TESTIMONY OF , DEPARTMENT OF ACCOUNTING AND ERAL SERVICES
STATE OF HAWAII

TO THE

SENATE COMMITTEE ON GOVERNMENT OPERATIONS

MARCH 16, 1988

ON

H.B. 2002, H.D. 1

TITLE: RELATING TO PUBLIC RECORDS

PURPOSE: The purpose of this bill is to adopt the Uniform Information Practice Act (Modified).

COMMENTS: The Department of Accounting and General Services supports the purpose and intent of H.B. 2002, H.D. 1 which encourages accurate, timely maintenance of government records, broadens accessibility to government records, while still protecting individual privacy. Archives Division, however, will have a difficult time complying with § -36 "report of record-keeping policies and practices" due to limited clerical staffing and voluminous agency records transferred for administrative maintenance and historic preservation.

RECOMMENDATION: The department recommends passage of H.B. 2002, H.D. 1, but we request that the State Archives be exempt from § -36 because it performs the unique function of servicing as the repository for records of other agencies.

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PRESENTATION OF THE
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

TO THE
SENATE COMMITTEE ON GOVERNMENT OPERATIONS

FOURTEENTH STATE LEGISLATURE
REGULAR SESSION, 1988

March 16, 1988

STATEMENT ON HOUSE BILL NO. 2002, H.D. 1

THE HONORABLE RUSSELL BLAIR, CHAIRMAN,
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs appreciates the opportunity to testify on House Bill No. 2002, H.D. 1. And while individual departments may also be testifying, I speak for the entire Administration when I say that we welcome any effort to rewrite our very inadequate record laws. We live with those laws on a daily basis and no one more strongly feels the inadequacies of those laws than we do.

As an Administration, we have some concerns about what has been done in House Bill 2002. We certainly would not have made every decision the same way. Nonetheless, we believe that much of the bill reflects policy decisions properly left in the hands of the Legislature and we will, of course, implement any new law which is enacted.

We believe that there are a number of features of House Bill 2002 which should be retained in any law which the Legislature passes.

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First, the bill combines the records laws into one basic statute. This has substantial merit as one of the most critical flaws in the current law and that is the lack of coordination between Chapter 92, Part V, and Chapter 92E. Even if the Legislature wanted to retain some features of either existing law, it would still be worthwhile to draw them together in order to ensure that coordination between the two laws is achieved.

Second, the bill clearly recognizes the two rights which must interplay in this law, the right of public access and the right of personal privacy. And while these rights are not exclusive, there is certainly tension between them. Any records law must recognize and deal with this tension.

Third, the bill sets forth a general rule that all records are open unless specifically closed. This is the rule that most people want and we believe it is very appropriate. The bill also goes on to specify a number of records which must be made available. This list was essentially drawn for the testimony submitted to the Governor's Committee and in general is for the Legislature to review as a matter of public policy.

Fourth, the bill sets forth the basic contours of a request and response system. This could obviously be done in the statute itself or delegated to the Administration to do by rules. We are comfortable with either approach so long as in the end there are firm deadlines which establish reasonable expectations for everyone.

Fifth, the bill sets forth the basic standard for record production, the "reasonably segregable" standard. If on the other hand, an absolute standard that information be produced no matter the cost and no matter the amount of actual information is to be substituted, then the cost to implement will be substantially more than the bill currently provides and staffing will need to be added to each department. In addition to the standard and possible staffing, the bill must also deal with the issue of who pays for the cost of searching and copying, the taxpayer or the requestor. We believe the individual requesting the information appropriately carries that burden.

Sixth, the bill provides for a strong internal appeals process. The purpose of having an administrative forum is to avoid the expenses involved in a court challenge. The judicial appeal must always be a final option but the citizens of this State should have some recourse prior to that form of appeal. Current law relies on eighteen information "czars," the directors of each department, the UH President and the Superintendent of Education. This bill substitutes the Office of Information Practices for the final internal appeal to the directors. While there is some reluctance to agree to this, we believe that it has merit by providing for the expeditious treatment of appeals and by ensuring the uniform implementation of the law throughout the departments.

Seventh, the bill recognizes that there are certain types of information which must be maintained on a confidential basis if government is to function. Certain law enforcement records, examination material, proprietary information and trade secrets are examples of these. Current law provides this to some degree but a good explicit statutory list of these items is important given the overall presumption of openness.

Eighth, the bill provides definite and specific guidance as to the contours of that material which is found to involve personal privacy interests. This is easily the most controversial part of this law but ultimately this is a question of fundamental public policy. In these cases, the executive and judicial branches need the Legislature to at least provide basic guidance in interpreting these privacy interests.

Ninth, the bill provides for a full opportunity to seek judicial review of any records decision. This we believe is essential and, in fact, should be fleshed out to some degree on such questions as attorneys fees.

Tenth, the bill provides for the sharing of material between agencies for legitimate purposes. This is again part of the effort to make certain that government is allowed to function. And while careful review of the potential abuses of such sharing should be undertaken (and hopefully will be during the interim), some sharing is absolutely essential.

Eleventh, the bill preserves an individual's right to review and correct records about themselves. It is in current law and is a feature we can't afford to lose. It is difficult enough to have government maintain files about individuals, especially when highly intimate or personal information is involved. It would become intolerable, however, without some method to correct that record.

Twelfth, the bill provides some general record-keeping standards. Section 28 on page 23 of this bill is a set of strong standards and gives the agencies and the courts guidelines to follow. We do believe that such standards may be quite worthwhile as a review of that section makes clear.

Thirteenth, the bill makes provision for legitimate research purposes. This is an area which has largely been overlooked in Hawaii but which deserves attention. Research using government records can have substantial public benefits and ought, with proper safeguards, to be encouraged.

Fourteenth, the bill provides a set of remedies, penalties or sanctions for abuses of the law. These should, however, be as well-drafted as possible so that they ensure the integrity of the law and at the same time do not have a chilling effect on public access to government records.

Fifteenth, the bill provides standards for agency implementation of the law. An alternative formulation would be to provide strong authority and guidance to the Administration to implement this law through rules. And while the Office of

Information Practices as proposed in this bill is not the only vehicle for accomplishing this task, it certainly represents a very strong model and would we believe be able to facilitate substantial public access.

In this context, however, the Administration would request that the Office be moved out of the Governor's Office. We would instead propose that it be placed in the Department of Accounting and General Services so that it could work closely with the State Archives to ensure that record-keeping and access questions are dealt with on the most professional basis possible.

And lastly, the bill provides a substantial lead time prior to its implementation. Nothing could be more harmful to public trust and confidence than to enact a strong new records law and then to meet it with anything less than strong implementation. But to do this we will need time and we agree with the implementation structure proposed in the House bill.

After reviewing the list of items covered in House Bill 2002, H.D. 1, we believe that the bill satisfies our major concerns. We would undoubtedly have handled some of these items differently, and we do seek at least one major change, but we would also acknowledge that House Bill 2002 by and large takes the journey which we believe must be taken with our records laws. The Administration urges you to keep this measure moving as action to drastically improve our current laws is essential.

Thank you for the opportunity to testify on this measure.

Date of Hearing: March 16, 1988

Committee: Senate Committee on Govt Operations

Department: Education

Person Testifying: Charles T. Toguchi
Superintendent of Education

Title: H.B. 2002, H.D.1 "A Bill for an Act Relating to Public Records"

Department's Position: The Department supports the purpose of this bill in clarifying the laws relating to public records and individual privacy. The Department commends the committee for its intent to establish an Office of Information Practices. An Office of Information Practices is an appropriate vehicle for assuring implementation of the Uniform Information Practices Act and initiating new remedies as needed.

The Department specifically supports Part III, Section 22, (b) 4 and 7 and Section 23, (3) B and C. We understand the language herein to mean that in the public interest and for the health, safety and welfare of students the Department may release information on the revocation or suspension of a teacher certificate. This language will enable the Department to responsibly fulfill its commitment to provide students with competent and qualified teachers.

The Department appreciates the committee's shared concern for the need to provide information to other states and local agencies which assures the welfare and safety of minors.

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Date of Hearing: March 16, 1988 Number: HB 2002, H.D. 1

Committee: Government Operations

Department: Health

Person Testifying: JOHN C. LEWIN, M.D., Director

Title: RELATING TO PUBLIC RECORDS

Purpose: To clarify the laws relating to public records and individual privacy.

Department's Position: We believe that the changes made definitely improve the bill.

We do, however, have serious concerns about the significantly increased staffing which would be required in our Vital Statistics Office by Section -26 and Section -28. We, therefore, request exemption from the provisions of these sections until we have fully completed our computerization process. We estimate this process to take approximately three years.

Section 22(a), lines 1-5, page 16, does not indicate who, or what agency, is to decide when a "compelling public interest" has developed. If this decision making body is to be the Office of Information Practices (Part IV), we believe this should be more clearly indicated.

In respect to the new section 578-16, we offer the comment that the only information the department has relating to geographic location of the natural parent is that given on the original birth certificate. This information is outdated within a few months of the birth in most instances, and thus, contacting the natural parent will be successful in only a very small percent of the attempts. We believe we could develop a more fruitful system for the future by coordinating with the Family Court which also has a significant interest in this matter. We would be glad to share our efforts and those of Family Court with your committee.

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JOHN WAIHEE
GOVERNOR
STATE OF HAWAII

ILIMA A. PIIANAIA
CHAIRMAN
HAWAIIAN HOMES COMMISSION

STATE OF HAWAII
DEPARTMENT OF HAWAIIAN HOME LANDS
P. O. BOX 1879
HONOLULU, HAWAII 96805

March 16, 1988

MEMORANDUM

TO: The Honorable Russell Blair, Chairman
Senate Committee on Government Operations

FROM: Ilima A. Piianaia, Chairman
Hawaiian Homes Commission

SUBJECT: Testimony on H.B. 2002, H.D. 1,
Relating to Public Records

Mr. Chairman and Members of the Senate Committee on Government Operations, we appreciate the opportunity to testify on H.B. 2002, H.D. 1, "Relating to Public Records."

H.B. 2002, H.D. 1, would amend the Hawaii Revised Statutes by adding a new chapter entitled the "Uniform Information Practices Act (Modified)" and repealing of Chapter 92, Part V, and Chapter 92E. H.B. 2002, H.D. 1, also amends Chapter 314 of the HRS by adding a new section.

The Department of Hawaiian Home Lands wholeheartedly supports the intent and purpose of H.B. 2002, H.D. 1. We find that there is a need for clear guidelines and parameters in respect to both public information and private records of individuals.

At the present time, the department maintains approximately 23,000 files on individual persons. These files are those of native Hawaiians who have been awarded homestead leases or who have applied for such leases pursuant to the Hawaiian Homes Commission Act of 1920, as amended. As you are aware, a native Hawaiian is defined in the Act "as any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." To verify the blood quantum of an individual so that he or she can qualify for the benefits of the HHCA, documentation is required through birth certificates, marriage certificates, death certificates, original birth certificates of adopted individuals, archive records which

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include baptismal records and sworn affidavits claiming paternity. The department's files, as a result, include much information of a private nature.

Further, the department makes loans to its lessees for home construction, home repairs, and farm and ranch development. Loan applications include financial information of a private nature.

While implementation of statutory requirements such as those found in H.B. 2002, H.D. 1, would necessitate the department to audit and separate the information contained in many of its files, particularly those concerning personal information, we find that such requirements would clarify existing statutory provisions and ensure that both privacy and access to information are fostered.

