STANDING COMMITTEE REPORT NO. 2580

Honolulu, Hawaii

MAR 31, 1988

Honorable Richard S.H. Wong
President of the Senate
Fourteenth State Legislature
Regular Session of 1988
State of Hawaii

Sir:

RE: H.B. No. 2002, H.D. 1

Your Committee on Government Operations, to which was referred H.B. No. 2002, H.D. 1, entitled:

"A BILL FOR AN ACT RELATING TO PUBLIC RECORDS,"

begs leave to report as follows:

The purpose of this bill is to repeal both the current law on public access to government records (Part V of Chapter 92, Hawaii Revised Statutes (HRS)) and the current chapter limiting access in the interest of privacy, limiting inter-agency record sharing and providing for the correction of inaccurate entries (Chapter 92E, HRS). In their place, the bill proposes a detailed and comprehensive chapter, based on the Uniform Information Practices Code of the National Conference of Commissioners on Uniform State Laws.

Your Committee acknowledges the efforts of Chairman Wayne Metcalf and the members of the Judiciary Committee of the House of Representatives in translating the Report of the Governor's Committee on Public Health Records and Privacy into legislation. They undertook an arduous task and produced a reasonable synthesis of conflicting interests.

The House of Representatives has, in effect, wiped the slate clean and adopted a new law. Your Committee proposes a less drastic alternative, premised on the belief that most of the current law is salvageable.

The only substantial problem with the current law flows from the attempt to combine three objectives in Chapter 92E: appropriately limit public access in the interest of individual privacy (92E-4); allow an individual access to the individual's own records and to correct erroneous entries; and limit inter-agency record sharing (92E-5). More specifically, the problem is the reliance on a single definition of "personal

records" for three different objectives. In order to broadly allow an individual access to records about the individual, the definition too broadly limits public access.

To resolve this problem, your Committee has repealed both 92E-4 and 92E-5, leaving a chapter devoted singularly to an individual's right to access and correct records which pertain to the individual. The title of Chapter 92E has been amended to reflect the narrower scope.

The provisions deleted from Chapter 92E have been replaced by new provisions in Part V of Chapter 92, which then serves as the law balancing the public interest in access to government records with the individual's privacy interest.

The effect of your Committee's approach is to dramatically shorten the bill, from forty-seven pages to seven pages. It is your Committee's belief that this draft focuses the discussion and highlights the public policy issue.

The Senate Draft

1. A new Section 92-50 has been added at the beginning of Part V, articulating the State policy on access to public records. To a substantial degree, it echoes the sentiments of Section 92-1. However, it applies specifically to Part V and sets the tone for the resolution of the sometimes conflicting interests of public access and individual privacy.

2. The former Section 92-50 is replaced by a new Section 92-51, which is expanded by the inclusion of a definition of "Agency." It should be noted that the new definition of "Agency" is broader than the definition of "Agency" in Chapter 92E. As under current law, the Legislature and Judiciary are also included.

The new definition of "public record" is expanded beyond the definition in the former Section 92-50, in three respects:

(a) Modern data storage technologies are specifically included and the definition is broad enough to encompass new information storage technologies;

(b) The exclusion of "records which invade the right of privacy of an individual" has been deleted from the definition. Such records will only be closed if there is a "clearly unwarranted" invasion of privacy, as provided in Section 92-53.

Your Committee is aware that the right of privacy in Section 92-53 is narrower than the right of privacy deleted from the

definition. Section 92-53 is modeled on the Freedom of Information Act, which the Attorney General of Hawaii characterized as less broad than Section 92-50, in a letter dated August 11, 1980 to Representative Russell Blair. It is an open question whether Hawaii's constitutional right to privacy is broader than the provisions of Section 92-53, in some respects, and may compel the State to close additional records, in the interest of privacy. It is your Committee's hope that the compelling state interest in open and accessible government will prevail and the balancing of interests under Section 92-53 will not be disturbed on constitutional grounds; and

(c) The words "by law" have been deleted. By this deletion, your Committee specifically rejects the application of the "legal requirement" test in Town Crier, Inc. v. Chief of Police of Weston, 361 Mass. 682, 282 N.E. 2d 379 (1972) and Dunn v. Board of Assessors of Sterling, 1972 Mass. A.S. 901, 282 N.E.2d 385 (1972), (cited in the May 6, 1976 Attorney General's memorandum to former Governor George Ariyoshi) to qualify entries that were made. Nor should a "legal requirement" test be applied to records which are "received" for filing.

