an action to compel agency compliance with an OIP decision might find themselves fighting an agency challenge of that decision.

Thank you for the opportunity to submit testimony.



LATE TESTIMONY

Larry Geller  
Honolulu, HI 96817

Committee on the Judiciary  
Senator Clayton Hee, Chair  
Senator Maile S.L. Shimabukuro, Vice Chair

SB2858  
JDL  
Thursday, February 2, 2012  
9:30 a.m.  
Room 016

February 2, 2012

**Re: SB2858—Relating to Open Government**

**In Opposition**

Dear Senator Hee, Senator Shimabukuro, and members of the Committee:

Although OIP testimony on this bill states that it was legislative intent to prevent lawsuits between agencies, the greater purpose of the Uniform Information Practices Act, and the clear legislative intent in formulating the open meetings and open records laws was to provide for easy and expedited access by the public to government records and government process.

The UIPA requires that OIP issue opinions as appropriate and also allows for legal challenge.

This bill would allow OIP to abdicate its responsibilities under current law and force the public to go to court. Eliminating the risk of default should a party not appear appears bogus--if you want to win in court you need be there, telling it to the judge.

This seems contrary to the purpose of the UIPA and to legislative intent. It would mean, since a court challenge is expensive, that the public would be denied access to government documents.

The bill introduces a "palpably erroneous standard", but to establish that you already need to be in court.

For most people, going to court is an extreme and expensive measure. It appears that even OIP isn't fond of that option. But that's the inevitable consequence should this bill become law.

The current statute is clear on OIP's responsibility:

§92F-15.5 Alternative method to appeal a denial of access. (a) When an agency denies a person access to a government record, the person may appeal the denial to the office of information practices in accordance with rules adopted pursuant to section 92F-42(12). A decision to appeal to the office of information practices for review of the agency denial shall not prejudice the person's right to appeal to the circuit court after a decision is made by the office of information practices.

(b) If the decision is to disclose, the office of information practices **shall** notify the person and the agency, and the agency **shall** make the record available. If the denial of access is upheld, in whole or in part, the office of information practices **shall**, in writing, notify the person of the

decision, the reasons for the decision, and the right to bring a judicial action under section 92F-15(a). [L 1989, c 192, §1].

Despite this, OIP has decided that its greater responsibility is to prevent agencies from suing each other.

Instead of passing this bill, it would be a greater service to the public if this Committee would ask OIP what part of "shall" do they not understand, and if necessary, strengthen the existing law so that OIP's opinion becomes the final word, and that the agency in question has to disclose the document within a certain time.

Larry Geller

# HEMIC

Hawaii Employers' Mutual Insurance Company, Inc.

1100 Alakea Street  
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Honolulu, HI 96813  
Telephone: 808•524•3642, ext. 240  
Facsimile: 808•524•0421  
pnaso@hemic.com

## Written Testimony Only

February 1, 2012

LATE TESTIMONY

The Honorable Clayton Hee,  
Chair, Senate Committee on Judiciary and Labor

The Honorable Maile Shimabukuro  
Vice Chair, Senate Committee on Judiciary and Labor

Re: SB 2858 - Relating to Open Government

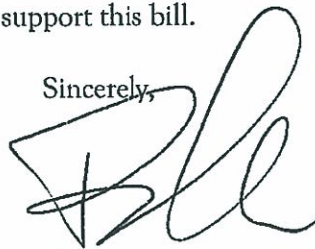
Dear Chairman Hee, Vice Chairman Shimabukuro, and Members of the JDL Committee

My name is Paul Naso. I am the General Counsel of the Hawaii Employers' Mutual Insurance Company, Inc. ("HEMIC"). I am submitting written testimony in support of SB 2858.

HEMIC believe that transparency and openness of government needs to be coupled with fairness in the procedures. The bill will improve the fairness by allowing further clarification of the appeals process.

We respectfully request this committee to support this bill.

Sincerely,



Paul Naso, General Counsel  
Hawaii Employers' Mutual Insurance Company, Inc.

PN:rm

**OFFICE OF THE MAYOR  
CITY AND COUNTY OF HONOLULU**

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PETER B. CARLISLE  
MAYOR



DOUGLAS S. CHIN  
MANAGING DIRECTOR

CHRYSTN K. A. EADS  
DEPUTY MANAGING DIRECTOR

January 31, 2012

The Honorable Clayton Hee, Chair  
and Members of the Judiciary and  
Labor Committee  
The Senate  
Hawaii State Capitol  
415 South Beretania Street  
Honolulu, Hawaii 96813

Dear Chair Hee and Committee Members:

Re: S.B. 2858, Relating to Open Government

The City and County of Honolulu opposes S.B. 2858 because it unduly restricts the rights of agencies to appeal advisory opinions issued by the Office of Information Practices ("OIP"), without affording any process for agencies to present facts and arguments in support of their position. We believe the bill does not give proper weight to the privacy and public policy interests recognized in statute that limit the application of the Sunshine Law and the Uniform Information Practices Act.

We understand the purpose of the bill is to strictly define and limit an agency's right to appeal an opinion issued by OIP under both HRS Chapter 92 ("Sunshine Law") and HRS Chapter 92F ("Uniform Information Practice Act"). The bill limits an agency's right to appeal in two major areas. First, it limits the agency appealing an OIP opinion to the record before the OIP, and prohibits an agency from submitting additional information and argument in its appeal to the Circuit Court, except in "extraordinary circumstances." This is problematic because it presumes that the agency had a full and fair opportunity and incentive to develop a complete record before the OIP, which is not the case. OIP does not have any rules or procedures for agencies to submit evidence, facts, or arguments in support of their positions. As a result, what the parties submit, and what OIP considers, for purposes of an OIP advisory opinion is too random and unreliable to serve as an exclusive record.

The Honorable Clayton Hee, Chair  
and Members of the Judiciary and  
Labor Committee

The Senate

S.B. 2858

Page 2

January 31, 2012

Second, the bill would give OIP's opinion undue weight and deference in agency appeals. It creates a new review standard whereby the Court would have to uphold an OIP opinion unless the agency can demonstrate that it was "palpably erroneous." This is in contrast to the abuse of discretion standard that is used to review actions of all other agencies as required under HRS §91-14(g). Moreover, agencies would be required to meet this "palpably erroneous" standard based only on the record before the OIP, without the benefit of any procedures for the agency to submit evidence, present argument, and ensure the development of a full record. For these same reasons, the law should not require, as this bill proposes, that courts consider advisory opinions and rulings of OIP as precedent without the procedural safeguards to ensure that they are reliable.

Before an agency can be bound by an OIP opinion, and before an agency's right to appeal can be restricted, there must be an established procedure whereby agencies are afforded an opportunity to present information and argument in support of their position. Rather than legislate deference to OIP advisory opinions in an appeal to Circuit Court, we believe the proper course would be for OIP to promulgate rules for a fair and equal administrative process whereby both individuals and agencies are allowed to present information and argument to OIP. Alternatively, agencies should be allowed to present information and argument in their appeal to the Circuit Court, similar to the rights afforded individuals, where the OIP advisory opinion would be subject to a de novo review. Without a process to ensure that the legal, public policy, and privacy reasons underlying an agency's position are heard and considered, the City and County of Honolulu strongly opposes this bill at this time.

Thank you for the opportunity to testify on S.B. 2858.

Very truly yours,

A handwritten signature in black ink, appearing to read 'DS Chin', written in a cursive style.

Douglas S. Chin  
Managing Director