We would be pleased to respond to any questions the Committee may have.

POLICE DEPARTMENT

CITY AND COUNTY OF HONOLULU

1455 SOUTH BERETANIA STREET
HONOLULU, HAWAII 96814 - AREA CODE (808) 943-3111

FRANK F. FASI
MAYOR

DOUGLAS G. GIBB
CHIEF

WARREN FERREIRA
DEPUTY CHIEF

OUR REFERENCE LM-CS

March 16, 1988

TO: The Honorable Russell Blair
Committee on Government Operations
The Fourteenth Legislature
Honolulu, Hawaii 96813

FROM: Leslie Moon, Major
Honolulu Police Department
City and County of Honolulu
Honolulu, Hawaii

SUBJECT: Public Testimony on H. B. No. 2002, H.D. 1, RELATING TO PUBLIC RECORDS

Mr. Chairman and Members:

I am Leslie Moon, Major of the Legislative Liaison Office, Honolulu Police Department, City and County of Honolulu.

The Honolulu Police Department applauds the intent of H. B. No. 2002, H.D. 1. However, we oppose the bill unless it is amended to address what we believe are serious concerns affecting the law enforcement's community's need for confidentiality as well as the right of every person, whether witness, victim or defendant, to privacy.

The Honolulu Police Department is very concerned about the proposed new Section 52-19 dealing with department rules and regulations. We are unclear as to the intent of this proposal, and its vagueness and overbreadth will make compliance overburdensome or simply impossible. Moreover, it appears that it may potentially conflict with existing Chapter 91, Hawaii Revised Statutes. We do not understand why distinctions were made about police functions of criminal investigation prior to indictment. Are police functions of criminal investigation subsequent to

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indictment any different? And, what happens to those cases that are not subject to indictment -- such as petty misdemeanors, misdemeanors or those cases prosecuted by way of preliminary hearing?

We appreciate this committee's table of S. B. 2331 which dealt exclusively with Chapter 52-19 and would appreciate your similar consideration by deletion of Sections 11 and 12 of H. B. No. 2002, H.D. 1.

Thank you for the opportunity to testify on H. B. No. 2002, H.D. 1.

LESLIE MOON, Major
Legislative Liaison

APPROVED:

DOUGLAS G. GIBB
Chief of Police

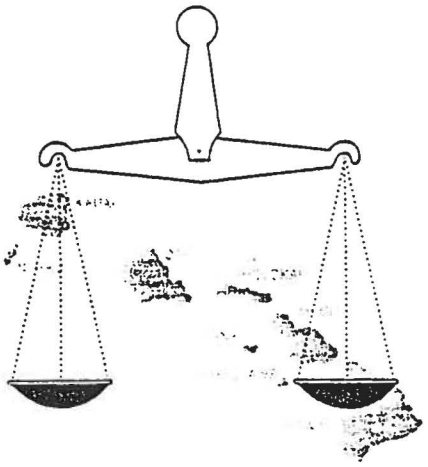
1:30 p.m.
Conference Room 6

The Judiciary
State of Hawaii

Wednesday, March 16, 1988

House Bill No. 2002, H.D. 1

Relating to Public Records



Committee Submitted to:

Senate Committee on Government Operations

Honorable Russell Blair, Chairman

Testimony
to the
Fourteenth Session
State Legislature
1988

Judiciary Representative:

Betty M. Vitousek

Senior Judge

HB 2002
Jud. 3/16/88

0180L

BETTY M. VITOUSEK
Senior Judge

KENNETH K.M. LING
Director

STATE OF HAWAII
FAMILY COURT
FIRST CIRCUIT
P. O. BOX 3498
HONOLULU, HAWAII 96811-3498

March 15, 1988

The Hon. Russell Blair, Chairman
Senate Committee on Government Operations
The Fourteenth State Legislature
The State Capitol
Honolulu, Hawaii 96813

Dear Senator Blair:

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

The Family Court of the First Circuit takes no position on the merits of H.B. No. 2002, H.D.1, which relates to public records and which further provides, in Section 10, procedures to assist an adopted child with obtaining medical information from his/her natural parents.

However, the Court has the following two concerns with the language in Section 10 (pp.43-44). First, given that these procedures do not involve the Family Courts, we suggest that this language would be placed more properly in another chapter because HRS Chapter 578 relates to adoption proceedings within the Family Court.

Second, the bill requires that the completed information form become a part of the sealed records of the adoption proceedings (page 44, lines 12-13). We request that this language be amended to clarify that the form be made a part of the adoption records within the possession of the Department of Health, as provided in HRS Section 338-20. Currently, the Court's adoption records are kept for several years and then microfilmed. After the records are microfilmed, the original documents are destroyed; therefore, it may be impossible to include the form with the court records. We recommend the following amendments.

1. H.B. No. 2002, page 44, lines 12-13: "... The information form shall become part of the sealed records of the [adoption proceedings] Department of Health."

2. HRS Section 338-20(e): "Such sealed documents, except for the information form provided for in Section _____, may be opened by the department only by an order of a court of record ..."

Respectfully submitted,

Betty M. Vitousek

Betty M. Vitousek, Senior Judge
Family Court, First Circuit

G A MORRIS, INC.
GOVERNMENTAL AFFAIRS/REAL ESTATE COUNSELOR
THE BLAISDELL ON THE MALL
1154 FORT STREET MALL, SUITE 307
HONOLULU, HAWAII 96813
(808) 531-4551

March 16, 1988

The Honorable Russell Blair, Chairman
Members-Committee on Government Operations
State Capitol
Honolulu, HI 96813

Dear Mr. Chairman & Members:

RE: H.B. 2002, H.D. 1
Relating to Public Records

In an effort to eliminate unnecessary reproduction, we refer you to our previous testimony which appears in Volume II, Report of the Governor's Committee on Public Records and Privacy, page 239 to 279 and a newspaper article that appears in Volume IV, March 18, 1985.

The next item I would like you to look at is the state law, HRS 286-172 (copy attached). If you also look at the bottom of that page, you will note how many times this section of the law has been amended; the majority of those amendments have been urged by my client, R. L. Polk & Co. Why? In order to obtain the Motor Vehicle Record data so as to use it for recall purposes and for statistical purposes.

With all these changes and safeguards, we have not received the data. We, therefore, urged the House to amend H.B. 2002, page 15, part III (a) and make this file public record.

They concurred with this request, as I believe they are aware that this data includes only the name and address of the owner/lien holder, address, type of vehicle, weight, etc. No other personal information is included in this file. This is considered "innocuous" (see page 250 of testimony).

Mahalo for your consideration of these commments and my sincerest thanks to you and your committee for taking a positive look at this issue in an effort to open up government records.

Sincerely,

G. A. "Red" Morris
Legislative Consultant for
R. L. Polk & Co.

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(4) Provide for a sufficient quantity and visibility of uniformed officers and official vehicles to assure speedy compliance with the purpose of the roadblocks and to move traffic with a minimum of inconvenience.

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[am L 1987, c 33, §6]

Revision Note

Only the subsection amended is compiled in this Supplement.

PART VIII. TRAFFIC RECORDS

§286-172 **Furnishing of information.** (a) Subject to authorization granted by the chief justice with respect to the traffic records of the violations bureaus of the district courts and of the circuit courts, the director of transportation shall furnish information contained in the statewide traffic records system in response to:

(1) Any request from a state, a political subdivision of a state, or a federal department or agency, or any other authorized person pursuant to rules adopted by the director of transportation under chapter 91;

(2) Any request from a person having a legitimate reason, as determined by the director, as provided under the rules adopted by the director under paragraph (1), to obtain the information for verification of vehicle ownership, traffic safety programs, or for research or statistical reports; or

(3) Any request from a person required or authorized by law to give written notice by mail to owners of vehicles.

(b) Any person requesting information contained in the statewide traffic records system under subsection (a)(2) shall file an affidavit with the director stating the reasons for obtaining the information and making assurances that the information will be used only for such reasons, that individual identities will be properly protected, and that the information will not be used to compile a list of individuals for the purposes of any commercial solicitation by mail or otherwise, or the collection of delinquent accounts or any other purpose not allowed or provided for by the rules.

(c) The information provided to any person qualifying to receive information under subsection (a)(2) shall be provided for a fee and under such conditions as set by the director pursuant to rules adopted by the director under chapter 91. The director shall require the person receiving the information to file with the director a corporate surety bond in favor of the State in the penal sum of not more than $70,000, conditioned upon the full and faithful compliance of the person receiving the information with the terms and conditions of the affidavit and the conditions set by the director. Any person otherwise qualified to receive information under subsection (a)(2) and who complies with the provisions of this section may receive all the information in the motor vehicle registration file if the person either provides information to or performs recalls on behalf of manufacturers of motor vehicles as authorized by the federal government or as deemed necessary by a manufacturer in order to protect the public health, safety, and welfare or to make a free correction of a manufacturing deficiency.

(d) Any person receiving information pursuant to subsection (a)(2) or (3) shall hold harmless the State and any agency thereof from all claims for improper use or release of such information. [L 1967, c 214, pt of §2; HRS §286-172; am L 1968, c 48, §2(e); am L Sp 1972 1st, c 20, §12; am L 1981, c 194, §2; am L 1983, c 154, §2; am L 1986, c 256, §1]

[PART XI]. MOTC

§286-203 Enforcement. Fc director of transportation shall have s to implement this part. The director county executive officers. For the p general public, and the safe transpor public highway, and the enforceme to this part, the director, persons app officers to whom powers of enfor buildings, freight and equipment of equipment of motor carriers and the shipping papers and hazardous waste to this part. Every state and county ordinances shall assist in the enfc pursuant to this part and issue cita 1st, c 20, pt of §1; am imp L 198-

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MOTOR VEHICLE S

SECTION
287-35 BOND AS PROOF

§287-35 Bond as proof. denced by the bond of a surety cor the State, or a bond with at leas within the State, and together hav amount of the bond, which real e the insurance commissioner, whic amounts specified in section 294- istrator and shall not be cancela administrator. The bond shall cor estate so scheduled of any surety a final judgment against the perso damages for care and loss of serv person, or for damages because the loss of use thereof, resulting fr of a motor vehicle after the bond and the filing of a certified copy of conveyances.

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[am L 1986, c 339, §33]

Section 294-10(a) referred to in tex

Only the subsection amended is com

ABAN

PART I. VEHICLES ABANDON

SECTION
290-8 DERELICT VEHICLE

Recalls

United Press International

DETROIT — Ford Motor Co. announced yesterday the recall of about 37,300 1987- and 1988-model cars, including its all-new Lincoln Continental, to correct problems with their seat-belt systems and rear suspensions.

No accidents or injuries have been reported to Ford as a result of any of the conditions, the carmaker said.

About 28,000 1987- and 1988-model Ford Crown Victoria and Mercury Grand Marquis station wagons are being recalled to modify the seat belts in the optional, rear-facing third seat.

The seat belts on those large, rear-drive cars, if not installed on the appropriate side of the seat, could malfunction by fitting too loosely or retracting too slowly, the company said.

Ford also is recalling about 9,300 of its all-new, front-drive Lincoln Continental sedans to install retainers on the rear torsion-bar springs. The company said the retainers will prevent the spring from hitting a tire if it were to break.