3. The former Section 92-51 is renumbered as Section 92-52 and expanded to explicitly include the right to duplicate public records. The bulk of the former Section 92-51 is covered by Section 92-53, allowing this new section to clearly focus on the general rules of disclosure.

4. A new Section 92-53 is added to create four categorical exceptions to the general rule. Rather than list specific records in the statute, at the risk of being over- or under-inclusive, your Committee prefers to categorize and rely on the developing common law. The common law is ideally suited to the task of balancing competing interest in the grey areas and unanticipated cases, under the guidance of the legislative policy. To assist the Judiciary in understanding the legislative intent, the following examples are provided.

(a) Privacy interest. The following are examples of information in which an individual has a significant privacy interest. However, any public interest in disclosure must be given due consideration. The case law under the Freedom of Information Act should be consulted for additional guidance.

(1) Information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation, other than directory information while an individual is present at a facility;

(2) Information compiled and identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(3) Information relating to eligibility for social services or welfare benefits or to the determination of benefit levels;

(4) Information in an agency's personnel file, or on applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position; except information relating to the status of any formal charges against the employee and disciplinary action taken, information concerning compensation, title, job description, education and training background, previous work experience, dates of employment and similar routine matters;

(5) Information relating to an individual's nongovernmental employment history, except as necessary to demonstrate compliance with requirements for a particular government position;

(6) Information describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness;

(7) Information compiled as part of an inquiry into an individual's fitness to be granted or to retain a license, except: records of any proceeding resulting in revocation or suspension of a license and the grounds for revocation or suspension; information on the current employment and required insurance coverages of licensees; and the record of any complaints including all dispositions; and

(8) Information comprising a personal recommendation or evaluation.

(b) Frustration of legitimate government function. The following are examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function.

(1) Records or information compiled for law enforcement purposes;

(2) Materials used to administer an examination which, if disclosed, would compromise the validity, fairness or objectivity of the examination;

(3) Information which, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency, including information pertaining to collective bargaining;

(4) Information identifying or pertaining to real property under consideration for future public acquisition, unless otherwise available under State law;

(5) Administrative or technical information, including software, operating protocols and employee manuals, which, if disclosed, would jeopardize the security of a record-keeping system;

(6) Proprietary information, such as research methods, records and data, computer programs and software and other types of information manufactured or marketed by persons under exclusive legal right, owned by an agency or entrusted to it;

(7) Trade secrets or confidential commercial and financial information;

(8) Library, archival, or museum material contributed by private persons to the extent of any lawful limitation imposed by the contributor; and

(9) Information that is expressly made nondisclosable or confidential under Federal or State law or protected by judicial rule.

5. A new Section 92-54 is added to provide rulemaking authority. The Attorney General is charged with responsibility for drafting a model set of rules, which will be adopted by each agency with such amendments as may be required by the unique nature of the agency's records or mission. For example, the Archives division of the Department of Accounting and General Services may need special rules limiting access and duplication of records of historical value.

6. The former Section 92-52 is renumbered 92-55. The only substantive change is the addition of a provision which awards attorney's fees to prevailing plaintiffs.

In concluding, your Committee would be remiss if it did not acknowledge its debt to the Governor's Committee on Public Records and Privacy. Without the herculian efforts of Chairman Robert A. Alm and members Duanne Brenneman, Andrew Chang, Dave Dezzani, Ian Lind, Jim McCoy, Stirling Morita, Justice Frank Padgett and Warren Price III, it is doubtful that we would have been able to develop the Senate Draft which is attached.

Your Committee on Government Operations is in accord with the intent and purpose of H.B. No. 2002, H.D. 1, as amended herein, and recommends that it pass Second Reading in the form attached hereto as H.B. No. 2002, H.D. 1, S.D. 1, and be placed on the calendar for Third Reading.

Respectfully submitted,

RUSSELL BLAIR, Chairman

PATSY K. YOUNG, Vice Chairman

STEVE COBB, Member

LEHUA FERNANDES SALLING, Member

MARY GEORGE, Member