CONFERENCE COMMITTEE REPORT NO. 235

Honolulu, Hawaii
APR 22
_____, 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, S.D. 1

Your Committee on Conference on the disagreeing vote of the House of Representatives to the amendments proposed by the Senate in H.B. No. 2002, H.D. 1, S.D. 1, entitled:

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

having met, and after full and free discussion, has agreed to recommend and does recommend to the respective Houses the final passage of this bill in an amended form.

The purpose of this bill is to clarify the laws relating to government records. Specifically, the bill provides a new framework for the resolution of the often competing public and privacy interests involved in terms of access to government records.

Both the earlier House and Senate drafts of this bill provided a general rule of access with a limited set of exceptions to that general rule. In doing so, both the House and Senate made clear their shared view that an open government is the cornerstone of our democracy. Under such a view, the current confusion and conflict which surround the existing records laws are plainly unacceptable.

The House and Senate in their earlier drafts, however, took markedly different paths to reaching the shared goal of access. The House chose, with some modification, to use the Uniform Information Practices Code of the National Conference of Commissioners on Uniform State Laws. The Senate, on the other hand, chose to modify existing laws in part because the House

bill appeared to have been significantly misunderstood and in part because a set of amendments which directly attacked the current problems appeared to be a preferable course of action.

After substantial debate and discussion, your Committee believes that there is wisdom in both approaches and that a synthesis of the versions is appropriate. In arriving at the conference draft of this bill, your Committee believes that it has produced a measure which ensures public access to government records which is capable of being understood by those who use the records laws and which provides a useful framework for handling records questions in the future.

The major features of the conference draft are discussed below and are intended to serve as a clear legislative expression of intent should any dispute arise as to the meaning of these provisions.

1. Title and Structure. The bill provides for use of the basic framework envisioned by the uniform law and will seperate out all provisions dealing with the access of individuals to their own records and place them in Part III. Provisions of the current Chapter 92E, Hawaii Revised Statutes (HRS), will be substituted for similar provisions in the uniform law.

2. Purpose. The bill will provide clear recognition of both its primary goal of ensuring access to government records and the constitutional right of privacy which must clearly be considered in every appropriate case. The recognition of both factors is not intended to diminish the vitality of either but is simply intended as full notice of the competing consideration involved in these cases.

3. Definitions. The bill includes the crucial definitions: the all-inclusive "government records" definition, the "personal records" definition taken from the current Chapter 92E, HRS, and a definition of "agency" which includes both the Legislature and the Judiciary. The definition of "agency" excludes the "non-administrative records of the Judiciary." The intent of this language is to preserve the current practice of granting broad access to the records of court proceedings. The records of the Judiciary which will be affected by this bill are the administrative records.

4. Affirmative Disclosure Responsibilities. The bill will provide a general disclosure responsibility in Section -11 which is intended to serve as the central section of the records law. Every other provision is an exception to this general rule. In addition, however, the bill will provide, in Section -12, a

list of records (or categories of records) which the Legislature declares, as a matter of public policy, shall be disclosed. As to these records, the exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable. This list should not be misconstrued to be an exhaustive list of the records which will be disclosed. Nor should any limiting language in this list be deemed to imply a legislative intent that such limitation be applied in any other circumstances. This list merely addresses some particular cases by unambiguously requiring disclosure.

5. Exceptions to Access. The bill will provide in Section -13 a clear structure for viewing the exceptions to the general rule of access. The five categories of exceptions relate to personal privacy, frustration of government practice, matters in litigation, records subject to other laws and an exemption relating to the Legislature. The category relating to personal privacy is essentially the same in both the House Draft and the Senate Draft. The second category, concerning frustration of legitimate government functions, was clarified by examples on pages 4 and 5 of Senate Standing Committee Report No. 2580. The last three are self-explanatory.

The records which will not be required to be disclosed under Section -13 are records which are currently unavailable. It is not the intent of the Legislature that this section be used to close currently available records, even though these records might fit within one of the categories in this section.

