

STAND. COM. REP. NO. 342-88

Honolulu, Hawaii
Feb 19, 1988

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

Honorable Daniel J. Kihano
Speaker, House of Representatives
Fourteenth State Legislature
Regular Session of 1988
State of Hawaii

Sir:

Your Committee on Judiciary, to which was referred H.B. No. 2002 entitled: "A BILL FOR AN ACT RELATING TO PUBLIC RECORDS", begs leave to report as follows:

The purpose of this bill is to clarify the laws relating to public records and individual privacy. Specifically, this bill addresses the often competing public and privacy interests in a single new act which categorizes various types of records maintained by governmental agencies and establishes standards and criteria for disclosure of this information to various types of requestors while establishing certain countervailing individual privacy interests.

Your Committee finds that the existing general public records law, Chapters 92, Part V, and 92E of the Hawaii Revised Statutes, received almost uniform criticism during public testimony presented over the past summer to the Governor's Committee on Public Records and Privacy. Your Committee incorporated that public testimony, Report of the Governor's Committee on Public Records and Privacy, December 1987 ("Governor's Report") at Vols. II and III, into the records of the public hearings on this bill held before your Committee on Judiciary.

Your Committee further finds that public testimony clearly pointed to the obvious conflicts between Chapters 92, Part V, and 92E, which were written at different times for different purposes, with conflicting definitions of a "public" and "personal" record. These factors led to the conclusion that "Hawaii's (public records) law appears . . . to give primacy to

personal privacy interests through the operation of Chapter 92E," Governor's Report, Vol. I at 17, despite the clear policy and intent of Chapter 92 to open up "the governmental processes to public scrutiny and participation" and "to protect the people's right to know." (Section 92-1, Hawaii Revised Statutes) These problems thus created this need for Section 1 of this bill and the corresponding repeal of Chapters 92, Part V, and 92E by Sections 2 and 3 of this bill.

The original bill contains sixteen (16) sections. Section 1 creates a new chapter of the Hawaii Revised Statutes, to be known as the "Uniform Information Practices Act (Modified)" (hereinafter referred to as "Uniform Act"). This section comprises the bulk of this bill. Divided into four parts, Section 1 includes the following: General Provisions and Definitions (Part I); Freedom of Information Act (Part III); Disclosure of Personal Records (Part III); and the Office of Information Practices (Part IV).

Your Committee finds that the purpose of Section 1 is to provide for: 1) the accurate, relevant, timely and complete governmental records; 2) the enhancement of governmental information; 3) the accountability of government to individuals in the collection, use, and dissemination of individually-related information; and 4) the promotion of the public interest in disclosure whenever individual privacy interests do not outweigh the disclosure interests.

At the heart of the Uniform Act contained in Section 1 are the five definitions for types of records held by the government. The terms "accessible", "government", "individually identifiable", "personal", and "research", all modify the word "record" to define the five overlapping groups of records. From these definitions flow the provisions that describe different levels of access and treatment for each record type as set forth in parts II and III of Section 1.

Part II of Section 1 lists those records or information which an agency "shall make available for public inspection and copying." (§___-11) (hereinafter "Sec. ___-___"). This is one of three parts which comprise the "open" records list. Other sections of Part II describe duties of an agency when acting on a request for records as well as the requestor's right of review if the agency denies the record request elsewhere. (Sec. ___-12)

Part II also describes those agency records for which disclosure "is not required". (Sec. ___-13) This is the first of two parts for the "closed" records list. This section describes the duties of the agency that chooses to disclose such

information over the objection of the person submitting the record to the agency. The objection to disclosure applies to trade secrets or proprietary information, among other things, under this bill. Also contained here is one of two sections authorizing judicial enforcement for persons aggrieved by the action of the agency, and the subsequent decision of the Office of Information Practices (Sec. ____-14), the singular reviewing agency established in this bill by Part IV of Section 1. This Office stands between the agency and the circuit courts to enforce the provisions of this Act, among other duties described in Part IV.

Part III of Section 1 relates to "personal" records. This record is distinct from an agency record by definition yet is often physically contained within the broader "agency" record such as a name on a license. This part describes a personal record subset defined as "individually identifiable records" for which disclosure is required. This is the second part of the "open" record list.

