



The Judiciary, State of Hawai'i

Testimony to the House Committee on Judiciary

Representative Karl Rhoads, Chair

Representative Joy A. San Buenaventura, Vice Chair

Tuesday, February 3, 2015, 2:00 PM

State Capitol, Conference Room 325

by

Susan Pang Gochros

Chief Staff Attorney and

Department Head, Intergovernmental and Community Relations

Bill No. and Title: House Bill No. 287, Relating to the Uniform Information Practices Act.

Purpose: Broadens the government records exception under the UIPA to include records whose disclosure may result in 1) physical harm to an individual, or, 2) harm, embarrassment, inconvenience, or unfairness due to the unauthorized use or disclosure of personally identifiable information.

Judiciary's Position:

The Hawai'i State Judiciary supports this bill as a means of ensuring that government records are not disclosed in situations where their disclosure could result in 1) physical harm to a person or, 2) harm, embarrassment, inconvenience or unfairness to an individual due to the unauthorized use or disclosure of a person's personally identifiable information.

This legislation is designed to promote the safety and security of individuals by ensuring that a review of matters relating to personal safety and security is part of the equation in determining whether particular documents shall be disclosed pursuant to Hawaii's Uniform Information Practices Act. While the present law states that government records shall not be disclosed if their disclosure would constitute a "clearly unwarranted invasion of personal privacy," the law does not specifically address situations where disclosure could result in a threat to one's physical safety or security.

This legislation is modeled partly after Pennsylvania's Right-to-Know-Law (RTKL) which provides a specific security exemption in its statute. A 2011 Pennsylvania court ruling



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House Committee on Judiciary
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clarified that regardless of a general right to privacy, a statutory exemption to the Pennsylvania Right-to-Know Law protects information, such as birth dates, from disclosure. The language in the second half of the exemption derives from Department of Homeland Security guidelines for protecting sensitive personally identifiable information. DHS defines sensitive PII as "Personally Identifiable information, which if lost, compromised, or disclosed without authorization, could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual." The intent of this exemption is to avoid the disclosure of personal information that could be used to commit crimes such as identity theft.

We believe that the proposed exemption is appropriate to ensure that the disclosure of government records does not place an individual's physical safety or personal information security at risk.

Thank you for the opportunity to testify on this matter.

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

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House Committee on Judiciary
Honorable Karl Rhoads, Chair
Honorable Joy A. San Buenaventura, Vice Chair

**RE: Testimony Opposing H.B. 287,
Relating to the Uniform Information Practices Act**
Hearing: February 3, 2015 at 2:00 p.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 H.B. 287. The Law Center strongly opposes this bill.

H.B. 287 will gut Hawaii's public records law. For 25 years, the UIPA exceptions have stood without change.¹ Those exceptions were the product of a year-long study by a committee specially appointed by Governor Waihee to examine the disclosure of public records and borrowed heavily from the 1980 Uniform Information Practices Code. None of those sources, nor the federal Freedom of Information Act (FOIA), provides for so broad an exception to the public right to know as proposed in H.B. 287 for perceived "embarrassment, inconvenience, or unfairness."

Governmental accountability – a core purpose underlying the UIPA – often involves embarrassment and inconvenience to someone. *See* HRS § 92F-2. President Obama explained:

A democracy requires accountability, and accountability requires transparency. . . . The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve.

Executive Mem. on Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

No amendment is necessary. An individual's personally identifiable information is protected by the constitutional right of privacy through Exception (1) of the UIPA. As under the Hawai'i Constitution, privacy interests are balanced against the public

¹ The 1993 amendment to HRS § 92F-13 did not change the substance of the exceptions.

interest to determine if disclosure “would constitute a clearly unwarranted invasion of personal privacy.” HRS §§ 92F-13(1), -14(a). The 1988 Legislature adopted that balancing test because the prior public records law was widely criticized for giving “primacy to personal privacy interests.” H. Stand. Comm. Rep. No. 342-88, in 1988 House Journal at 970. But there are no such safeguards for the public interest in H.B. 287.²

H.B. 287 instead misappropriates a **recordkeeping** standard under federal law and twists it into a public records exception. The federal Privacy Act requires that federal agencies “establish appropriate administrative, technical, and physical safeguards to insure the safety and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in *substantial harm, embarrassment, inconvenience, or unfairness* to any individual on whom information is maintained.”³ 5 U.S.C. § 552a(e)(10) (emphasis added). There is no comparable language, however, exempting those records from disclosure under the FOIA. If the Legislature were interested in adopting such a recordkeeping security requirement for state agencies, the proper statute might be, for example, HRS chapter 487N – not the UIPA.

In the absence of pervasive evidence that agencies are disclosing government records that should remain confidential, there is no reason for the Legislature to consider adding to the list of UIPA exceptions.