Five-thousand of those Continentals also will be checked for defective assembly of the inboard front seat-belt attachments, the No. 2 carmaker said. If the belt assembly is not anchored properly, it could loosen or pull free during an accident.

The Continental, priced $26,000 to $28,000, was introduced Dec. 26.

R C Hotel

Recalls

United Press International

DETROIT — General Motors Corp. yesterday announced recalls of nearly 322,000 1984- through 1988-model cars for a variety of problems including two that have caused at least 24 car fires and one minor injury.

The largest recall involves 179,000 1985- and 1986-model Buick Somerset and Skylark cars with headlamp switches that could overheat under extended use.

Also being recalled are about 132,000 1987-model Buick Skyhawks, Oldsmobile Firenzas, Pontiac Sunbirds and Grand Ams powered by 2.2 liter 4-cylinder engines. GM said the fuel lines on those cars could crack and possibly lead to an engine fire.

GM spokeswoman Karen Longridge said the automaker received reports of 15 fires but no injuries as a result of that problem.

GM is also recalling about 5,500 1984- and 1985-model Cadillac Eldorado convertibles. Those cars have power window switches that may short if water or snow gets into the door panel. Longridge said GM received reports of nine fires and one minor injury related to that problem.

About 5,300 1988-model rear-drive Cadillac Broughams are being recalled for defective rear seat shoulder belt retractors, although the lap belts still function properly. No injuries have been reported because of that problem, Longridge said.

All repairs and replacements will be made free of charge, GM said.

The Honolulu Advertiser Thursday, February 18, 1988

The Honolulu Advertiser

ERRY KEIR
anaging Editor

TESTIMONY ON HB-2002, HD 1

Testimony before Senate Government Operations Committee
Wednesday, March 16, 1988

Mr. Chairman and Members of the Committee:

My name is Gerry Keir and I am the managing editor of The Honolulu Advertiser.

I appreciate the opportunity to appear before you today to voice my concerns about the current draft of House Bill 2002.

We are pleased at the attention being given by both the administration and the Legislature to the problem of excessive secrecy in government. The governor's committee and the House have both worked hard to come to an understanding of the problem.

In our view, however, HB 2002 is not the answer. It sets up an extremely cumbersome procedure almost guaranteed to result in delay, appeal, frustration and expense. It creates a costly new government bureau to address problems which don't really require another bureau. And the creation of that bureau seems destined to result in automatic 3-week delays for citizens seeking access to what ought to be open records.

There are good things in the bill, features which address the problems inherent in the present Chapter 92-E. But on balance, we at The Advertiser feel that the present draft of legislation does more harm than good. We urge that it be drastically modified or held by your committee for interim study before action is taken.

HB 2002
Ag, 3/16/88
1:30 p.m.

Honolulu Star-Bulletin

March 16, 1988

Sen. Russell Blair
Chairman, Committee on Government Operations
Senate, State of Hawaii

Mr. Chairman and committee members:

The Honolulu Star-Bulletin thanks you for the chance to comment on legislation aimed at keeping government free and open. Today is the 237th anniversary of James Madison's birthday, and for his work on the Constitution, March 16 has been designated "Freedom of Information Day." We appreciate the timing.

The Star-Bulletin has mixed feelings about House Bill No. 2002, the Uniform Information Practices Act, and also its slightly revised House Draft No.1. A copy of our Friday, March 11, editorial is attached. As it says, we thank the House for trying. Some parts of the complex measure might help, but we cannot support the bill in its present form.

We think the Senate can find a shorter, simpler way to improve the flow of information from government agencies to the public. We believe the basis for keeping public records, meetings and decision-making open can be found in existing law, perhaps in Section 92, regarding public records and information.

The 46-page bill passed by the House tries to do too much. We don't need a centralized "information czar" in the governor's office. It wouldn't take long for such an office to become a high-level bottleneck, a statewide collection point where department officials could detour the most routine requests for information. We would urge the committee to tread cautiously in considering a powerful office of this kind, anywhere in government. What is needed instead of a new "ministry of information" is a statewide policy of responsiveness to requests for information within each department and agency of government. The governor and his department heads already have the authority they need to do this.

The Star-Bulletin's basic position is that all government records, meetings, decisions and other activities relating to the public's interest should be open and presumed to be open, unless a compelling need otherwise can be shown by those seeking to close them. We do not offer a line-by-line analysis of the House bill or its revised draft here. We do share the views of those who believe the measure is more complex than it need be, and that if enacted as it passed the House would result in more confusion among government officials and the general public.

We thank the committees of both houses for their work. We hope any legislation this session produces on the subject of open information will have as its purpose a furthering of the public's interest and, as its contents, language that truly supports that purpose. Thank you.

Catherine Shen
Publisher, Honolulu Star-Bulletin

John E. Simonds
Senior editor, Honolulu Star-Bulletin

HB 2002
Ag. 3/16/88

Information-privacy bill needs to be improved

A complex bill called the "Uniform Information Practices Act" has quietly passed the House and is now in the state Senate, where we hope it will be shelved for major reworking.

In its present form, the bill tries to do too many things — including the creation of a powerful and potentially obstructive information czar in the governor's office — and we cannot support it.

The measure is only slightly changed from the 47-page version introduced early in the session by House Judiciary Committee Chairman Wayne Metcalf, and opposed, at least in part, by news media representatives and others in testimony at committee hearings.

Ian Lind, former Common Cause leader here and a champion of open information, said in a Feb. 29 commentary on these pages that the Metcalf bill also does not pertain to activities of the Legislature.

The *Star-Bulletin* view of the four-part bill is mixed. We applaud the committee for its attempt to sort out the conflicting requirements of public information and privacy laws. But some provisions in the Metcalf bill, which 33 other House members signed, do not seem aimed at making records and information more readily available to the public. They would set time limits on agency responses that could become automatic delays, and impose other procedures that complicate the pursuit of public information.

Our basic position is that all government records, meetings, decisions and other activities relating to the public's interest should be open and presumed to be open, unless a compelling need otherwise can be shown by those seeking to close them. This should be inscribed into law as state policy, rather than the other way around — where information may assumed to be private unless the public or news media can justify a need to know.

The federal Freedom of Information Act passed by Congress in 1966 has its flaws, but it has stood up fairly well over the years. We think it would provide a reasonable foundation from which to structure a state law. In any case, the measure now before the Legislature is just too full of questionable provisions to be enacted.

'SELL CADES
AM L. FLEMING
LD S. WRIGHT
EDERICK SCHUTTE
S S. CAMPBELL
GLETON CAGLE
INN
WOPE
LCK
PRIOR
NNER SCHULL
AS P. HUBER
AEL P. PORTER
LD E. SCEARCE
RD A. JAFFE
IRD A. HICKS
R H. EPSTEIN
IEY S. PORTNOY
RD DeL. BOYLE
ICE LITTMAN
OLAS C. DREHER
A. HAZLETT

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PHILIP J. LEAS
DAVID C. LARSEN
STEPHEN B. MacDONALD
LARRY T. TAKUMI
WILLIAM A. CARDWELL
C. MICHAEL HARE
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ROY A. VITOUSEK II
STANLEY M. KURIYAMA
NELSON N. S. CHUN
DARRYL H. W. JOHNSTON
EDWARD R. BROOKS
VITO GALATI
CARY S. MATSUSHIGE
DAVID SCHULMEISTER
THOMAS E. CROWLEY III
LORRAINE H. AKIBA
MILTON M. YASUNAGA
SUSAN OKI MOLLWAY
GINO L. GABRIO

CADES SCHUTTE FLEMING & WRIGHT
ATTORNEYS AT LAW

HONOLULU, HAWAII OFFICE
P. O. BOX 939
HONOLULU, HAWAII 96808
1000 BISHOP STREET
HONOLULU, HAWAII 96813
TELECOPIER: (808) 531-8738
TELEX: 7238589
CABLE: LEX
TELEPHONE: (808) 521-9200

COLIN O. MIWA
MARTIN E. HSIA
STEPHANIE A. GONSALVES
STANLEY K. W. CHONG
ALLEN H. SAKAI
PETER W. OLSON
PATRICIA UYEHARA WONG
AMY E. EJERCITO
BARRY K. TAGAWA
RHONDA L. GRISWOLD
RENE E. OJIRI
GAIL M. TAMASHIRO
THOMAS YAMACHIKA
GRACE NIHEI KIDO
KEITH A. LEE
ANNE L. SYLVESTER
STEWART J. MARTIN
SANDRA Y. TAKAHATA
ARLENE S. KISHI
DONNA Y. L. LEONG
JOHN S. BLISS

GEORGE E. DARBY
PATRICIA J. McHENRY
DENNIS J. GAUGHAN
PATRICIA A. JENDRASZEK
MICHAEL J. SAMPLE
PHILLIP ALLEN LI
G. HISAE ISHII-CHANG
CONSTANCE C. ARVIS
CHERYL L. BRADY
J. THOMAS MALONEY, JR.
ROBBY B. VILLEZA
MAY LEE TONG
ANDREW WON

A LAW CORPORATION

OF COUNSEL
MILTON CADES
GILBERT E. COX

WRITER'S DIRECT DIAL NUMBER:

March 16, 1988

TESTIMONY OF JEFFREY S. PORTNOY
REGARDING HOUSE BILL NO. 2002

Before the Senate Committee on Government Operations

Attached please find a copy of written testimony which I provided on behalf of my clients, The Honolulu Advertiser and KHON-TV, to the House Committee on Judiciary. I believe that that testimony is as relevant today as it was prior to the House's adoption of House Bill No. 2002.

Although the final version of House Bill No. 2002 adopted by the House did contain some changes from the original version, those amendments, for the most part, do not make substantive changes in the Bill and fail to address the significant problems with the bill set out in my written testimony attached hereto.

I look forward to the opportunity of presenting oral testimony concerning my recommendations for proposed amendments before the Committee today.

Respectfully submitted,

JEFFREY S. PORTNOY

HB 2002
Ag. 3/16/88
1:30 p.m.

CADES SCHUTTE FLEMING & WRIGHT
ATTORNEYS AT LAW

HONOLULU, HAWAII OFFICE
P.O. BOX 939
HONOLULU, HAWAII 96808
1000 BISHOP STREET
HONOLULU, HAWAII 96813
TELECOPIER: (808) 531-8738
TELEX: 7238589
CABLE: LEX
TELEPHONE: (808) 521-9200

WRITER'S DIRECT DIAL NUMBER:

February 10, 1988

TESTIMONY OF JEFFREY S. PORTNOY
ON BEHALF OF THE HONOLULU ADVERTISER
AND KHON-TV
REGARDING HOUSE BILL NO. 2002

Before the Committee on Judiciary,
House of Representatives
14TH LEGISLATIVE REGULAR SESSION 1988

My name is Jeffrey Portnoy, and I am a partner in the law firm of Cades Schutte Flemin g & Wright. I am here to testify on behalf of my clients, The Honolulu Advertiser and KHON-TV.

Although my clients want to commend this Committee for its' efforts in attempting to draft legislation to remedy inadequacies in our state's present open records statutes, House Bill No. 2002 does not appear to be the appropriate mechanism to do so.

This Bill is unduly complex, unwieldy, and frankly, too legalistic. In my clients' opinion, this Bill attempts to do too much, and on the whole, may make access to public records more difficult rather than more accessible.

