

DEPARTMENT OF THE CORPORATION COUNSEL

# CITY AND COUNTY OF HONOLULU

530 SOUTH KING STREET, ROOM 110  
HONOLULU, HAWAII 96813

Phone: (808) 523-4859 Fax: (808) 523-4583 Internet: www.honolulu.gov

MUFI HANNEMANN  
MAYOR



CARRIE K.S. OKINAGA  
CORPORATION COUNSEL

DONNA M. WOO  
FIRST DEPUTY CORPORATION COUNSEL

February 3, 2006

The Honorable Lorraine R. Inouye, Chair  
Senate Transportation and Government Operations Committee  
Hawaii State Senate  
Hawaii State Capitol  
Honolulu, Hawaii 96813

Dear Chair Inouye and Members of the Committee:

Re: Opposition to SB 2366, Relating to the Office of Information Practices

We greatly appreciate the opportunity to provide testimony in opposition to SB 2366. This bill would give the Director of the Office of Information Practices ("Director") enforcement powers under HRS Chapter 92 (the "Sunshine Law"), that are equivalent to the authority the Director currently has under the Uniform Information Practices Act (Modified), HRS Chapter 92F ("UIPA"). Generally, SB 2366 will increase the Director's authority to investigate and rule upon possible Sunshine Law violations. We believe that these provisions, which make sense for the UIPA, are ill suited to the Sunshine Law.

Section 3 of SB 2366 would adopt HRS § 92-1.5(1), empowering the Director to "rule on any issue regarding compliance of a board with the requirements under this part." In furtherance of this new authority, SB 2366 would add HRS § 92-1.5(4), authorizing the Director to "conduct inquiries regarding compliance by a board and investigate possible violations under this part." To ensure the Director has the tools needed to conduct a proper investigation, SB 2366 would add HRS § 92-1.5(5), which would allow the Director to "examine the records and make inquiries of any board for the purpose of paragraph (4) and seek to enforce that power in the courts of this State." Under proposed HRS § 92-1.5(11) of the bill, after ruling, the director "[m]ay commence a proceeding in circuit court to enforce a decision made pursuant to this part."

We are concerned by the extent to which SB 2366, by giving the Director such broad powers to investigate and rule on Sunshine Law matters, will make county boards, which include the County Councils, subject to potentially intrusive and disruptive investigations at the sole discretion of the Director. These same provisions do not raise this specter under the UIPA. It is the nature of that enactment - which deals with what government documents ought to be made public - that constrains investigations under the UIPA. An investigation under the UIPA is

February 3, 2006

inherently confined to a readily definable set of documents, giving clear scope to the Director's authority under the UIPA to "examine the records of any agency ... and seek to enforce that power in the courts." HRS § 92F-42(5). Because of this fact, the UIPA lends itself to placing a greater level of authority in the regulatory agency, versus the courts.

Though the Sunshine Law serves the same conceptual ideal as the UIPA, open government, an investigation into a possible violation fundamentally differs from an investigation under the UIPA, in that the Sunshine Law investigation will likely not focus on documents but on the infinitely more inscrutable subject of behavior, specifically, private discussions of board business. Whether a particular private discussion sought a commitment to vote, for instance, might turn on not only the content of a conversation, but on the subtleties of implication, insinuation, and even intonation, that can color the meaning of any dialogue. Conversations between individuals, with fallible memories and perhaps idiosyncratic understandings and interpretations of discussions to which they were a party, can never be ascertained and ruled upon with the assurance of a document. And the fact that such discussions may have criminal consequences heightens both the seriousness and the difficulty of an investigation considerably.

Therefore, it should give all greater comfort if binding determinations on Sunshine Law matters are made by the institutionally impartial court system, and not by an individual for whom a perfectly appropriate job qualification would be his or her zealous devotion to open government. Consequently, grafting these UIPA provisions onto the Sunshine Law would result in an improvident grant of authority to the Director of the Office of Information Practices.

If such an increase in regulatory authority is to be implemented, it ought, at the very least, to be accompanied by adoption of a measure such as SB 2657. SB 2657 would create a board of information practices to administer both the Sunshine Law and the UIPA. The board would be constituted of members that would include at least two former members of just the sort of boards subject to the provisions of the Sunshine Law. This would create a regulatory body with genuine expertise in the nature of the conduct of board business, and would temper the law's implementation through the input of individuals with a range of experienced perspectives.

We respectfully urge you not to support SB 2366.

Very truly yours,



*fw* CARRIE K.S. OKINAGA  
Corporation Counsel