Thank you again for the opportunity to testify.

² While the Judiciary – as sponsor for this bill – might believe that the qualifying language “which is reasonably likely to result in substantial and demonstrable risk” provides some safeguard, agencies already have the burden under HRS § 92F-15(c) to prove that any proposed exception applies.

³ H.B. 287 reinforces the confusion of using a recordkeeping standard in a public records law by referencing “unauthorized use or disclosure”; while recordkeeping standards focus on unauthorized breaches of personal data, public records laws authorize the disclosure of government records. Thus, embarrassment from disclosure under the UIPA would not be “caused by” an *unauthorized* disclosure.



House Committee on the Judiciary
Chair Karl Rhoads, Vice Chair Joy San Buenaventura

Tuesday, February 3, 2:00 p.m., Room 325
HB 287 Relating to the Uniform Information Practices Act

TESTIMONY IN OPPOSITION
Barbara Polk, Interim Chair, Common Cause Hawaii

Dear Chair Rhoads, Vice Chair Buenaventura, and members of the Committee on the Judiciary.

Common Cause Hawaii strongly opposes this bill, which substantially closes the door to public disclosure of government records. Although a “substantial and demonstrable risk of physical harm to an individual” may be warranted at times, we believe that such a decision should be made by a court, and not by an administrator.

We are especially opposed to part (6)(B), which contains wording so broad that it is not clear what all might be encompassed by it. For example, what type of government record would be “unfair?” Even the word “harm” in (6)(B) is overly broad—there may be people who believe any mention of their name would “harm” them. But our greatest concern is with allowing records to be kept confidential if they might prove “embarrassing or inconvenient.”

Among the records which one might claim should be hidden under the terms of this bill are all records of consumer complaints, including their resolution; all fines or penalties imposed by the Campaign Spending Commission; Health Department findings of violations by restaurants or nursing homes; and criminal records, especially those of public persons. In addition this bill appears to work against the current public concern that more information about police misconduct be released as a way to curb or guard against overzealous policing. In the past, police have opposed more openness based on all the criteria that this bill would add.

We believe that all of this information is important in a healthy society. Consumers need to have information when choosing a dentist, nursing home or restaurant. And when individual misdeeds can be hidden, the society is ripe for widespread corruption. The risk of public embarrassment is often the most potent constraint on misbehavior among people in all parts of the society.

In the interests of open government, we urge you not to pass this bill.

Thank you for this opportunity to express our strong opposition to HB 287.



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HOUSE COMMITTEE ON JUDICIARY
Tuesday, February 3, 2105, 2 pm House Conference Room 325
HB 287 RELATING TO THE UNIFORM INFORMATION PRACTICES ACT

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

Chair Rhoads, Vice-Chair San Buenaventura, and Committee Members:

The League of Women Voters of Hawaii strongly opposes HB 287. The bill proposes to keep government records secret if disclosure poses risk that some person might be harmed, embarrassed, inconvenienced, or treated unfairly. For example, it would be permissible to refuse to disclose government records which embarrass public employees who have wasted public funds, been terminated for misconduct, or been arrested for criminal activity. The public interest would not be an important consideration under such an unbalanced, one-sided privacy policy.

Section 92F-13, Hawaii Revised Statutes, already prohibits disclosure of government records which "... constitute a clearly unwarranted invasion of personal privacy..." However, Section 92F-14(a), Hawaii Revised Statutes, also provides that: "Disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interest of the individual." The League believes that the existing "balancing test" works and does not need revision or clarification. We request that you hold HB 287.

Thank you for the opportunity to submit testimony.

Feb. 2, 2015

Ryan Kawaiiani Ozawa
95-595 Kanamee St., #326
Mililani, HI 96789-1431
ryanozawa@gmail.com

Dear Rep. Karl Rhoads, Chair; Rep. Joy A. San Buenaventura, Vice Chair; honorable Representatives on the Committee on Judiciary:

I am writing to **oppose HB287 relating to the Uniform Information Practices Act.**

I have been an advocate for open data policies and practices since studying and practicing journalism at the University of Hawaii, then as an independent publisher and blogger. The UIPA is a critical piece of state law, which provides for the accessibility and transparency of government, but which also protects against “a clearly unwarranted invasion of personal privacy.”

Section 92F-13 already provides extensive exemptions, including disclosures that could result in the “frustration of a legitimate government function.” This offers significant leeway in arguing against the disclosure of government records.

The proposed amendment, in particular the new exemption for information that could result in “embarrassment, inconvenience, or unfairness,” is so broad as to be nearly meaningless, and could be interpreted to keep secret any information that could make a government agency or official look bad.

I urge the committee to carefully consider what information in a government record could be interpreted as embarrassing. A birthdate? A vote on a controversial bill? A contribution from a lobbying group? Shall we give government so large a blanket as to obscure anything that may spark criticism or opposition? In order to speak truth to power, one must first have access to the truth.