The present problem with access to public records is basically the result of the adoption of H.R.S. 92(E), the Fair Information Practice Act, and the interpretation of that act by various governmental bureaucrats and employees. Prior to the adoption of H.R.S. 92(E), access to public records was governed by H.R.S. 92, the Public Agency Meetings & Records Act. The preamble to that act, which coincidentally is not included in proposed House Bill No. 2002, made it clear that it was the public policy of this state to open up government records to public scrutiny and indicated a significant commitment to protect the people's right to know. Under H.R.S. 92, access to public records was guaranteed nless someone objecting to disclosure could demonstrate that disclosure would "invade the right of privacy of an individual". Chapter 92(E) designated a certain category for otherwise public records as a "personal record". These records were interpreted to include any record that contained anyone's name or any personally identifiable information. Access to these records was cut off by Chapter 92(E).

What followed was an avalanche of public record access denials by State bureaucrats and employees. This led to such an outcry that both the Governor and this legislature decided that it was in the best interests of the citizens of this state to review our public records legislation, and House Bill NO. 2002 is an attempt to remedy this situation.

However, House Bill No. 2002, a 47-page statute as drafted, does not appear to be the appropriate vehicle to correct the problem.

What is needed is basically simple legislation that would maintain the presumption of openness and access contained in H.R.S. 92, while redefining the definition of personal record. And legislation would require disclosure of all records unless their disclosure would be a clearly unwarranted invasion of an individual's privacy. This new legislation could include certain limited categories of information which could be presumed to be a clearly unwarranted invasion of privacy. This could include information such as tax returns, ongoing criminal investigatory files, medical records, and some of the other records having a presumption of a significant privacy interest presently contained on pages 15, 16 and 17 of House Bill 2002.

It is my client's opinion that these narrowly drawn amendments to the present open records legislation would accomplish greater openness and demonstrate the State's continuing commitment to the public's right to know, while balancing an individual's right to be protected from a clearly unwarranted invasion of privacy. Some may believe that a definition of that term must be included in any statute. I believe that it is impossible to consider a definition which would meet all possible contingencies, but fortunately the term "clearly unwarranted invasion of privacy" is contained in the Federal

Freedom of Information Act and there is a large body of judicial interpretation of that term which could be used by the public, state agencies, and the courts to aid in the appropriate interpretation of that term.

House Bill No. 2002 contains several other provisions which I believe are overly restrictive and would deny appropriate access to public records. For example, this proposed bill would deny access to inter and intra agency memorandum, which records are currently public and critical to the public's right to know and understand how its' government operates.

House Bill No. 2002 would exempt the legislative branch and its records from public a access. There is no reason to allow access to the executive branch and to deny access to the legislative branch.

I also believe that the proposed administrative procedures for responding to requests for records and appealing any denial thereof are unduly cumbersome and complex. It would lead, in many cases, to documents not being produced for thirty or more days. My clients are engaged in ongoing news gathering, and it is often said that stale news is no news. To make my clients and other members of the public wait for as long as thirty days to possibly review records is unnecessary and unwarranted, and is really a restriction on public access.

My clients also object to that portion of House Bill No. 2002 which denies access to documents which would "substantially inhibit the flow of communications within an agency or impair an agency's decision-making process"; "materially impair the effectiveness of an ongoing investigation"; and related provisions which appear to deny access to documents which are now public records under existing law and which are critical to the public's right to know.

My clients object to Part III, Section 22(b) of the Bill which, if literally interpreted , would deny access to practically all State records unless the person requesting disclosure could demonstrate an "imminent threat to public health and safety". And my clients object to that portion of the Bill which makes it a crime for someone to not only disclose records which might subsequently be found to be non-public, but also applies criminal penalties to the person who gains access or obtains a copy of that record. It is not reasonable to assume that a state employee is going to provide access knowing that if he or she is wrong, she may be subject to criminal penalties. And to impose criminal penalties on a representative of the media or public for obtaining information which might subsequently be found to have been non-public can lead to a significant chilling effect on an individual's right to access public records.

However, there are several good and necessary proposals in H.B. NO. 2002 which should be adopted by this

legislature. This proposed legislation would require a state agency which wrongfully refused to produce public records to pay the legal fees and costs of any individual or company who brings a successful legal challenge to that refusal. Present legislation does not provide those sanctions, and it has been my personal experience that the costs and expenses of pursuing a challenge for a wrongful denial to access discourages those challenges and encourages various state employees to withhold disclosure.

The proposed legislation would require an agency to provide access to any reasonably segregatable portion of a record after deleting any non-disclosed material. This is a significant improvement over the present practice which is to simply deny access to all records which contain any identifiable information even when that personally identifiable information can be easily deleted.

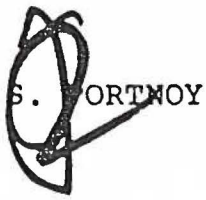
Another laudable aspect of H.B. No. 2002 is contained in Section 22(a) of the Statute which states that disclosure of a record which contains personally identifiable information does not constitute a clearly unwarranted invasion of personal privacy if the public interest and disclosure outweighs the privacy interests of the individual. This definition should be placed in any legislation which amends our present open records legislation and would greatly benefit the public's access to what heretofore has been unreasonable restriction to various state public records.

Much of proposed House Bill No. 2002 does not relate to the public's right of access to state records. I believe that the provisions of House Bill NO. 2002 which relate to inter-governmental access, and an individual's right to review his or her own records, belong in separate legislation. One of the problems with Chapter 92(E) is that it mixes together so many different subject matters that it has led to a significant restriction on the public's access to records while attempting to restrict inter-agency communications and protect the right of individual access to one's own records. The present bill appears to compound this problem, and it would be far better for the legislature to pass single issue legislation rather than to continue to lump these various problems together.

In conclusion, I want to repeat again that my clients and I commend this Committee and other State agencies and officials for all of their work in reviewing the present status of public access to records. Legislation is needed to improve what has become a disturbing trend towards limiting access to governmental records, and many provisions of House Bill No. 2002 are necessary to insure greater access to public records. However, the present draft of House Bill No. 2002 may, in fact, make it much more difficult to obtain access to records, both procedurally and substantively, and therefore we urge this

Committee to work with my clients and others to develop legislation that will protect an individual's right to privacy while guaranteeing public access to most government records.

Respectfully submitted,



JEFFREY S. PORTNOY

Ian Y. Lind
olitical Analyst & Consultant
1451-1 Hunakai Street, Honolulu, Hawaii 96816 • Phone (808) 737-3428

Testimony presented on HB 2002, HD 1, "Relating to Public Records"
Senate Committee on Government Operations, Russell Blair, Chairman.
Wednesday, March 16, 1988.

Thank you for this opportunity to testify concerning HB 2002, HD 1. My name is Ian Lind and I am testifying as an individual with extensive background in the area of access to public records. I formerly served as executive director of Common Cause/Hawaii and was a member of the Governor's Committee on Public Records and Privacy. Despite my familiarity with the issues that this bill addresses, I have had considerable difficulty evaluating HB 2002 and its potential impact on the public's right to know. The bill is very ambitious in its overall approach and attempts to bring a number of subjects under one overarching statutory structure. As a result, it is a complex and far from straight-forward measure. I have no difficulties with those provisions in this bill which relate to an individual's right of access to their own personal records, the right to correct misinformation in those records, or controls on agency development, maintenance and use of records about individual citizens. My comments will focus on those provisions regarding access to public records.

My sense is that HD 1 is a substantial improvement over the original bill. However, I have reluctantly come to the conclusion that significant problems remain. First, the complex structure of the bill detracts from its positive substantive aspects. Its repetitive, sometimes overlapping and cross-referenced sections make interpretation difficult even for someone like myself who is well-versed in the subject matter. This difficulty is inherited from the Uniform Fair Information Practices Act, which HB 2002 is modeled after. Second, I am not convinced that Hawaii needs a very elaborate bureaucracy for handling information requests. Third, a careful review of

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the sections of the bill relating to access to public records—both the general provisions and the lists of enumerated records—indicates that the overall effect of the bill may be to close records off that are now considered to be public. Specific aspects of this assessment are presented below.

In earlier House testimony I suggested that a key to evaluating this bill would be to determine whether it would result in opening up records which are now closed. If it results in more information being available to the public, it would be desirable, but if it cuts off information it would not deserve your support. I now believe that HB 2002, HD 1 fails to pass this overall test despite its many positive elements.

What, then, should be done? It is instructive to note that the impetus behind this bill was a desire on the part of the Waihee administration to respond to conflicts between the public's right of access to government records and a statute designed to implement the State Constitution's provisions on privacy. HB 2002, HD 1 was an initial attempt by the House Judiciary chairman to address this effectively in an omnibus bill touching on a range of related issues. Despite good intentions and hard work on the part of all concerned, it is becoming clearer that this approach has too many attendant problems to be fruitful. At the same time, I am reluctant to simply drop the effort and squander the opportunity that the administration's current attitude represents.

Perhaps HB 2002, HD 1 could be amended with the following points in mind.

- Restore coverage of legislative records, at least as regards access to public records.

- Delete references to intra- and inter-agency records, or at least narrow the exemption as much as possible.

- Clearly "decouple" provisions relating to public access to records from provisions regarding individual access to and agency handling of personal records. Separate the latter provisions from the former and reconsider whether they should be incorporated in the same statute.

• Consider a more modest information structure. The complicated rules, timetables, and staffing proposed by the Uniform Act may be "overkill" for a state our size.

Assessing the impact of HB 2002, HD 1

There are four separate listings in the bill that describe records that would be either open or closed. In addition, there are certain definitions which would also affect the availability of records.

1. The definition of "agency" in HD 1 (page 3) would exclude the legislature and the courts, while the existing public records law does apply to the legislature. This would be a major net loss of public information.

2. The definition of "government record" on page 4 is simpler and more inclusive than the current statute and would probably mean a net overall gain in public access.

3. Thirteen specific categories of records which would be required to be readily available to the public are presented on pages 5-6. All except one category are clearly open under current law. The exception, involving information concerning the amount and status of loans made by a state or county program, has not been easily accessible in the past but probably should also be open under current law. This entire section, therefore, is neutral with regard to openness.

4. Twelve categories of information which would not be subject to mandatory disclosure are listing on pages 9-11. Most of these, such as information which would violate personal privacy or compromise trade secrets, licensing exams, or similar materials, could not be available under current law. However, subsection (2) on page 10 relating to inter- and intra-agency records would result in closing off access to records which are currently open to the public. Although access to such records is resisted in practice, the only Hawaii legal case resulted in the disclosure of this type of internal agency correspondence. In addition, it is unclear how the exemption for law

enforcement records on pages 9-10 would impact on access to information from the police departments or other law enforcement agencies. Overall, it would appear that this section results in a net loss of information currently available.

5. Eleven types of information in personal records which would still be available to the public are listed on pages 14-15. These consist primarily of information which is already available to the public, with the exception of information from motor vehicle registration files, which could now be made available for a "legitimate reason" as determined by agency rules. The section would allow the public disclosure of the salaries of public employees who are not part of the civil service system. This information has not been made available to the public in recent years. No Hawaii court has issued a decision regarding disclosure of public employee's salaries, but decisions in other jurisdictions would suggest that the public does have a right of access to such information. In any case, clear access to salary information is a plus for the bill.

