TESTIMONY OF THE STATE ATTORNEY GENERAL

ON S.B. NO. 1799

RELATING TO THE UNIFORM INFORMATION PRACTICES ACT (MODIFIED)

BEFORE THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS

DATE: TUESDAY, February 21, 1989

TIME: 1:00 P.M.

PLACE: Conference Room 212, State Capitol

PERSON(S) TESTIFYING:

Warren Price, III
Attorney General

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The Honorable Chairperson and Committee Members:

The State Attorney General supports this bill.

The overall purpose of this bill is to provide for substantive and procedural changes to the new Uniform Information Practices Act (Modified) (Hawaii Revised Statutes, Chapter 92F) ("UIPA") to better reflect the legislative intent and to ensure the smooth implementation of the law, which takes effect on July 1, 1989.

The UIPA is truly trailblazing legislation which seeks to strike a delicate balance between an individual's constitutional right to privacy and the public's right to open government through access to government records. The Office of Information Practices (OIP), which is within the Department of the Attorney General, was established in September 1988 pursuant to the UIPA. In preparing for implementation of the UIPA, the OIP has discovered that some modifications to the law will make it more "user friendly," thereby striving to deliver on its inherent promise to the citizens of Hawaii.

Option to Appeal to OIP or Court

The bill adds clear language in a new section to emphasize that a person aggrieved by a denial of access to a government record under Chapter 92F, Part II, "Freedom of Information," may either appeal to the office of information practices or directly and immediately to court. It is essential that anyone reading the law should be able to understand the alternative appeal procedures available. In addition, the bill emphasizes that an exhaustion of administrative remedies is not required before appealing a denial of access to circuit court. This language is necessary to provide a more accurate reflection of the legislative intent contained in Conference Comm. Rep. No. 235 on H.B. No. 2002, 14th Hawaii Leg., reprinted in Senate Journal at 689 (1988), and to provide guidance to those using the statute.

The bill permits those individuals denied access to their own personal records under Chapter 92F, Part III, "Disclosure of Personal Records," the right to appeal to the office of information practices or directly to circuit court, as is now permitted when denied access to records pertaining to others under Chapter 92F, Part II, "Freedom of Information." The law presently allows an individual denied access to records about themselves to only appeal within the agency or to circuit court. Thus, this bill would make the appeal procedures for a denial of access to records consistent. This is essential in order

to permit individuals who are denied access to their own personal records the opportunity to use the no cost, informal appeal process to the office of information practices.

Time Limitations for Appeals

The language of HRS section 92F-15 implies that civil action to compel disclosure of a government record can be brought "at any time" ad infinitum. The bill proposes to set an upper limit of ninety days. Therefore, civil action may be brought as soon as the person desires after denial of a request (without any need to exhaust administrative remedies) but no later than ninety days from the denial.

With respect to personal records, the bill deletes a two-year limitation on causes of action in section 92F-27(e) that begins from "the date of the last written communication to the agency requesting compliance" and sets a ninety day time limit in order to add consistency. The bill also provides a ninety day time limit for filing an appeal with the office of information practices from either a denial of access to a government record or a personal record since the existing law is silent on this subject.

Exemption from Contested Case Hearing

Because the legislature envisioned that the review by the office of information practices would be informal, expe-

ditious and no cost to the public, the bill adds explicit language to exclude the review from the contested case under Chapter 91, Hawaii Revised Statutes. The review is optional in nature and anyone aggrieved by a denial of access to a government record can appeal immediately to a circuit court for a full evidentiary hearing.

If the review process is not exempted from the contested case requirements, the office of information practices will be unable to provide a review that is expeditious due to notice requirements or at no cost because the more formal proceedings may very well require attorneys to represent the parties. Additional hearings officers would also be necessary for the office of information practices. This would defeat the very process envisioned by the Legislature. Therefore, the addition of language exempting the office of information practices from the Chapter 91 contested case is necessary in order to avoid future challenges to the administrative rules for failure to have contested case hearings.

Records Reports

The UIPA requires each agency to compile a public report which describes all of the records it routinely uses or maintains and designates each record as being public or confidential, among many other things.

The bill mandates that agency public record reports must be filed on or before July 1, 1991 with the office of infor-

mation practices in accordance with a scheduled developed by the office. The existing law does not specifically set a deadline for the completion of the reports although it was probably envisioned by the Legislature that the office of information practices would use the 1988-89 fiscal year to set up the office, draft rules, provide training and complete the records report. Thus, once the law went into effect on July 1, 1989, all the government agencies would have conducted a detailed survey of their records and had the reports reviewed by the office of information practices. Consequently, the implementation of the law would be a smooth one instead of chaos at the records counters of government agencies.

Unfortunately, a significant gap between the concept and good intentions of the law and the reality of implementing the law has now appeared. There can be no doubt that the completion of the records report is crucial to the overall success of the law. However, no one was aware of the tremendous volume of information to be collected until the office of information practices set about fulfilling its statutory mandate. To get an idea of the numbers involved, we have learned that the record report forms to be completed by the government agencies will be at a <u>minimum</u> 16,000 to 20,000, and will have to contain over 500,000 categories of information! Under the new law, the office of information practices staff must develop the inventory form, develop standard record titles to the extent possible and prepare

detailed instructions for completing the reports. Moreover, the government agencies affected must be provided with training and assistance in completing the reports, and then the office of information practices must review all 16,000 - 20,000 forms (minimum) for the correct application of the law, consistency and accuracy. Obviously, this cannot be done with the three people on the office staff.