Also described in this part are examples of those records in which the individual has a significant privacy interest. (Sec. ____-) Your Committee intends that these records are available following application of the "balancing test" to determine whether the public interest in disclosure outweighs the individual privacy interest.

In addition, Part III contains the third section of the "open" records list, namely record disclosures permitted to other agencies of government. (Sec. ____-23) Any restrictions on the original agency apply to the agency receiving the record.

This part also makes clear that existing prohibitions against disclosure of individual records as provided by other laws remain valid and are not overruled by its language. (Sec. ____-24) It is the intent of your Committee that this section preserve existing choices, and not encourage the creation of any new prohibitions.

Other provisions of this part relate to access to records by the individual to whom the record relates (Sec. ____-25), limitations on individual access (Sec. ____-26), correction and amendment of records (Sec. ____-27), agency record collection and maintenance (Sec. ____-28), and disclosure of individual records for research purposes and limitations. (Sec. ____-29) This last section is similar to the "open list" but open records based on restricted use, rather than on records specifically described or listed.

Civil remedies for violation of part III are found in this section that permits judicial enforcement. (Sec. ___-32) This is the second section of the Uniform Act authorizing judicial enforcement as noted earlier. As a highlight, this section limits recovery of money damages for a violation by the agency to no more than \$10,000 exclusive of any pecuniary loss.

Criminal penalties are also available for "willful disclosure of individual records or confidential information with knowledge of the prohibition against disclosure. (Sec. ___-33) A second part imposes criminal sanctions for gaining access or obtaining the prohibited records by false pretenses, bribery, or theft. A misdemeanor is the sanction for both parts. A "willful disclosure" may result in a higher penalty, however, if specifically provided for by any other law. It is the intent of your Committee that such penalties should not deter other appropriate sanctions by the agencies against their responsible officers or employees, such as discipline, suspension, or dismissal.

As a final major provision of Part III, "good faith" immunity from civil or criminal liability is provided any person participating in the disclosure or withholding of a government record, including confidential information. Agency officers or employees also receive protection from personal liability for any damages sustained for violations of Part III. (Sec. ___-34)

Part IV of Section 1 creates the Office of Information Practices with powers to review and rule on agency decisions on access to records. The Office shall be within the Office of the Governor, with rulemaking and other powers, including rendition of advisory opinions concerning the provisions of the new chapter.

Your Committee finds that while the vision of one law controlling all public records is ideal, reality presents a body of many existing laws affecting particular and specific records which defy incorporation in one place. Thus Sections 4 through 12 of this bill address specific records statutes presently on the books, as well as creating new types of records, to meet specific public needs.

Under this bill, private donors to the Hawaii Public Broadcasting Authority receive confidential treatment, absent consent to disclosure. (Section 4) Confidentiality of inspections, investigations, and audit of books and accounts under the Milk Control Act is eliminated. (Section 5) The confidentiality of boat accident reports is also eliminated and the reports are made available for public inspection. (Section 6)

Concerning creation of new records, this bill creates a new means by which adopted children may obtain the medical history of their natural parents without disclosing the parents' identity absent their consent. This would permit determination of any inherited diseases or disorders by the child's physician. (Sections 7 through 10)

The Honolulu Police Commission has long functioned without a statutory rulemaking requirement. Neighbor island counties, however, have the statutory requirement. The operative language is therefore added to Section 52-62, Hawaii Revised Statutes, relating to the City and County of Honolulu to provide consistency and equality between counties. (Section 12) A new record, namely rules for all county police departments, is also created by this bill (Section 11). The police departments are the single agency in the state with no legal requirement for rules. Hence no rules, except relating to roadblocks under a specific statute or at their sole discretion, are disclosed to the public by the police.

The Department of the Attorney General raised the concern that Section 11 of this bill may be invalid as a violation of the "single subject" requirement for a piece of legislation. Your Committee disagrees. The purpose of Section 11 is to require the county police departments and the Honolulu Police Commission, to create a public or government record in the form of agency rules. Once established, the rules are public information by existing law and shall be filed with the lieutenant governor or with the county clerk. (Section 91-4(a), Hawaii Revised Statutes) The rules inform the public of the department's functions, services, and methods of operation, in complete agreement with the overall purpose of this bill: making government records more accessible to the public.

