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To: Senate Committee on Judiciary and Labor

From: Cheryl Kakazu Park, Director

Date: March 3, 2015, 9:00 a.m.
State Capitol, Conference Room 016

Re: Testimony on S.B. No. 1208
Relating to the Employees' Retirement System.

Thank you for the opportunity to submit testimony on this bill, which would allow the Board of Trustees (Board) of the Employees' Retirement System ("ERS") to discuss certain matters in meetings closed to the public. The Office of Information Practices ("OIP") has concerns about the broad nature of the fourth proposed exemption from the Sunshine Law, part I of chapter 92, HRS, set out at bill page 2, lines 14-17.

This bill amends chapter 88, HRS, which governs the ERS and the Board, by adding a new provision allowing the ERS Board to discuss or deliberate in closed meetings when it is considering certain records or information, as listed in the bill, that are exempt from public disclosure under the Uniform Information Practices Act (Modified), chapter 92F, HRS ("UIPA"). Currently, the Sunshine Law does not allow a board to hold a closed meeting to discuss records exempt from public disclosure under the UIPA. The Sunshine Law, in section 92-5(a)(8), HRS, does allow a board to deliberate or discuss matters that requires consideration of "information that must be confidential" by law. HRS § 92-5(a)(8) (2012). Because the UIPA itself does not mandate confidentiality – its exceptions allow but do not

require an agency to withhold records from the public – the UIPA is not a law that allows a board to hold closed meetings under section 92-5(a)(8), HRS.

This bill would allow the ERS Board to discuss and deliberate in closed meetings when considering records and information exempt from the UIPA because they relate to investments (including proprietary or confidential business information), procurement (to the same extent if the procurement was subject to the Procurement Code), the authority of persons to negotiate investments or the sale of property for the ERS, and intra-agency and inter-agency draft reports memoranda, and preliminary recommendations “subject to the deliberative process privilege under section 92F-13(3)” (the UIPA’s “frustration of a legitimate government function” exception to required records disclosure). While OIP believes the ERS Board’s closed meetings, as proposed by this bill, may be appropriate when the ERS Board is considering information protected from disclosure under the UIPA that relates to investment, procurement, or an individual’s representation of the ERS in negotiation, OIP questions the need for closed meetings to consider records protected by the deliberative process privilege.

All boards routinely discuss in open meetings proposed actions, such as adoption of draft reports, approvals of applications, and other policy decisions, thereby partially waiving the deliberative process privilege as to records containing the information that was discussed in a public meeting. Allowing the ERS board to discuss such matters in a closed meeting would mean that the ERS board had no obligation to publicly deliberate on its proposed actions of any nature, prior to actually voting to act as proposed. While it is up to the Legislature to determine as a matter of policy whether such a broad exception to the Sunshine Law is appropriate, OIP strongly suggests that if this Committee does choose to give the ERS Board a “deliberative process privilege” Sunshine Law exception, it should

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explain in the Committee Report why it is uniquely necessary for the ERS Board to deliberate on policy proposals in private.

Thank you for the opportunity to submit testimony.

TESTIMONY BY KANOE MARGOL
INTERIM EXECUTIVE DIRECTOR, EMPLOYEES' RETIREMENT SYSTEM
STATE OF HAWAII

TO THE SENATE COMMITTEE ON JUDICIARY AND LABOR
ON
SENATE BILL NO. 1208

MARCH 3, 2015, 9:00 A.M.

RELATING TO THE EMPLOYEES' RETIREMENT SYSTEM

Chair Keith-Agaran, Vice Chair Shimabukuro and Members of the Committee,

S.B. 1208 confirms the authority of the board of trustees of the Employees' Retirement System (ERS) to meet in executive session to consider confidential information related to investments and to consider draft reports and memoranda and preliminary recommendations, from staff, consultants, and other agencies, that would be subject to the deliberative process privilege.