Perhaps, taken to the extreme, you might be able to imagine how a campaign contribution or salary amount could lead to embarrassment or even harm. But I would submit that the existing exception relating to “the frustration of a legitimate government function” provides a wide enough limit on such extreme scenarios.

Thank you for your consideration.

Malama pono,

Ryan Ozawa
HawaiiWeblog.com

LATE

OFFICE OF INFORMATION PRACTICES

STATE OF HAWAII

NO. 1 CAPITOL DISTRICT BUILDING

250 SOUTH HOTEL STREET, SUITE 107

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TELEPHONE: 808-586-1400 FAX: 808-586-1412

EMAIL: oiip@hawaii.gov

To: House Committee on Judiciary

From: Cheryl Kakazu Park, Director

Date: February 3, 2015, at 2:00 p.m.
State Capitol, Conference Room 325

Re: Testimony on H.B. No. 287
Relating to the Uniform Information Practices Act

Thank you for the opportunity to submit testimony on this bill. The Office of Information Practices (“OIP”) opposes this bill, which would add an exception to public disclosure under the Uniform Information Practices Act, chapter 92F, HRS (“UIPA”) for records whose disclosure may result in physical harm to an individual or “harm, embarrassment, inconvenience, or unfairness” to an individual resulting from the disclosure of personally identifiable information.

Initially, please note that while the UIPA does not have an exception that is specifically and primarily concerned with information whose disclosure would present a risk of physical harm to an individual, two UIPA exceptions already address security concerns of individuals and organizations. For individuals, the UIPA’s privacy exception applies to information affecting an individual’s ability to be undisturbed at home, such as home address and personal contact information, as well as information affecting reputational privacy, such as involvement in a criminal investigation whether as a victim or a suspect, medical information, work evaluations, ethnicity and citizenship, or personal finances. The UIPA’s frustration exception also protects information whose disclosure would present security

concerns generally, not limited to security concerns affecting individuals. For instance, OIP has previously held that the frustration exception protects information whose disclosure could reasonably be expected to cause damage to public security. OIP Op. Ltr. No. 07-05. The frustration exception also allows an agency to protect the identity of an individual who has provided information as a confidential source, thus preventing possible retaliation.

OIP is concerned that this bill essentially seeks to recreate the UIPA's current protection for security concerns as expressed in its privacy and frustration exceptions, but in a more broadly phrased and potentially subjective way that would alter OIP's and the courts' interpretations of the existing law. The question of whether information would embarrass an individual, for instance, would be largely based on an individual's subjective perception. And disclosure of government records often seems inconvenient to at least one individual – the state contractor who would rather keep competitors in the dark as to the precise contract terms, a government official who may be called on to explain the slow pace of work on a project as shown in relevant records, or even the individual government employees who must drop other tasks to fulfill a record request.

Applying the principle that when the Legislature alters the words of a statute it intends to change the statute's meaning, addition of this exception to the UIPA would give rise to a presumption that it protected additional information not previously covered by the privacy or frustration exceptions, which could alter OIP's long-standing interpretations of current law. For example, under current law, information about a public employee's misconduct that led to termination or (except for police officers) suspension loses its privacy interest and becomes publicly disclosable once the employee's final appeal has passed; however, under this proposal, even though the misconduct information would no longer be "private," it

could continue to be withheld because its disclosure would likely embarrass the employee. Similarly, disclosure of complaints filed against a licensed dentist would no doubt inconvenience and embarrass the dentist and thus would be covered by the proposed exception, even though the current statute specifies that licensees do not carry a significant privacy interest in certain information so complaints against them would not be withheld under the privacy exception.

OIP recognizes that this bill arises from an intent to ensure that individuals' home address and similar contact information, as well as other private information is protected, and that individuals are not endangered by information disclosed under the UIPA. However, protection of home contact information and sensitive personally identifiable information is generally provided for by the UIPA's existing exceptions, particularly the privacy exception. The language of this bill goes well beyond that intent to significantly broaden an agency's ability to withhold records from public disclosure based on "embarrassment" of or "inconvenience" to an individual and would alter long-standing interpretations of the UIPA. Consequently, OIP respectfully requests that this Committee hold this bill.

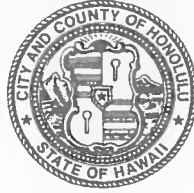
POLICE DEPARTMENT

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LATE

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MARIE A. McCAULEY
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GK-DNK

OUR REFERENCE

February 3, 2015

The Honorable Karl Rhoads, Chair
and Members
Committee on Judiciary
House of Representatives
Hawaii State Capitol, Room 325
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members:

SUBJECT: House Bill No. 287, Relating to the Uniform Information Practices Act

I am Captain Gerald Kaneshiro of the Records and Identification Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports House Bill No. 287, Relating to the Uniform Information Practices Act. This bill broadens the government records exemption to include records whose disclosure may result in physical harm, embarrassment, and/or inconvenience to individuals from the unauthorized use of their personal, identifiable information.