6. Clearly unwarranted invasion. Once a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure. If the privacy interest is not "significant", a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy.

7. Judicial Enforcement. The bill will provide for immediate access to the courts when an agency refuses to release records. Section -15 provides for a de novo hearing, in camera review, attorneys fees and expenses, liberal venue provisions, and expedited review by the courts, and places the burden of proof on the agencies.

In this regard, the intent of the Legislature is that exhaustion of administrative remedies shall not be required in any appeal of a refusal to disclose records. Any internal or administrative appeals structure which is established would be optional and an aggrieved party may proceed directly to court if the party chooses to do so.

There is also a need to provide a remedy for those whose records are inappropriately disclosed. While this bill does not address this issue, except as to personal records, it is a subject for immediate attention at future sessions.

8. Immunity. The bill will provide in Section -16 that the good faith actions of employees in handling records distribution shall not subject them to liability. In this way, public employees will be free to act according to the intent of the law without the defensive posture which was perhaps a consequence of existing penalty provisions. This bill provides that actions will proceed against agencies and not individual employees. Employees misconduct can, of course, be handled under normal personnel provisions.

9. Criminal Penalties. The bill will provide in Section -17 for criminal penalties for the willful release of confidential information. There are reservations about this provision, and particularly about its placement outside of the penal code, but there is also a sense that willful actions of this type merit strong sanction.

10. Agency Implementation. The bill will place particular emphasis on the need for strong and active agency implementation of the records laws. Under Section -18, the agencies will be required to issue necessary instructions, train their employees, and prepare guides which will set forth in detail the records in their custody and the way in which those records will be treated for access purposes.

The proper functioning of any public records law is very much dependent upon the attitude of those who implement the law. Your Committee urges all agencies to accept this new law as a challenge and a mandate to ensure public access to the public's government.

11. Limitation on Disclosure to Other Agencies. The bill will continue the current prohibitions on the sharing of records and information between agencies except in specific circumstances or where the record or information is otherwise public. Specific mention has, however, been made to the Legislative Reference Bureau, the Legislative Auditor, and the Ombudsman to ensure that they receive the information necessary to carry out their duties.

12. Disclosure of Personal Records. The bill will recodify major portions of Chapter 92E, HRS, in Sections -21 to -28 except that these provisions will be limited to handling an individual's desire to see his or her own record. All other

requests for access to personal records (i.e. by others) will be handled by the preceeding sections of the bill. In this way, the very important right to review and correct one's own record is not confused with general access questions.

13. Office of Information Practices. Established under Sections -41 and -42, this office is intended to serve initially as the agency which will coordinate and ensure implementation of the new records law. In the long run, however, the Office is intended to provide a place where the public can get assistance on records questions at no cost and within a reasonable amount of time.

Provisions have been made in the bill to assure that the Office does not become a roadblock to access by ensuring that a direct right of appeal to the courts will exist at all times. The Office, therefore, will become an optional avenue of recourse which will increasingly prove its value to the citizens of this State as the law is implemented.

The Office will be placed within the Office of the Attorney General and will receive a budget to have a director, a researcher, and two clerical positions as well as funds for printing and publication. As the Office determines what role it can best play, it can approach the Legislature to suggest alternate levels of funding or support.

14. Repeals and Effective Dates. The Office of Information Practices would begin operations on July 1, 1988. This is essential to ensure implementation of the new law one year later. The remaining portions of the new records law would then become effective July 1, 1989, and at that time the existing records laws (chapter 92, Part V and chapter 92, HRS) would be repealed. This orderly implementation is essential if the new provisions are to deliver their inherent promise to the people of this State.

Your Committee on Conference is in accord with the intent and purpose of H.B. NO. 2002, H.D. 1, S.D, 1, as amended herein, and recommends that it pass Final Reading in the form attached hereto as H.B. NO. 2002, H.D. 1, S.D. 1, C.D. 1.

Respectfully submitted,

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