The members of the board of trustees have a fiduciary duty to invest the funds of the ERS for the benefit of the system and its members. In order to fulfill this duty, the trustees must consider proprietary information and confidential business information relating to the investments of the system. This information is provided to the trustees and the system on the condition that the system and its trustees keep the information confidential.

Chapter 92 (the "Sunshine Law"), Hawaii Revised Statutes, requires that the trustees deliberate on and make decisions upon matters over which they have supervision and control at meetings open to the public. Although the Sunshine Law allows the trustees to hold meetings closed to the public for certain specified purposes requiring confidentiality, the applicability of these exceptions to the trustees' consideration of confidential information relating to investments has been questioned.

If the board of trustees is unable to consider confidential information relating to the system's investments in executive session, the trustees' fiduciary oversight of the system's investments will be hampered, the system may be precluded from making many types of investments that are beneficial to the system and the system will be placed in a competitive disadvantage when it makes investments or sells investment assets.

The board must also consider draft reports and memoranda and preliminary recommendations from the system's staff, consultants, and actuaries and from other agencies. Such consideration should be kept confidential: (1) in order to encourage open, frank discussions between subordinates and superiors; and (2) to protect against public confusion that might result from the disclosure of projections, reasons, and rationale that are not ultimately the grounds for action by the board. To the extent that the draft reports and memoranda and preliminary recommendations become the basis of the board's decision or are adopted by the board, the reports, memoranda, and recommendations would no longer be confidential and any minutes of the executive session would become publically available, unless publication of the minutes would defeat some other lawful purpose of the executive meeting.

This measure would authorize the board of trustees of the ERS to hold executive sessions closed to the public in order to consider the types of information or records that would be exempt from disclosure under Hawaii's public records act (chapter 92F, Hawaii Revised Statutes) or under the procurement code (chapter 103D, Hawaii Revised Statutes) or in situations in which disclosure of the information under consideration would result in a competitive disadvantage to the ERS as an investor.

The Board of Trustees of the ERS strongly supports this proposal.

Thank you for the opportunity to testify on this important measure.

THE CIVIL BEAT
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Senate Committee on Judiciary & Labor
Honorable Gilbert S.C. Keith-Agaran, Chair
Honorable Maile S.L. Shimabukuro, Vice Chair

**RE: Testimony Commenting on S.B. 1208,
Relating to the Employees' Retirement System**
Hearing: March 3, 2015 at 9:00 a.m.

Dear Chair and Members of the Committee:

My name is Brian Black. I am the Executive Director of the Civil Beat Law Center for the Public Interest, a nonprofit organization whose primary mission concerns solutions that promote government transparency. Thank you for the opportunity to submit testimony on S.B. 1208. The Law Center respectfully requests that the Committee **amend subdivision (a)(4)** to read:

To consider draft reports, memoranda, and preliminary recommendations from staff, consultants, actuaries, and other agencies, to the extent protected from disclosure under section 92F-13(3).

As currently drafted, subdivision (a)(4) references the "deliberative process privilege." The deliberative process privilege is a federal evidentiary privilege that is nowhere codified in the Hawai'i Revised Statutes. The Legislature declined to recognize the privilege when it enacted the Hawai'i Rules of Evidence in 1980 and when it adopted the Uniform Information Practices Act (Modified) in 1988. Although the Office of Information Practices interprets the privilege to apply through HRS § 92F-13(3) (the exception for frustration of a legitimate government function), that OIP interpretation has not been addressed by the Judiciary.

The proposed amendment would maintain the status quo without requiring this Legislature to codify a federal privilege that has been the subject of recent Congressional criticism.

Thank you again for the opportunity to testify.

From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc:
Subject: Submitted testimony for SB1208 on Mar 3, 2015 09:00AM
Date: Friday, February 27, 2015 5:29:56 PM

SB1208

Submitted on: 2/27/2015

Testimony for JDL on Mar 3, 2015 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Edward Stankos	Individual	Oppose	No

Comments: Public meetings need to remain open for transparency.

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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