The HPD provides copies of police reports to the public upon request in accordance with the law. Personal information is redacted to prevent the unauthorized use of the information given. This provides additional protection to victims as well as persons suspected of committing a crime from possible physical harm, embarrassment, and/or inconvenience.

Thank you for the opportunity to testify.

Sincerely,


Gerald K. Kaneshiro, Captain
Records and Identification Division

APPROVED:


Louis M. Kealoha
Chief of Police

GRASSROOT

Institute of Hawaii

February 3, 2015
2:00 PM
House Conference Room 325

LATE

To: House Committee on Judiciary
Rep. Karl Rhoads, Chair
Rep. Joy San Buenaventura, Vice Chair

From: Grassroot Institute of Hawaii
President Keli'i Akina, Ph.D.

RE: HB 287 -- RELATING TO THE UNIFORM INFORMATION PRACTICES ACT
Comments Only

Dear Chair and Committee Members:

The Grassroot Institute of Hawaii would like to offer its comments on HB 287, which broadens the exception to the Uniform Information Practices Act to include, "records whose disclosure may result in physical harm to an individual or harm, embarrassment, inconvenience, or unfairness that results from the unauthorized use or disclosure of personally identifiable information."

Open records and public access to the actions of government are essential to promoting trust in government, establishing an informed and active citizenry, discouraging corruption, and allowing voters to review the use of public funds and the actions of public officials. Leaders at both the state and federal level have made a point of endorsing greater transparency in government.

The language of the proposed bill creates a broad and vague exemption that is very troubling for those who favor open government. To allow the denial of requests on the grounds that they may be embarrassing, inconvenient, or unfair would permit the withholding of exactly the type of information and records that the law was designed to expose.

The exception envisioned by this bill could effectively render the existing Act meaningless, as it provides grounds for denial that could be interpreted to apply to nearly any request. As it has already been established that information requests in Hawaii face a significant delay in fulfillment and enforcement, this bill would further undermine transparency in our state.

Thank you for the opportunity to submit our comments.

Sincerely,
Keli'i Akina, Ph.D.
President, Grassroot Institute of Hawaii

Board of Directors

Richard Rowland
Chairman and Founder

Keli'i Akina, Ph.D.
President/CEO

Eddie Kemp
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P.O. Box 3141
Honolulu, HI 96802
Feb. 3, 2015

House Judiciary Committee
State Capitol
Honolulu, HI 96813

Re: House Bill 287

Chairman Rhoads and Committee Members:

My name is Stirling Morita, and I am president of the Hawaii Chapter of the Society of Professional Journalists.

We oppose the amendments proposed in HB 287. We believe they would dramatically undermine the state Uniform Information Practices Act, which was intended to promote transparency and accountability.

As a member of the committee that helped provide the foundation for the act, I find this measure to be repugnant to the concept of public information – details that the public needs to know to make informed decisions about its government. I submit that a lot of information about government missteps or corruption will be embarrassing or inconvenient but that should not be used as a standard to block release of information.

If it is indeed private information, the law already provides a balancing test.

We suggest to you that there is no need for such a broad exception to the Uniform Information Practices Act.

Thank you for your time and attention.

Stirling Morita
President
Hawaii Chapter SPJ



ACLU

LIBERTIES UNION

LATE

Committee on Judiciary
Hearing Date/Time: Tuesday, February 3, 2015, 2:00 p.m.
Place: Conference Room 325
Re: Testimony of the ACLU of Hawaii **in Opposition to H.B. 287**, Relating to the Uniform Information Practices Act

Dear Chair Rhoads and Members of the Committee on Judiciary,

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in **opposition to H.B. 287**, Relating to the Uniform Information Practices Act.

This bill unnecessarily weakens Hawaii’s laws on government transparency, and threatens one of the strongest tools the public has to ensure accountability by government agencies. The UIPA already contains strong protections to ensure employees’ personal privacy, and the broad exemptions proposed by H.B. 287 are unwarranted.

Thank you for this opportunity to testify.

Daniel M. Gluck
Legal Director
ACLU of Hawaii

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for 50 years.

American Civil Liberties Union of Hawai'i
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LATE

Submitted By	Organization	Testifier Position	Present at Hearing
Frances K. (Frankie) Stapleton	Individual	Oppose	No

Comments: My name is Frances K. (Frankie) Stapleton, a registered voter living at 14-803 Crystal Circle in Pahoa, Hawaii, 19887. I oppose this measure as being unconstitutional. Please vote against HB287. Mahalo