6. Finally, the bill presents a listing of information which would be presumed to be private and confidential unless it were shown that the public interest in disclosure outweighs the individual's interest in privacy. This section seems to be confined to information which is not currently available and is therefore largely neutral.

The impact of these provisions would be to potentially close off public access to two major categories of records, those of the legislature and the internal records of agencies. Balanced against this would be a clearer definition of a government record and more straightforward access to certain types of government information such as salaries of public officials and certified payroll records. The impact on information about crime and law enforcement is unclear at this time, but could potentially be negative. This needs to be clarified. Strictly from the perspective of public access to records, the overall specific gains do not appear to outweigh the broad categorical losses.

League of Women Voters

49 SOUTH HOTEL STREET, SUITE 314 HONOLULU, HAWAII 96813

March 16, 1988

TESTIMONY BEFORE SENATE GOVERNMENT OPERATIONS COMMITTEE CONCERNING HB 2002, H.D. 1

The League of Women Voters of Hawaii would like to address the following points in this proposed legislation:

1. Office of Information Practices (III-41, p.33 1.5)

We feel that creation of another layer of bureaucracy to implement this legislation is unnecessary. Requests for government records that could provide a subject for controversy are rare. If the intent of the legislation is clear, implementation could be made the kuleana of a single attorney in the Attorney General's office. Furthermore, there is a growing body of federal case law that could serve as guideline. By creating this office, a cumbersome procedure that could significantly delay information-gathering by the public is also created.

2. Exclusion of the Legislature and Judiciary (I-4 p.3, 1.22)

The Hawaii State Constitution gives the legislature the right to create its own rules; there is no reason why it cannot make itself subject to the same guidelines as it proposes for the administrative branch. Also, the records of the administrative department of the Judiciary should be open to the pbulic.

3. Declaration of Intent (I-2 p.1, 1.10; II-11 p. 5, 1.2)

The League welcomes this language and has no problem with the wording regarding individual privacy, as we are concerned about too-pervasive government record-keeping (III-28 p. 23, 1.14 provides guidelines). Following the declaration of intent of II-11 p. 5, 1.2, is a long list of the types of records that are mandated to be open. It should be made clear that this list is not definitive, but illustrative, and all government records are open to inspection unless restricted by law, as stated.

The League has been concerned with the issue of privacy vs. the public's right to know for some time; it's a delicate balancing act. On the whole, we stand for openness in government, but tempered with concern for the individual.

Respectfully submitted,

Rhoda Miller

HB 2002
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Hawaii Professional Chapter

The Society of Professional Journalists, Sigma Delta Chi

News Building, 605 Kapiolani Blvd., Honolulu, Hawaii 96813

March 16, 1988

The Honorable Russell Blair
Senate Government Operations Committee

Testimony on H.B. 2002, H.D. 1

Mr. Chairman and Committee Members:

Thank you for the opportunity to testify on H.B. 2002, H.D. 1. Unfortunately, we will not be there in person.

Although the bill is a step in the right direction, we feel it doesn't go far enough to open records to the public. We recommend that the measure be radically revamped or held for this session, pending further study.

The bill is still complex and interweaves privacy and freedom of information provisions to the point that it can only cause confusion. Instead of one list of exempted types of records as in the federal Freedom of Information Act, the bill creates four lists of records -- none of which appear to be a major improvement in the kinds of records the public is entitled to.

If you do pass the bill out of committee, we ask that you seriously consider a proposal by the news media and others that the current law remain intact with modifications: Establishing a "clearly unwarranted invasion of privacy" standard in 92-50, HRS; making a list of records that have significant privacy interests; and deleting all links between 92-E (the privacy code) and the public records law, thus making the privacy code affect only people's access to government records about themselves.

We feel the proposal is good: It cuts out needless bureaucracy and confusion.

We thank you for your time and attention.

Sincerely,

Howard Graves
President

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TESTIMONY OF HONOLULU BRANCH,
AMERICAN ASSOCIATION OF UNIVERSITY WOMEN,
ON H.B. 2002, H.D. 1: RELATING TO PUBLIC RECORDS

Before the Senate Government Operations Committee
Wednesday, March 16, 1988, at 1:30 p.m.
State Capitol Conference Room 6

We would like to applaud the House Judiciary Committee and other House members for the considerable time and attention already devoted to this problem and to commend this Committee for initiating such timely efforts on the Senate side.

H.D. 1 makes important improvements to the original bill, we believe, but still leaves several areas of concern to us.

First, the option introduced in H.D. 1 (on page 14, lines 8-9) that the compensation of certain government employees be publicly disclosed in "salary range" rather than exact amount is unsound. This option is unsound for three reasons:

(a) it unnecessarily offers the mechanism of secrecy or obfuscation permitting governmental payrolls -- for equal or comparable worth --to be used to discriminate against women or other disadvantaged groups,

(b) it unnecessarily permits secrecy about how taxpayer funds are spent,

(c) it unnecessarily confuses disclosure of public funds for public officials with the "salary range" option used by elected officials to publicly disclose their private sources of income in their filings with the State Ethics Commission.

Second, on that same page, lines 14-15, also unsound is the addition of the clause reading provided that this provision shall not require the creation of a roster of employees.

This addition is unsound because -- like so much of this bill -- it denies the taxpayer the slightest benefits from the millions of dollars in public funds spent for computers and other sophisticated technology now used in Hawaii by all branches and levels of government.

Continued failure to give taxpayers more access to or information about public records amassed by the governments they fund may lead to a split-level society of informational haves and have-nots.

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Third, the state policy cited on page 2, lines 7-10 should be changed to read:

> "Therefore the legislature declares that the policy of this State is, to the greatest extent possible, to preserve individual freedom--including the right to have highly personal and intimate details about oneself remain private and accurate--and to foster democratic government--including the right to scrutinze those records entrusted to governmental agencies."

This language replaces the following sentence:

> "Therefore the legislature declares that it is the policy of this State that individual freedom and dignity--including the right to have personal and intimate details about oneself remain private and accurate--shall be preserved to the greatest extent possible."

Fourth, the cumbersome bureaucracy created by this bill should be streamlined and then placed in a legislative agency--rather than the governor's office--where the staffing and funding levels can be adequately and consistently maintained to ensure proper administration safeguarding competing constitutional rights that affect all citizens of this state.

Those most in need of governmental safeguarding of their constitutional rights are women--whose medical records in Hawaii's state and county hospitals are among the most highly personal and intimate of all those held by government. Others also needing governmental protection are those who are the least powerful in society--children and the disadvantaged.

Fifth, the legislature should provide proper leadership by opening its own records to public scrutiny.

Sixth, this bill fails to address some of the most pressing and vexing privacy issues, many of which are of direct impact on women and children.

Based on uniform legislation drafted nearly a decade ago, this bill is already out-of-date. It is silent on protecting citizens from invasion of privacy made possible by new and revolutionary technologies of many kinds and descriptions used by government and by third parties.

Following is a mere glimpse of some of these used by the federal government for electronic surveillance; this information was contained in Federal Government Information Technology: Electronic Surveillance and Civil Liberties, Washington, D.C.: Congress of the United States, Office of Technology Assessment, OTA-CIT-293, October 1985.

Table 4.—Electronic Surveillance Technology. Current and Planned Agency Use

Technology	Number of agency components reporting: Current use	Planned use	Total
Closed circuit television	25	4	29
Night vision systems	21	1	22
Miniature transmitters	19	2	21
Radio receivers (scanners)	19	1	20
Vehicle location systems (e.g., electronic beepers)	13	2	15
Sensors (e.g., electromagnetic, electronic, acoustic)	12	3	15
Telephone taps and recorders	13	1	14
Pen registers	11	3	14
Telephone usage monitoring	7	3	10
Computer usage monitoring	4	2	6
Electronic mail monitoring or interception	1	5	6
Cellular radio interception	3	2	5
Pattern recognition systems	2	2	4
Satellite interception	1	3	4
Expert systems/artificial intelligence	0	3	3
Voice recognition	0	3	3
Satellite-based visual surveillance systems	1	1	2
Microwave interception	1	1	2
Fiber optic interception	0	1	1

SOURCE: Office of Technology Assessment.

The threats to personal privacy have grown with the computerization of governmental and commercial records, Congressional committees have found. We would like to share with you two very recent articles on this point. Especially interesting to women and others subject to discriminatory practices is the second article written by Peter Hiam, the insurance commissioner of Massachussetts who resigned in disagreement with Gov. Dukakis's decision to reverse Hiam's ban on AIDS antibody testing by insurance companies in that state.

We urge this committee to initiate adequate safeguards against such discriminatory practices and from such other unreasonable governmental and third-party encroachments as unwarranted computer-matching, eavesdropping and electronic surveillance.

We also urge this committee to initiate means to inform Hawaii's citizens about these revolutionary changes affecting their lives so that they may know how much and what kinds of personal privacy they may reasonably expect.

Beverly Ann Deepe Keever

Honolulu Branch, AAUW

Beverly Ann Deepe Keever
Legislative Chair

Rebecca Ryan Senutovitch
President

Personal but Not Confidential: A New Debate Over Privacy

By MICHAEL deCOURCY HINDS

The privacy of personal records — those collected by employers, insurers, retailers and other private organizations — is primarily protected by the lack of interest in them, not by law. When curiosity or a business interest develops, privacy may vanish.

That happened last September, when a weekly newspaper in Washington published a profile of Judge Robert H. Bork based on 146 films his family had rented from a video store. At the time, the Senate Judiciary Committee was holding hearings on the judge's nomination to the Supreme Court.

The family's preference for Alfred Hitchcock and Cary Grant films drew little national interest, but many Senators and Representatives were stunned by what they regarded as an invasion of privacy. After all, if a judge's viewing habits were newsworthy, so were those of members of Congress.

The House quickly introduced legislation forbidding retailers from disclosing video rental records without a customer's permission or court order. Hearings on the bill are expected soon. A similar measure, which is widely supported, is expected to go before the Senate next month.

State and local legislators have also picked up the privacy issue. In Maryland, a bill modeled on the Federal legislation is waiting to be signed by the Governor. The District of Columbia Council recently sponsored similar legislation.

Privacy advocates, who have long lobbied for stronger protections for personal records, hope that the Bork matter will galvanize interest in a more comprehensive review of privacy protection.

Most existing laws pertaining to records about individuals protect the privacy of records held by government agencies, but relatively few laws protect records that are collected by private institutions and businesses. Privacy advocates say people should have the right to view all their files, correct them if necessary and limit their distribution.

A video bill could lead to new protections.

"The video bill is one of the first pieces of legislation in years that would create a privacy right in records held by the private sector," said Janlori Goldman, a lawyer with the Project on Privacy and Technology of the American Civil Liberties Union in Washington.

"It's a beginning, a modest beginning," she said. "But the video bill *may be the first evidence of a resurgence* of interest in the privacy movement."

Even now, Senate staff members are considering broadening the video bill to include records of materials borrowed from libraries. About half the states already have such laws.

Support for Proposals

The legislative proposals have widespread support. Librarians have endorsed any proposal to keep borrowing records private; last year, they rejected requests by the Federal Bureau of Investigation to compile a list of people who borrowed books on subjects that might aid terrorists.

Even video dealers — who could be fined $10,000 for improperly releasing records — support the legislation. They say business could suffer if customers were not assured of privacy.