It has become apparent that due to the magnitude of this project, computer automation is critical to its ultimate success. Therefore, the office of information practices is proposing that the records report be competely computer automated. Pursuant to the Governor's Message Items dated January 25, 1989, a budget request has been made for additional funding for a computer consultant and data entry capabilities. It is projected that the development of a computer program for the records report will take twelve months to complete. Once the reports are completed by the agencies, data entry will be necessary. Therefore, we believe that two years is a more realistic time frame for the completion of this vital project.

The additional funds and the time to complete computerized reports will provide an invaluable source of information to the public, as well as to government agencies responding to requests for records. The bill also imposes a duty on the agencies to update the records reports annually to ensure that the public will receive accurate information.

A massive assembly of information without a reasonable means to access its contents will fail to meet the Legislature's vision of open government, and this Department's as well. Since the records report will ultimately be the cornerstone of open government, a model computer system will be well worth the extra wait. In the meantime, the office of information practices would do its very best to respond to records inquiries on a case-by-case basis.

Rules

The bill addresses rulemaking in the following four areas. First, the bill adds specific authority for the office of information practices to adopt rules setting forth uniform standards for disclosure of records for research purposes in order that legitimate research is not jeopardized by the new laws. The agencies shall adopt these rules individually, insofar as practicable. This is to ensure uniformity while recognizing that some agencies will need to modify the rules to fit particular circumstances, such as the State Archives.

Second, the bill permits the office of information practices to develop and adopt rules pertaining to the disclosure of personal records. The existing law places this burden on the attorney general and the county corporation counsels. Now that the office of information practices has been formed, it can be responsible for drafting rules on this issue.

Third, the bill changes the label "internal appeals" rules to "administrative appeals" rules to emphasize that the rules will set forth the entire process from the time a party initially requests a record from a government agency, to an appeal to the office of information practices, to circuit court.

Fourth, the bill adds general standard language for the office of information practices to adopt, amend or repeal rules in order to carry out the purposes of the law.

Miscellaneous Revisions

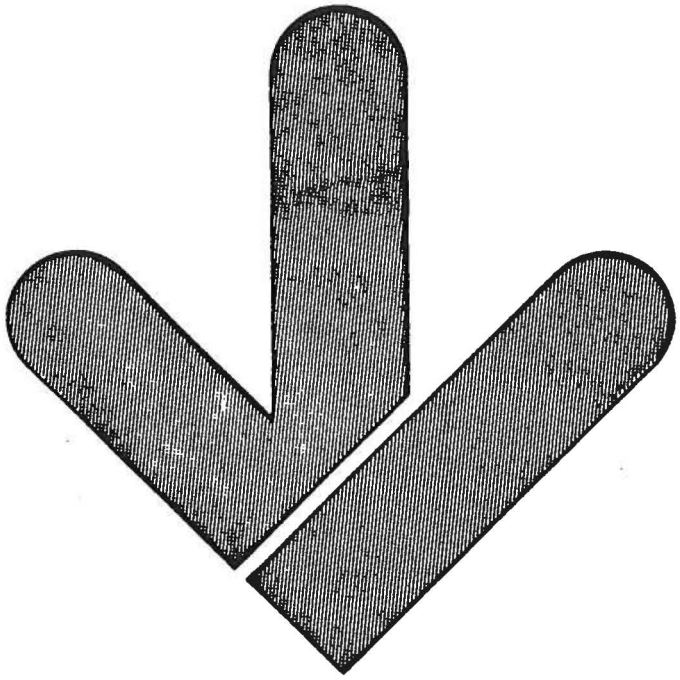
The bill also does the following:

1. Adds language to section 92F-41 which clarifies that the office of information practices is within the Department of the Attorney General for administrative purposes only, thereby emphasizing the Attorney General's commitment that the office shall operate independently;

2. Provides that the office of information practices can recommend criminal prosecution to appropriate agency officers where warranted pursuant to section 92F-42(a)(6); and

3. Corrects a typographical error in section 92F-42(a)(13) to reflect that the office of information practices shall adopt rules setting forth fees and charges, not changes, for searching, reviewing and segregating records.

In conclusion, we urge passage of this bill. We will be happy to try to answer any questions.



UNIVERSITY OF HAWAII

TESTIMONY

H.B. 1799
Relating to the Uniform Information Practices Act

Presented Before the
Senate Committee on Government Operations
February 21, 1989

by
James Takushi
Director of Personnel

Testimony by James H. Takushi
Director of Personnel

Senate Committee
on
Government Operations

We agree to the proposed changes to the Uniform Information Practices Act (Modified) as set forth in Senate Bill 1799.

In addition, we would like this committee to consider clarification of section 92F-12, Disclosure Required, as follows:

* * *

(14) The name, compensation (or salary range for employees covered by chapters 76, [and] 77 and 304-11), job title, business address, business telephone number, job description, education and training background, previous work experience, and dates of first and last employment of present or former officers or employees of the agency, provided that this provision shall not require the creation of a roster of employees;* * *

Statutory material to be repealed is bracketed. New statutory material is underscored.

This change is required in order to afford those employees of the University appointed pursuant to section 304-11, HRS, the same protection of the right to privacy as those employees covered by sections 76 and 77, HRS. As the existing

language now reads, the specific salaries of these University employees are subject to disclosure under this section. Such a disclosure would reveal an individual's financial status to third parties. We believe that government employees at the University of Hawaii are entitled to the same right to privacy as other individuals as guaranteed by Article I, section 6 of the State Constitution.

Furthermore, we would like to point out that there are no salary ranges for United Public Workers (UPW) blue collar workers and "red circled" employees (beyond the maximum step). In other words, specific salary figures would be disclosed for those individuals if the existing language of section 92F-12, subsection 14 is not amended.