Over the three days of public hearings on H.B. No. 2002, your Committee received testimony from over 30 government agencies and private citizens, business, or associations. This testimony can be roughly categorized into the following areas.

Your Committee received unconditional support for this bill from the Department of Education, the Department of Hawaii Home Lands, the Department of Commerce and Consumer Affairs, the Hawaii Delegation to the National Conference on Uniform State Laws, the Hawaii Federation of Physicians and Dentists, the Painting and Decorators Contractors Association, and the Hawaii Construction Industry Association.

The following government organizations gave strong support to the bill with some concerns over its provisions: the Office of the Lieutenant Governor, the Department of the Attorney General, the Department of Taxation, the Department of Accounting and General Services, the University of Hawaii, the Department of Health, the Department of Labor and Industrial Relations, the Department of the Corporation Counsel of the City and County of Honolulu, and the Victim/Witness Services of the Department of the Prosecuting Attorney for the City and County of Honolulu.

Your Committee also received conditional support for this bill from Common Cause/Hawaii, G.A. Morris, Inc., the Honolulu Star-Bulletin, the American Association of University Women, Robert Ellis Smith, Esq., publisher of the Privacy Journal a national publication on privacy laws, the League of Women Voters, and the Society of Professional Journalists, Sigma Delta Chi.

Support for the intent of this bill with strong concerns over its provisions came from the Honolulu Police Department, Mr. Desmond Byrne, Vice President of Computab, Inc., and Mr. Ian Lind, political analyst and consultant, and a member of the Governor's Committee on Public Records and Privacy.

Specific concerns for portions of the bill without support for overall passage came from the Family Court of the First Circuit, and the Hemophilia Foundation of Hawaii.

Finally, the only general opposition to the bill with support of its intent and limited provisions came from KHON-TV and the Honolulu Advertiser.

Your Committee made the following substantive amendments to the provisions of this bill, with reference to the appropriate sections where the changes occur.

- 1) Sec. ____-2: Your Committee added language to this section taken from the declaration of policy intent under Section 92-1, Hawaii Revised Statutes. Your Committee also added a new paragraph that recites the Legislature's intent in also preserving the individual privacy interest where possible.
- 2) Sec. ____-4: Your Committee inserted the definition of "individual" to mean a "natural person", and added definitions of "provider" and "recipient" as defined in Chapter 42, Hawaii Revised Statutes.
- 3) Sec. ____-11: Your Committee added the general rule that "government records are open to public

inspection unless access is restricted or closed by law." This statement makes obvious the thrust of Section 1.

- 4) Sec. ___-11(b)(6): With reference to environmental tests found at this subparagraph, it is the intent of your Committee that environmental tests include water quality and water well test results.
- 5) Sec. ___-11(b)(7): Your Committee amended this subparagraph to limited disclosure of minutes of agency meetings to those required by law to be public. This avoids the conflict with laws that presently allow confidential meetings, as with executive meetings under Section 92-4, Hawaii Revised Statutes, and related laws.
- 6) Sec. ___-11(b)(10): Your Committee clarified this language relating to disclosures on contract hires.
- 7) Sec. ___-12: Your Committee added a new subsection (g) taken from the original model Uniform Act concerning duties of the Office of Information Practices when acting on a request for review of an agency decision. It is the intent of your Committee that the Office of Information Practices monitor the time periods and other deadlines provided for in this bill and recommend appropriate changes next session. This addresses the competing concerns that, the time periods and deadlines are either too short or too long depending on whether you are the responding agency or the person requesting the record.
- 8) Sec. ___-12(e): Your Committee amended this subparagraph to permit reasonable charges for the cost of record search, review and segregation of non-disclosable information from the record prior to disclosure. The new language also requires that rates shall be set by rules promulgated by the Office of Information Practices. It is the intent of your Committee that such charges for search, compilation, and segregation shall not be a vehicle to prohibit access to public records. It is the further intent of your Committee that the Office of Information Practices move aggressively against any agency that uses such charges to chill the exercise of first amendment rights. Your Committee also

added new language to allow waiver of these charges when such action serves the public interest.