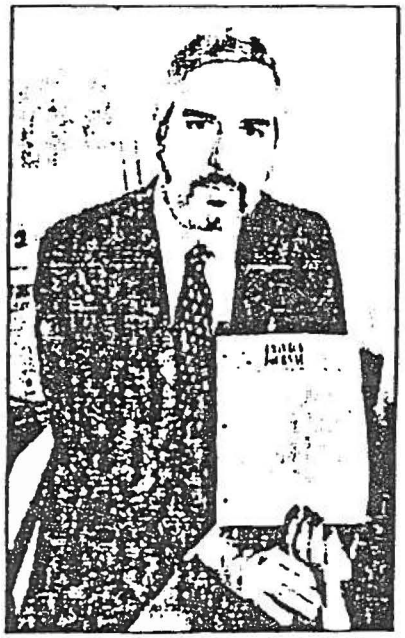
But Jack Shafer, the editor of City Paper, the weekly that ignited the issue by lampooning the Bork family's viewing habits, said: "The legislation only prohibits stores from giving away the information. But that won't prevent a paper getting hold of it by stealth and publishing it."

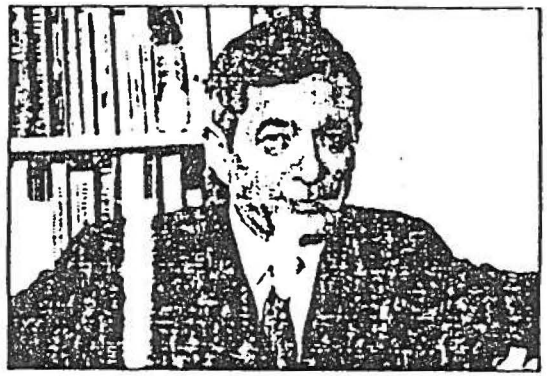
A Privacy Expert's Doubts

Robert Ellis Smith, publisher of The Privacy Journal, a monthly in Washington that advocates greater privacy protection, sees no need for the video legislation. "I've not seen anybody concerned about this issue before," he said. "I would rather see a more systematic approach to protecting the privacy of all retail records. What is sensitive to one person isn't to the next. And that is why we have this uneven, patchwork protection over the privacy of records."

Privacy laws are based on the Fourth Amendment to the Constitution, which guarantees people the right "to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."

Concern about privacy began to grow as record keeping became automated in the 1950's. After Watergate, Congress passed laws giving people access to Government records and restricting Federal agencies from exchanging personal records without obtaining consent or court orders.





Associated Press for The New York Times

The article, right, that led to bills to limit disclosure of video records. Robert Ellis Smith, above, of The Privacy Journal, prefers a "systematic" approach; Jerry Berman of the A.C.L.U., top right, endorses the bill.

Subsequent Federal laws provided limited privacy protection to records involving school, credit and financial reports, electronic communication and purchases made by subscribers ordering products and movies on cable television.

States have also passed privacy laws, but most regulate records controlled by government entities, not private ones.

"There is not going to be any omnibus privacy legislation in the near future," said Jerry Berman, director of the American Civil Liberties Union's privacy project. "So whenever the opportunity arises to create privacy precedents, like the video bill, we endorse them."

Consumer leaders and privacy advocates say that they are most concerned about invasions of privacy that can occur with records on medical treatment and insurance.

"Leaving the privacy procedures up to the insurance industry is like letting the automobile industry write their own safety rules," said Dr. Jerome S. Beigler, a Chicago psychiatrist who heads the American Psychoanalytic Association's committee on confidentiality.

Many people who seek help from mental-health professionals do not submit insurance claims, he said, because their records are too easily accessible to employers and insurers.

Russel P. Iuculano, a spokesman for the American Council of Life Insurance, a trade group, addressed these criticisms in an interview, saying that the insurance industry voluntarily complies with disclosure guidelines issued by the National Association of Insurance Commissioners, a professional organization of state commissioners.

The industry's compliance, however, is uneven, according to a recent study by the Congressional Office of Technology Assessment. The study found that underwriters at many insurance companies considered sexual orientation in health-insurance applications, a violation of the commissioners' guidelines.

Privacy experts say that companies share personal information in ways that do not benefit the consumer. "When people give information for a credit-card application, they don't expect the I.R.S. or another company to get it later," said Ms. Goldman of the A.C.L.U.

Fueling this concern is the vast amount of personal information being collected by credit-card issuers, banks and merchants in doing business and targeting promotions.

"Is it really in your interest that extensive dossiers can be created on your habits and taste?" asked Frederick W. Weingarten, a program manager in the Congressional Office of Technology Assessment.

"Suspicion," he said, "is imbedded in this country, in the Constitution and in our value system. We don't want people being too nosy."

Not for Your Eyes Only

With few exceptions, companies have broad discretion to determine who gets customer records.

Insurance companies share medical-history reports maintained in central data banks. Retail, banking and other concerns develop and rent mailing lists based on products and services purchased by charge customers.

Companies may try to safeguard customer files, but their employees might release them to a persuasive lawyer, private investigator or government official.

Even when laws apply, protections are usually limited. For example, Federal law prohibits credit bureaus from releasing a credit report unless the individual has given permission.

However, any business — or the Internal Revenue Service — can obtain a credit report without obtaining permission if the report is on a customer who owes money to the company. Once a company has the credit report, it can do what it wants with it.

FAILING THE AIDS TEST

The epidemic reveals aspects of society gravely in need of treatment—especially those concerning access to health care and protection from discrimination—argues the former insurance commissioner of Massachusetts.

by PETER HIAM

In October of last year my household, like all households in Massachusetts with addresses known to the authorities, received a letter from Michael S. Dukakis, governor of the Commonwealth, which, after saluting me as a friend, announced that AIDS "is one of today's most critical health problems."

This missive, with its enclosed brochure written in English and Spanish, was a result of considerable soul searching within the state administration. In August, true to predictions of six months before, AIDS cases in Massachusetts passed the 1,000 mark. An additional 30,000 Massachusetts residents were thought to be infected with the AIDS virus, and the projections of the federal Centers for Disease Control for 1991 were horrendous. It was felt that something direct and bold had to be done to educate the public. A frank letter to every Massachusetts family was decided upon.

But that letter's opening line revealed just how unready the Massachusetts state administration was to be innovative and bold. It could not even acknowledge the magnitude of the epidemic. Does the public really believe that AIDS is only *one* of today's most critical health problems?

AIDS is the most feared and dreaded disease in our lifetimes. Its explosive growth, its strange symptoms, its deadliness, and the mystery of its origins and future course all set AIDS apart from more familiar diseases. One would imagine any new threat to the public health and safety even remotely approaching the seriousness of AIDS would command an immediate public response from the nation's leaders and a general outpouring of assistance and comfort. In recent years the public response to such comparatively trivial threats as legionnaire's disease, toxic shock syndrome, and the Tylenol capsule poisonings has been immediate and dramatic. Or consider the familiar reaction when a flood or other natural calamity occurs. The local government head demands that the necessary findings be made to qualify for disaster funds. The chief executive of a state, and sometimes even the nation's president, takes to the field, and the airwaves are filled with pictures of the concerned leader peering at floods and wrecks and talking earnestly with appreciative survivors.

Compare these reactions with those that have occurred in response to the AIDS epidemic. The president is almost silent about the subject. His annual budget submissions have requested such minuscule funds to battle AIDS that Congress routinely increases them enormously. The governor of Massachusetts, in late 1987, observed that AIDS is one of today's most critical health problems, but just months before, in his January 1987 state message, he had not a word to say about AIDS, although he decried such social ills as drug addiction and school dropouts. Sadly, these public reactions to AIDS are typical of officials across the land. Even the Democratic presidential candidates, who could be expected to criticize the Republican administration's AIDS policy, have had little to say about the subject, limiting their discussions largely to promises of additional research funds.

Why? Why should AIDS, so incomparably greater a public threat than all but the possibility of nuclear warfare, arouse so little response? Ironically, one reason is probably the unintended result of the health programs designed to make the public

aware of the means by which AIDS is spread and can be prevented. This message, intended to combat fear and promote safe behavior, emphasizes that the disease is spread only by blood-to-blood contact and that in daily life danger of infection is remote except by sexual acts or use of contaminated needles. The message that each person has it in his or her own power to avoid the disease may be having the unplanned effect of encouraging a lack of sensitivity and compassion. Understandably, this is likely to be the case for the tens of millions of Americans who, because of age or lifestyle, have no reason to consider themselves at risk. Added to the confidence in the minds of many that they are not in danger is the fact that those who have been at the greatest risk belong to two of the most heavily stigmatized groups in American society—gay men and intravenous drug users. Nor has it helped that AIDS has afflicted blacks and Latinos out of all proportion to their numbers. The needs of these two minorities have not ranked high on the national agenda.

Until now AIDS has been perceived largely as a challenge to medical science and public health. To a nation accustomed to remarkable medical advances and expansive rhetoric about the eradication of ancient scourges, it seemed at first simply a matter of waiting for the development of a vaccine. But our confidence in the early development of a cure has waned. The most that medical research appears to offer in the short term is costly palliatives. We are left, then, with public health education as our only immediate weapon against the spread of . . . . But is it likely that messages such as those contained in Governor Dukakis's letter, even if they do acknowledge the extraordinary threat of AIDS and are printed in many tongues, will accomplish their purpose? The answer is almost certainly no. They will not reach the millions of people unknown to the census takers. They will not be read by the millions who are illiterate. They will not be believed by the millions who have been forgotten and left out of the era of American prosperity.

Last August the Centers for Disease Control held a conference in Atlanta at which participants were asked to help determine what leadership structure existed in the black and Latino communities that could be useful in advancing the AIDS public health program. If AIDS were not a life-and-death subject, such an inquiry would be laughable. After all, most blacks are not recent immigrants; the last of the slave ships landed on these shores in 1807. Yet federal officials approach the black community as if they were seeking out members of an unknown tribe, asking to be taken to their leader.

The growing number of AIDS patients is already beginning to place a strain on the health care system. But it is less frequently noted that the AIDS epidemic also is calling into question the fairness and adequacy of other social institutions. The extreme distress of AIDS sufferers has cast a harsh light on conditions and practices in society that cry out for reform, particularly those concerning access to health care and protection from discrimination.

One of the most glaring failures we must face today is our inequitable method of paying for disability and health care. We do not recognize health care as a right. Most Americans arrange for coverage through their employers, but this system leaves large gaps. When I was the Massachusetts insurance commissioner, I would sometimes receive anguished calls for help in obtaining health insurance coverage. Usually the callers had a pre-existing health condition and were turning to the insurance department as a last recourse. It was often my unhappy duty to inform them that private insurance companies were justified under existing law in denying coverage and that the only way to have their bills paid would be to qualify for public medical assistance by spending down to penury. These problems have been greatly magnified by the onslaught of patients with AIDS and AIDS-related complex. Many of the afflicted are too debilitated to work; they may never have had

The insurance industry has taken steps to avoid selling health insurance to anyone at risk of AIDS.

health care coverage, but they all need care. Will we force a huge new cohort of sick young people to try to obtain health care in a system that does not even acknowledge the right to such care except for the destitute?

