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To: House Committee on Finance

From: Cheryl Kakazu Park, Director

Date: February 26, 2021, 11:00 a.m.
Via Videoconference

Re: Testimony on H.B. No. 930, H.D. 1
Relating to Employees' Retirement System Investments

Thank you for the opportunity to submit testimony on this bill, which would exempt certain specific types of alternative investment fund information from disclosure under chapter 92F, the Uniform Information Practices Act (Modified) (UIPA). The Office of Information Practices (OIP) offers comments explaining its lack of objection to this bill.

A version of this bill introduced last year drew concern that the language of its UIPA exemption was written loosely enough for the Employees' Retirement System (ERS) to assert in the future that the exemption did not apply only to the listed specific categories of protected alternative investment fund information, but also could be used to withhold any records related to managing and investing ERS funds. Although OIP had not testified to that concern, OIP understands how the looseness of the language in last year's version of this bill gave rise to it.

The exemption language in the bill as introduced this year has been tightened up, and OIP believes it makes clear that the only documents being statutorily exempted from the UIPA are the specifically listed categories of documents relating to alternative investments, and does not allow room for an

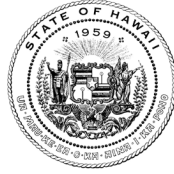
interpretation that the exemption might apply to records related to managing and investing ERS funds generally. After setting out a list of categories of records that are statutorily exempted from the UIPA, the bill goes on to specify that the categorical exemption for those records is in addition to any other UIPA exceptions that may apply to ERS records. OIP believes this makes clear that ERS records not falling into one of the listed categories of exempt records may be withheld to the extent they fall under one of the UIPA's generally applicable exceptions to disclosure, but are not automatically exempted from disclosure.

OIP finds the listed categories of records relating to alternative investments that would be statutorily exempted by this bill reasonably limited and specific, and based on the explanation in the bill's purpose clause, consistent with the UIPA's generally applicable exceptions to disclosure. The records to be protected would likely fall under the UIPA's frustration exception to disclosure in any case, so this bill would not restrict public access to a type of records that have historically been public under the UIPA, and OIP recognizes that having a specific statutory exemption will give confidence to alternative investments that ERS will not be required to publicly release their confidential information.

Finally, OIP notes that the Civil Beat Law Center's testimony on this bill as introduced suggested alternative language for proposed subsection (e), which in the H.D. 1 version of the bill became proposed subsection (d). OIP believes the Law Center's language would have substantially the same effect as the language in the current subsection (d), and OIP would have no objection to that amendment.

Thank you for considering OIP's comments.

DAVID Y. IGE
GOVERNOR



THOMAS WILLIAMS
EXECUTIVE DIRECTOR

KANOE MARGOL
DEPUTY EXECUTIVE DIRECTOR

STATE OF HAWAII
EMPLOYEES' RETIREMENT SYSTEM

TESTIMONY BY THOMAS WILLIAMS
EXECUTIVE DIRECTOR, EMPLOYEES' RETIREMENT SYSTEM
STATE OF HAWAII

TO THE HOUSE COMMITTEE FINANCE

ON

HOUSE BILL NO. 930, H.D. 1

February 26, 2021
11:00 A.M.
Conference Room 308

RELATING TO THE EMPLOYEES' RETIREMENT SYSTEM INVESTMENTS

Chair Luke, Vice Chair Cullen and Members of the Committee,

H.B. 930, H.D. 1 identifies certain specific types of alternative investment fund information, the disclosure of which would likely put the Employees' Retirement System ("ERS") at a competitive disadvantage, and therefore exempts such categories of information from disclosure under chapter 92F, Hawaii Revised Statutes (HRS), consistent with market best practices. With ERS' \$14.6 billion unfunded liability and its 55.3% funded ratio, it is essential that ERS' assets be protected and its ability to be competitive in alternative private markets not be impaired. The ERS Board of Trustees strongly supports this legislation.

This bill amends section 88-103 to exempt certain specific types of alternative investment fund information from disclosure under chapter 92F. This will enable the ERS to efficiently maintain the confidentiality of information relating to alternative investments such as investments in private equity, private credit and private real estate funds, consistent with competitive investment market best practices. H.B. 930, H.D. 1 addresses earlier concerns raised by the Civil Beat Law Center and with the assistance of the Office of Information Practices, restricts the documents which may be exempt



Employees' Retirement System
of the State of Hawaii

from disclosure requirements of chapter 92F, HRS, while still ensuring that the system will not be disadvantaged as a competitive investor.

In order to address the system's unfunded liability and other financial needs, the system, as a prudent investor, engages in diversified investments, including private alternative investment funds. Due diligence into such investments requires that the system invest time and money for detailed proprietary and confidential information and research regarding the projected performance of each fund. If the system is required to disclose such confidential information, the system is disadvantaged as a competitive investor.

General Partner and Limited Liability Corporations competing with and providing investment alternatives to those in which we invest get access to proprietary information and are able to use this information to their advantage while diminishing the competitive position of those private funds in which we invest. Competing investors would be able to acquire, at no cost, the system's investment intelligence and that of the funds in which we invest, resulting in oversubscription of the system's best investments, reducing the system's access. Further, if the system is required to disclose confidential information which the investment funds require to be kept confidential, difficult to access high-performing funds will be deterred from allowing the system to invest with them. The system currently expends significant time and staff resources in responding to requests for such confidential information. Information which in turn is sold on the commercial markets.

H.B 930, H.D. 1 identifies certain, specifically listed categories of alternative investment fund information the disclosure of which would likely put the system at a competitive disadvantage, and therefore categorically exempts such categories of information from disclosure under chapter 92F, consistent with market best practices. A byproduct is that investment staff will be allowed to focus its attention on ERS high value investment activities as opposed to information gathering and disclosure to commercial entities.

The ERS Board of Trustees is in strong support of H.B. 930, H.D. 1.

Thank you for this opportunity to testify.

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House Committee on Finance
Honorable Sylvia Luke, Chair
Honorable Ty J.K. Cullen, Vice Chair

**RE: Testimony Opposing H.B. 930 H.D. 1, Relating to
Employees' Retirement System Investments**

Hearing: February 26, 2021 at 11:00 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 governmental transparency. Thank you for the opportunity to submit testimony **opposing the language in subsection (e) of the proposed amendment in H.B. 930. The Employees' Retirement System accepted the proposed alternative language below in the Senate Committee on Labor, Culture, and the Arts.**

I attended the August 28, 2020 meeting of the Legislative Committee of the Board of Trustees of the Employees' Retirement System. At that meeting, ERS informed the committee that it proposed the language in this bill so that ERS is "exempt from FOIA." ERS should not be exempt from our public records law.

The Law Center does not have a position concerning the exemption for specific documents concerning specific investments in subsection (d). Subsection (e), however, is far more broadly worded and could be read by ERS—in light of its desire to be "exempt from FOIA"—to justify withholding documents that currently are public.

To focus this bill on specific records and to avoid unintended consequences, the Law Center requests that the Committee **remove subsection (e)** as unnecessary. Neither OIP nor the courts have ever held that the specificity of a confidentiality statute means that an agency cannot rely on normal record exceptions. To the contrary, after determining that a record is not covered by a confidentiality statute, OIP consistently turns next to the determine whether the record may be withheld under the normal exceptions.

In the alternative, please amend subsection (e) to simply read:

The foregoing categorical exemptions from chapter 92F are in addition to any other records otherwise exempt from disclosure pursuant to chapter 92F or other law.

Thank you again for the opportunity to testify.