- 9) Sec. ___-13(a)(1): With regard to law enforcement records, your Committee considered the concerns from the police department and the press, and deleted this from the subparagraph in its entirety, adopting similar language from the federal Freedom of Information Act ("FOIA"), 5 U.S.C. §552.
- 10) Sec. ___-13(a)(8): Your Committee clarified "proprietary information" to include research methods, records, and data. The University of Hawaii raised this concern over access to ongoing research on their campus. This change makes clear that such practices are clearly protected by this bill.
- 11) Sec. ___-21(g): Your Committee clarified the reference to motor vehicle registration information to make such information available for legitimate purposes as established by rules. The League of Women Voters were concerned about the release of motor vehicle registration information to learn the identity and address of the car owner. The amendment would permit release of such records for motor vehicle recall purposes, but disallow release of the same information to merely learn the identity and address of the car owner without a legitimate public purpose.
- 12) Sec. ___-22: Your Committee clarified this section by incorporating a modification of subsection (b) of the original bill into subsection (a) of this bill. The new language would require disclosure of individually identifiable records to which a privacy interest attaches when the established compelling public interests involves public health, safety or welfare.
- 13) Sec. ___-22(b): Your Committee deleted subparagraph (5) relating to public donations.
- 14) Sec. ___-23(a)(6): Your Committee deleted reference to income or other tax return information as such information is clearly confidential by existing federal and state laws.

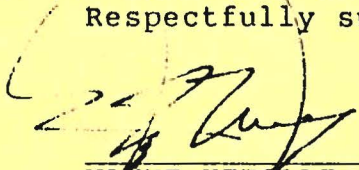
- 15) Sec. -23(a)(10): Your Committee deleted reference to social security numbers.
- 16) Sec. -28: Your Committee added new language to prohibit any agency from collecting information on an individuals first amendment rights, absent the state exceptions. This tracks a similar provision found in FOIA.
- 17) Sec. -29: Your Committee added new language to ensure that there is a public benefit or purpose to the research, to ensure that a copy of the work product is provided to the agency, and if appropriate (i.e., if it does not violate the other protections of this law) released to the public. These provisions should address the concern that personal information would be sought (and received) for inappropriate purposes, such as harrassment of victims.

The above amendments are contained in Section 1 of this bill. Your Committee added a new section 13 to this bill which contains a severability clause for any provisions or portions of this bill that may be subsequently found invalid. This clause thus protects the other valid portions of this bill.

Finally, it is the intent of your Committee that the commentary to the Model Uniform Information Practices Code ("Model Act") guide the interpretation of similar provisions found in the Uniform Act created by this bill where appropriate. The Model Act can be found in the Governor's Report, Vol. I at Appendix E.

Your Committee on Judiciary is in accord with the intent and purpose of H.B. No. 2002, as amended herein, and recommends that it pass Second Reading in the form attached hereto as H.B. No. 2002, H.D. 1, and be referred to the Committee on Finance.

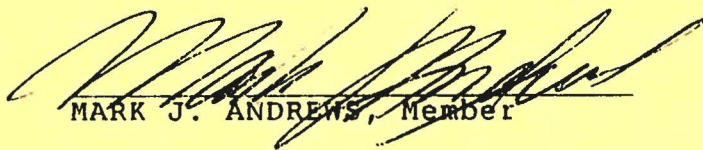
Respectfully submitted,



WAYNE METCALF, Chairman



DAVID HAGINO, Vice Chairman


MARK J. ANDREWS, Member

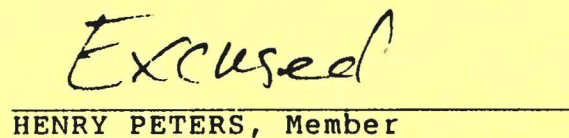

REB BELLINGER, Member

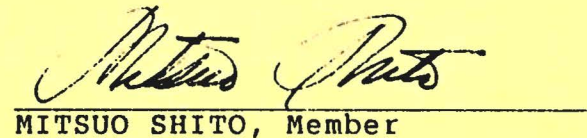

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