Many AIDS patients who are now too ill to work have found the government's disability and health programs to be a cruel delusion. The federal government will supplement an individual's disability payments only up to a maximum $472 per month, a bare subsistence level. Moreover, unless a member of the Social Security system is poor enough to qualify for Medicaid, he or she must wait two years after becoming disabled before qualifying for Medicare. Because of the length of the waiting period, many AIDS sufferers die before qualifying for their medical benefits. Nor will commercial disability insurance offer most AIDS patients a substitute or supplement. The insurance industry, with the permission of state governments (now, unhappily, including Massachusetts), has taken steps to avoid selling such insurance to anyone at risk of AIDS and is increasing its use of blood tests to detect the presence of antibodies to the AIDS virus.

The contrast between the war on drugs and the measures taken to combat AIDS is instructive. In their pronouncements on the war against drugs, state and national leaders have suffered from none of the reticence that has characterized their approach to AIDS. Perhaps it is easier to speak out when the message is one of punishment rather than compassion, of prison rather than assistance. One part of the antidrug program that would be of immediate benefit to those at high risk of AIDS, the methadone maintenance programs, is chronically short of capacity. It appears to be politically more palatable to add new prison beds than to open new clinics.

If AIDS has called attention to the lack of ready access to adequate disability support and to health care services, it has in even starker terms underscored the gaps in our safeguards against discrimination. An individual's right to privacy regarding health care records is well accepted in public health practice. The public health community, to its credit, has generally maintained such privacy in the face of the panic aroused by AIDS. The insurance industry, however, has followed the opposite course. Since the early

What other medical tests are in store for us?

One of the goals of life and health insurers is to determine before the onset of a disease which persons are at increased risk of health impairment. Just as the insurance industry emphasizes that the AIDS-antibody blood test is a useful underwriting tool in predicting risks, regardless of the health of the applicant when the policy is written, so will genetic screening be useful to the industry. And as in the case of the HIV antibody tests, the insurance industry will be eager to use such information, even if it is less than completely accurate. Already, the presence of Huntington's chorea, sickle cell, and Tay-Sacks traits could be used by the industry for underwriting purposes.

As progress is made in identifying the genetic component of additional diseases and disorders, the insurance industry can be expected to require access to such information from their applicants, and whole new groups of Americans will be denied health and life insurance altogether—as are those who test AIDS-antibody positive—or will find themselves subject to premium surcharges. If insurers were permitted to do so, their life and health products would become available to an increasingly restricted group of low-risk applicants.

Carried to its extreme, this identification of higher risks would defeat the purpose of insurance by excluding from the insurance market those who would most benefit from coverage. State legislatures have demonstrated, however, that they are willing to protect favored groups from such exclusion. Over the objections of the industry, for example, a number of states have forbidden discrimination by insurers because of confirmed or suspected exposure to the drug DES. The children of women who had been prescribed DES in the 1950s for the purpose of preventing miscarriages have been found to be at increased risk of cancer and other reproductive disorders. Insurers would like to be able to question applicants about the use of DES by their mothers. —*P.H.*

ears of the century, life and health insurers have exchanged information through a central organization; by the early 1980s, when AIDS was first recognized as a threat, the insurance industry had developed a central data bank, the Medical Information Bureau (MIB), an unregulated private organization located near Boston in whose computers are recorded the health records of millions of Americans. The details of the health of each insurance applicant are entered according to the appropriate code, among hundreds of different codes, and this information is made readily available to the six hundred member companies at more than one thousand locations in this country and Canada. Until the Massachusetts insurance regulators questioned its need to do so, the MIB had four separate codes for AIDS-related conditions, including one reserved for generalized symptoms and one for unexplained weight loss or persistent fever. In response to the concerns of the regulators that the reports of positive AIDS antibody test results might be made public, the MIB now codes all such reports as part of a larger group of miscellaneous blood disorders. It is not clear, however, that this change will protect from discrimination those with positive antibody test results. It may be that they and all other members of the miscellaneous-blood-disorders reporting group will be suspected of carrying the AIDS virus.

At a recent hearing held by the New York Insurance Department, the president of a major life insurance company, after lauding the industry's maintenance of strict rules of confidentiality for more than sixty years, added that the industry "deals routinely with highly sensitive medical information, including such problems as chemical dependency, alchoholism, syphilis, and diagnosis of cancer, even when the diagnosis has not been revealed to the patient by the physician." Do applicants for insurance know that the industry routinely reports to its central data bank sensitive health conditions such as these, even if the applicant is not aware of them?

If we are truly believers in the brotherhood of man, we must be willing to embrace those whose needs and even existence we have until now barely acknowledged.

We do not yet know how far AIDS will spread beyond the groups now at highest risk. But even if only a sizable minority of Americans were subject to this deadly affliction, that would be no excuse for inaction. If we are truly believers in the brotherhood of man, we must be willing to embrace those whose needs and even existence we have until now barely acknowledged.

Georges Clemenceau's famous remark that war is too important to be left to the military is equally true of AIDS and our system of public health. We cannot rely exclusively on traditional public health measures—vital though they are—either to turn the tide of the epidemic or to redress the unnecessary pain suffered by those afflicted with or at risk of AIDS. Nor can we stand by and wait for a medical cure. The challenges are large. To make public information and education about AIDS effective among those who have been rejected and ignored, we must make a new commitment to the needs of our fellow citizens. And to ensure that those afflicted with AIDS or at risk of the disease are not denied access to health care or subjected to discrimination, we must be willing to reform our existing social systems. ▽

Peter Hiam '55, LL.B. '61, resigned as the Massachusetts commissioner of insurance in July 1987 in disagreement with Governor Dukakis's decision to reverse Hiam's ban on AIDS antibody testing by insurance companies in Massachusetts. Hiam is a member of the Harvard University AIDS Study Group, which has a grant from the Helena Rubinstein Foundation to inquire into a wide variety of AIDS-related issues.

COMMON CAUSE/HAWAII

1109 Bethel St., Ste. 419 • Honolulu, HI 96813 • 533-6996/538-7244

TESTIMONY OF COMMON CAUSE
presented to the
Senate Government Operations Committee
The Honorable Russell Blair, Chairman
The Honorable Patsy K. Young, Vice Chair
on HB 2002, H.D. 1 RELATING TO PUBLIC RECORDS

My name is Jay Scharf and I am Interim State Chair for Common Cause/Hawaii. Thank you for this opportunity to testify.

The overall purpose of HB 2002 is to make government records MORE accessible to the public. The House Judiciary Standing Committee report Number 342-88 on H. D. 1 talks about the problem of too much emphasis on personal privacy interests :) 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."

It clearly says "the overall purpose of this bill (is) making government records more accessible to the public." Despite great efforts of the House Judiciary Committee, and despite some excellent improvements in the present draft, it seems this bill fails to meet that purpose. This bill could result in a NET loss to the public. Overall, government records could be LESS accessible, NOT more.

Although we are impressed with certain aspects of the draft (such as the definition of "government record" on page 4, and the section which would allow the public disclosure of the salaries of public employees who are NOT part of the civil service system on page 14 and 15) AND we truly appreciate the hard and fine work already made, Common Cause has no choice but to oppose this bill.

HB 2002
Ag. 3/16/88

Some of the problems we have start with the definition of "agency" on page 3, which would exclude the legislature and the courts. The present public records law does apply to the legislature, and this would be a major net loss of public information.

On page 10 relating to inter and intra-agency records, this draft would result in closing off access to records which are currently open to the public. Again, this would be a major NET loss of public information.

In regards to the thirteen specific categories of records which would be required to be opened to the public, on pages 5 & 6, ALL but one are already clearly open under current law. This entire section is neutral, and would not be a net loss or gain of public information.

The same is true for the listing of information presumed to be private and confidentail. The impact would be neutral.

In our previous testimony on the original draft, we asked that when amendments are made to this bill they be done with "the knowledge that this is perhaps one chapter of the Hawaii Revised Statutes that a regular citizen will consult to seek guidance, and to determine his rights. Therefore, it needs to be written as clearly and concisely as possible." Overall, we feel the present draft is, instead, too unwieldy and has the potential for causing confusion rather than clarification.

Why not start with the presumption that all government records are open and then simply spell out the exceptions?

Thank you.

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

HAWAII PACIFIC DIVISION

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LEGISLATIVE PROGRAM CHA

HB 2002

Senator Blair and Committee Members:

Thank you for this opportunity to testify on H.B. 2002. I am Martha Black, Division Legislative Chair for the American Association of University Women. AAUW urges this committee to not pass this bill in its original form because it provides for less rather than more openess in governemnt. Hawaii needs a simplified bill which addresses more directly the fundamental requirements of open government and provides clearly defined measures to address infractions.

Therefore, AAUW recoommends that Hawaii's privacy laws follow the Federal Freedom of Information Act. This act provides guidance to maintain a reasonable balance between personal privacy and what the public is entitled to know.

First, there is need to make it clear that in the interest of open government, all records held by state and county governments must be accessible to the public except for specific legal exceptions which should be clearly spelled out in language easily understood by both the public and bureaucracies.

Second, There is need for mechanisms to provide for appeal and dispute resolution as well as a means of obtaining correct information from the attorney general's office or other designated authority.

Third, AAUW recognizes that the privacy of an individual is directly affected by the collection, maintenance, use and dissemination of personal information by state and city-county agencies and therefore the legislature should regulate these activities. However, regulation should not deprive the public of its right of access to information about the background and actions of individuals or government agencies who are accountable to the public because they are doing the public's business. It must be recognized that those who choose to act in the public arena must bear public scrutiny.

Fourth, no governmental body, including the legislature should be exempt from this act.

Fifth the public should have access to any relevant information which thanks to tax supported modern technology, all levels of government collect and maintain. Rather than institutionalizing secrecy by passing restrictive legislation, the state needs to reinforce sunshine law and open government, and depend on legal and constitutional means to protect against infringement of privacy rights by individuals, organizations and government.

Martha Black, Division Legislative Chair

HB 2002

ERICAN ASSOCIATION OF UNIVERSITY WOMEN

HAWAII PACIFIC DIVISION

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LEGISLATIVE PROGRAM CHAIR

Government Operations Committee
Senator Blair and Committee Members:

I am Martha Black, Division Legislative Chair for the American Association of University Women. Thank you for your continuing efforts to provide Hawaii with a clearly stated, simple privacy law which makes all public records as open as possible.

H.B. 2002, H.D. 1 (Proposed S.D. 1 is certainly less complex, less lengthy and more direct than previous versions. We appreciate this, especially Paragraph 92-50 which has new language which states that liberally granting access to government records shall be the policy of this State.

AAUW State Division with seven branches on the islands insists that the basic assumption of any privacy law must be a clear statement that all government records must be presumed to be open to the public with certain specific legitimate exemptions of which privacy is one. Specific legal and investigatory exceptions which might harm the government in its efforts to prosecute crime should be clearly spelled out in language easily understood by both the public and bureaucracies. Various comments follow.

The collection and distribution of electronic data is an area that requires attention.

The provision at the end of paragraph 92-55, "In addition, the court shall require the agency to pay reasonable attorney's fees and costs of a prevailing plaintiff." provides support to the individual who in good conscience, at personal cost, finds it neccessary to make the effort to maintain openness of records.

AAUW strongly affirms that no governmental body, including the legislature should be exempt from this act.

The above statements reflect the AAUW legislative position adopted at their 1987 state convention on Maui.

Thank You,

Martha Black, Division Legislative Chair
American Association of University Women, Hawaii Pacific Div.
March 23, 1988

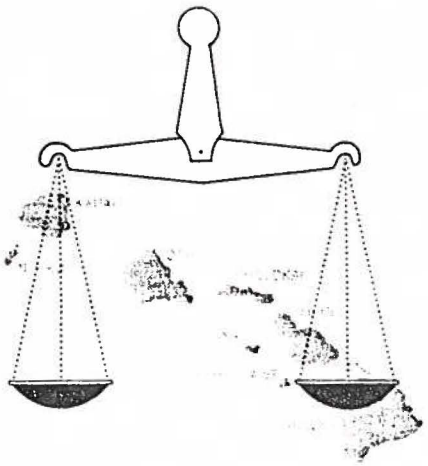
1:30 p.m.
Conference Room 6

The Judiciary
State of Hawaii

Wednesday, March 16, 1988

House Bill No. 2002, H.D. 1

Relating to Public Records



Committee Submitted to:

Senate Committee on Government Operations

Honorable Russell Blair, Chairman

Testimony
to the
Fourteenth Session
State Legislature
1988

Judiciary Representative:

Betty M. Vitousek

Senior Judge

HB 2002

0180L

BETTY M. VITOUSEK
Senior Judge

KENNETH K.M. LING
Director

STATE OF HAWAII
FAMILY COURT
FIRST CIRCUIT
P. O. BOX 3498
HONOLULU, HAWAII 96811-3498

March 15, 1988

The Hon. Russell Blair, Chairman
Senate Committee on Government Operations
The Fourteenth State Legislature
The State Capitol
Honolulu, Hawaii 96813

Dear Senator Blair:

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

The Family Court of the First Circuit takes no position on the merits of H.B. No. 2002, H.D.1, which relates to public records and which further provides, in Section 10, procedures to assist an adopted child with obtaining medical information from his/her natural parents.

However, the Court has the following two concerns with the language in Section 10 (pp.43-44). First, given that these procedures do not involve the Family Courts, we suggest that this language would be placed more properly in another chapter because HRS Chapter 578 relates to adoption proceedings within the Family Court.

Second, the bill requires that the completed information form become a part of the sealed records of the adoption proceedings (page 44, lines 12-13). We request that this language be amended to clarify that the form be made a part of the adoption records within the possession of the Department of Health, as provided in HRS Section 338-20. Currently, the Court's adoption records are kept for several years and then microfilmed. After the records are microfilmed, the original documents are destroyed; therefore, it may be impossible to include the form with the court records. We recommend the following amendments.

1. H.B. No. 2002, page 44, lines 12-13: "... The information form shall become part of the sealed records of the [adoption proceedings] Department of Health."

2. HRS Section 338-20(e): "Such sealed documents, except for the information form provided for in Section _____, may be opened by the department only by an order of a court of record ..."

Respectfully submitted,

Betty M. Vitousek

Betty M. Vitousek, Senior Judge
Family Court, First Circuit

0234L(8)

March 30, 1988

The Hon. Russell Blair, Chairman
Senate Committee on Government Operations
The Fourteenth State Legislature
The State Capitol
Honolulu, Hawaii 96813

Dear Senator Blair:

RE: Proposed S.D.1 to HB.No. 2002, H.D.1
Public Records

At Wednesday's hearing on the above-mentioned bill before the Senate Committee on Government Operations, you requested of the Family Court of the First Circuit, a more detailed response regarding the possible ramifications of this bill on the Family Court records. As this bill may possibly require the closure of records which are currently "open" as well as the "opening" of records which are currently "closed," we are providing you with information on both the open and closed court records.

A. Definition of "records":

First, we include the following materials in our definition of Family Court "records":

A. Attached to the court file:
1) the legal file (all motions, orders, etc.- documents which are file-stamped by the Circuit Court's Documents Receiving Clerks and indexed);
2) clerks' minutes of the hearings;
3) exhibits which are entered into evidence;
4) judges' notes;
5) unfiled correspondence or memos;

B. Not attached to the court file:
1) social records - e.g., psychiatric evaluations, FC-D social studies, FC-G guardians' annual reports, etc.;
2) court's administrative materials - e.g., calendars of hearings, court clerks' stenographic pads, audio cassette tapes of hearings or court reporters' tapes, etc.

B. Statutory and rule authorities:

The following are the citations for the statutory and rule authority re confidentiality of Family Court records:

1. Hawaii Family Court Rules - Rule 79
2. HRS Section 333E-6 (records re developmentally disabled)
3. HRS Section 334-5: (mental health records)
4. HRS Section 571-84 (records involving juveniles)
5. HRS Section 578-15 (adoption records)
6. HRS Section 587-41 (child abuse and neglect case records)

These statutes also relate to our records: 1) HRS Section 846-1 (Hawaii Criminal Justice Data Center); 2) HRS Section 846-12 (juvenile records); and 3) Act 380-87 (HRS Chapter 846: establishment of a computerized fingerprint identification system).

C. Open records:

The following Family Court files are presently open to the public: matrimonial actions, criminal misdemeanors and felonies, Uniform Child Custody Jurisdiction Act matters (HRS Chapter 583), the Uniform Reciprocal Enforcement of Support Act cases (HRS Chapter 576), habeas corpus, establishment of foreign decree, domestic abuse cases (HRS Chapter 586), custody actions, support actions, and declaratory judgments.

D. Potential ramifications of bill:

1. This bill does not presently contain an exception which would permit the Family Court the discretion to determine administratively that certain documents or court files should be confidential. Therefore, this bill may require the Court to obtain statutory authority to restrict access to certain documents or court files which are not currently protected by existing statute or rule authority.

It is the existing policy of the Family Court, First Circuit to make confidential, absent specific statutory authority, selected court files which contain sensitive financial information or information relating to an already confidential matter (e.g., adoption, paternity, etc.) and/or the custody of a child. Also, the law does not provide

presently for the confidentiality of records relating to the guardianship of the person of an incapacitated adult [HRS Section 560:5-301 et seq.] proceedings. By its very nature, these files contain very personal information (reports from doctors and other sources) relating to the incapacity of the adult subject. Therefore, the Court has determined that access to these records should be restricted.

In many cases, the following documents should also be made confidential: medical, psychological and psychiatric reports, custody investigations, school transcripts, annual reports submitted by the guardian (HRS Section 560:5-308A), social and clinical reports, and sensitive financial information. Whenever necessary, the Court will order that psychiatric, medical, psychological evaluations, custody investigations or other reports be separated from the case record and stored in a confidential file.

2. If the bill mandates that information infringing upon a person's privacy interests must be protected, the Family Court may be required to make confidential entire court files or selected documents.

For example, a determination to "close" all documents or court files which include any type of financial disclosure would have a tremendous impact on all divorce case files and records relating to child support orders (pursuant to statute and administrative policy, completed child support guidelines worksheets are required from both parties).

Further, unlike HRS Section 709-906 (Abuse of Family and Household Members), its counterpart in the penal code, HRS Chapter 586 (Domestic Abuse) requires that the initiating petition include a statement by petitioner detailing the specific facts and circumstances of the physical abuse. These unverified statements frequently contain allegations of sexual and child abuse.

E. Ancillary impact on staff:

Most of the Family Court records are stored in the repository of the Chief Clerk of the First Circuit Court. Accordingly, the Chief Clerk's staff handles most photocopy requests. A photocopying machine is available to the public.

Requests for information from the Family Court's confidential files or copies of confidential documents are directed to the Family Court's Court Management Services Branch. The following charges apply: $2.00 for the search; $1.00 for the first page; $.50 for each additional page and $1.00 for certification.

According to present procedures, anyone requesting access to a confidential file must complete a written request form, which requires the person requesting the information to be identified as a party, attorney for a party to the case, or other, and to specify the need for such access. Parties and their respective attorneys are afforded virtually unrestricted access to the court files; however, there may be restrictions placed on duplication of certain documents. Requests for access from other interested persons, such as creditors, title searchers, representatives from agencies, such as the Social Security Administration, are screened by the hearings judge (if the case is presently assigned to a particular judge) or by the Senior Judge.

Therefore, any designation as confidential of additional case records will result in an increased burden on the judges and court staff. This workload will include the initial screening and processing of requests for access. Additional time will also be needed to search for and retrieve the case records (identify case number and track present location of case file), photocopy the document(s) (if authorized), and to collect monies from person making the request (in certain cases, parties are "reluctant" to pay for additional copies). The Court also anticipates that there will be an attendant rise in requests for copies from these records (e.g., there are currently 45-50 domestic abuse cases each week and at least two parties in each case).

A further concern relates to a possible mandate that only selected documents will be segregated. Such a decision would require Court staff to retrieve the particular document each time the court file was needed for a court hearing, review by the Judge or court staff (pursuant to submission of a document which needed to screened, correspondence, etc.) or review by a party or legal counsel, and to accordingly return the loose document to the proper filing cabinet or box.

For example, if a document in a domestic abuse court file were made confidential, the document would be removed from the court file and stored in a filing cabinet. Designated staff

would be responsible for retrieving the document whenever the case came on for hearing (at least twice, not including review hearings) or whenever any inquiry relating to the document was received by the Court. If one considers that this procedure would be followed for each document and that several documents from many court files may be required to be segregated, there is potential for a chaotic situation, if only certain documents are made confidential. Given the frequency of hearings in each Family Court case, and the fact that different staff members handle the court file (judge, court clerk, social worker, & filing and docketing clerks), any mandate for segregation of documents would have serious repercussions on the Family Court's operations.

We appreciated the opportunity to clarify our testimony and to comment on this bill.

Sincerely yours,

Janice Wolf

Janice Wolf, Administrative Director
of the Courts

League of Women Voters

49 SOUTH HOTEL STREET, SUITE 314 HONOLULU, HAWAII 96813

MARCH 23, 1988 Rhoda Miller

TESTIMONY ON HB2002 HD1 PROPOSED SENATE DRAFT 1

The challenge to the Legislature to implement citizens' right to privacy as mandated by the state Constitution (Art I Sec 6) is a formidable one. Unfortunately, League of Women Voters finds this proposed legislation inadequate to the task. As a substitute for the 47-page HB2002, it contains many deficiencies and omissions. For example:

1. 92-50: To this declaration of intent should be added the important words: "All government records are open to public inspection unless access is restricted or closed by law." There would then be no doubt whatsoever about the intent of the law.

2. 92-51: The League is pleased that the Legislature and Judiciary are not omitted from coverage by this legislation.

The definition of public record does not include electronic records, by far the most comprehensive information gathering device today.

A large potential for abuse is opened up by permitting fees with no guidelines. Although the committee report says such fees may be waived, there is no such proviso in the legislation.

3. 92-53: The wording "unwarranted invasion of personal privacy" is too broad, as are the examples given in the committee report. Even the 1976 AG's report on guidelines on the meaning of public records was not so restrictive, citing only certain lists and confidential relationships.

4. 92-54: This gives broad rule-making authority to each department, making for confusion for the public. Rules should be fairly uniform, especially those regarding the appeal procedure.

5. 92-55: Access to circuit court of the ciruit where public record is found is convenient for neighbor islanders.

The League is glad to see the omission of a proposed office of uniform practices, which we feel is an unnecessary layer of bureaucracy, but laments the omission of clear guidelines for the gathering and maintenance of records. The type of information government may gather should be clearly spelled out. In fact, the disparity between the two bills is so great that we would recommend that, rather than push through a hasty compromise, the legislature should wait until next session to effect a good, workable public records law.