TESTIMONY BEFORE THE SENATE COMMITTEE
ON GOVERNMENT OPERATIONS

Wednesday, March 23, 1988, 1:30 p.m.

Kathryn S. Matayoshi, Corporate Attorney
Hawaiian Electric Company, Inc.

CHAIRMAN BLAIR AND MEMBERS OF THE GOVERNMENT OPERATIONS COMMITTEE:

I am Kathryn Matayoshi, representing Hawaiian Electric Company, and I am happy to have this opportunity to testify before your committee regarding House Bill No. 2002.

In general, we believe that the revised draft of this bill responds to the Legislature's and the public's concerns regarding expansion and clarification of the current statute on public access to public records. However, HECO has the following specific concerns and suggestions regarding the revised draft of House Bill 2002.

We suggest that section 92-53(4) specifically include confidentiality or protective orders issued by an agency, along with state and federal court orders. The foregoing proposal would clarify that information submitted under such agency orders would be protected from disclosure, and is clearly within the intent of the legislation.

In addition, we suggest that section 92-54, providing for agencies to promulgate rules and regulations governing disclosure, include procedures whereby a party who submits information to an agency may object to disclosure of the information. Specific procedures and rules could be left to the agencies to develop; however, we believe that legislative direction in this regard would be helpful.

TESTIMONY OF HONOLULU BRANCH,
AMERICAN ASSOCIATION OF UNIVERSITY WOMEN
REGARDING H.B. 2002, H.D. 1 and S. D. 1
RELATING TO PUBLIC RECORDS AND PRIVACY

ONE-YEAR ADDITIONAL STUDY IS URGED TO RESOLVE FUNDAMENTAL FLAWS IN BOTH DRAFTS

I. FUNDAMENTAL FLAWS OF SUBSTANCE: QUESTIONS UNANSWERED AND QUESTIONS UNASKED.

A. Questions Unanswered

1. Both drafts are based on mainland models that are insensitive to Hawaii's unique geography, demography and history; a creative local synthesis addressing local conditions is warranted. Why isn't that worth an extra year's time?

2. Both drafts are rooted in the past. They fail to review today's revolutionary changes in:

   a. global, national and state economies toward information-based societies in which more than ever before, information is power and secrecy concentrates power in the hands of the privileged at the expense of the weak;

   b. communications technologies that permit numerous invisible ways to spy on Hawaii's citizens.

   Why aren't these trends factored into a bill that was supposed to be comprehensive?

3. Both drafts need simplification in key ways so that they can be comprehended by the public they are supposedly serving. For example:

   a. In the Senate draft, the citizen must prove that he has a right to a record held by the government; the presumption is that records held by the government are secret--unless several criteria are met. This requirement is a big one to prove, as we'll see in a moment, and it works to the disadvantage of Hawaii's most disadvantaged citizens.

Our Branch's No. 1 hope is that the burden of proof is shifted from the citizen to the government; then the onus is upon the government to justify secrecy rather than the citizen to obtain access.

b. Thus, instead of the current presumption that their records are secret, state and city agency officials should be mandated to presume that their records are open--with certain clearcut exceptions. One such exception certainly is some records of private citizens.

c. This simple presumption of openness--which is the approach used in the federal Freedom of Information Act--is essential in Hawaii when one reads the following snippet from a tortured, 22-page memorandum written on May 6, 1976, by then Attorney General Ronald Amemiya to Governor Ariyoshi:

Thus, what is considered a "public record" is "any written or printed report, book or paper, map or plan of the State or of a county and their respective subdivisions and boards." This would seem to encompass every record that is in the possession of any State or county agency, however, there are certain qualifications to this definition of "public record". These qualifications are as follows:

1) The record must be the property of the State or of the county; and

2) An entry has been made or is required to be made in or on the record by a public officer or employee; or

3) The record has been received or is required to be received for filing by a public officer or employee.

In regard to qualification (2) above, relating to a record in or on which an entry has been or is required to be made, a record is considered a "public record" within the meaning of § 92-50, HRS, only if (a) an entry has been made in or on it pursuant to a legal requirement, or (b) it is a record in or on which an entry is required to be made by law even though such entry may not in fact have been made as required. This "legal requirement" test has been established by various Massachusetts cases dealing with a definition of "public record" which is almost identical to the definition found in § 92-50, HRS.[1/]

The dropping of the words "by law" from the Senate draft seems to raise more questions than it seeks to answer. How would the requirement be made--if not by law?

d. Thus, the narrow definition of public record in the Senate draft reserves for agencies most government records--even if electronic and other modern types of data are included, as we're sure this Committee will do.

Permitting officials to reserve so much material for themselves invites the risk of secret governmental recordkeeping and violation of citizen's constitutional rights.

e. The House draft specifies all government records are open--but its exceptions clause and the placement of the provision is also so confusing that study by independent legal experts is warranted.

B. Questions Unasked

1. Although government attorneys have written much about privacy and public records, one question remains unasked: "What is the state doing to ensure that citizen's constitutional rights to privacy are being protected?"

The state Constitution sets an unusually high standard, as noted in the following excerpt from the Harvard Law Review, February 1988, page 821:

> State constitutions may also protect the right of privacy. At least ten states have recognized that their constitutions protect such a right.[115] In five of these states, the constitutional privacy provisions offer protection similar to that provided by the federal Constitution and thus may guard against only governmental intrusions.[116] The constitutional provisions of the other five states appear to be broader, providing protection from private as well as public invasions of privacy.[117] The latter five states may thus provide private employees and job applicants with a direct cause of action against employers who use polygraph exams. In any case, the constitutions of all ten states can serve as the source of a public policy against invasions of privacy even if they do not provide a direct cause of action against private employers.[118]

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[114] *Id.* at 599 (footnote omitted).

[115] *See* McGovern, *Employee Drug-Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 STAN. L. REV. 1453, 1466 (1987) (listing states).

[116] *See id.* The states are Arizona, Florida, Louisiana, South Carolina, and Washington.

[117] *See id.* The states are Alaska, California, Hawaii, Illinois, and Montana.

[118] *Cf. id.* at 1467 (arguing that employees subject to drug testing may bring wrongful discharge claims grounded in, among other sources, the state constitutional right to privacy).

What explicitly and affirmatively has the state done to monitor the activities of third parties in a position

to violate the citizen's rights to privacy?

2. More specifically, what is being done in the Hilo Hospital case to investigate the possible violations of patients' constitutional rights when the private firm of Hospital Business Management, Inc. was contracted by the state?

   The Legislative Auditor indicated that "other hospitals admit that HBM has free access not only to the patients, but also to the patient's charts, any other patients' charts, any doctors, relatives, etc. The HBM personnel can roam some hospitals at will, and do."

   How citizen's privacy is violated by secrecy--rather than by public disclosure--is exemplified by this case in which a secret non-bid contract with a secrecy clause was approved by the Department of the Attorney General.

   "We find it surprising," the Legislative Auditor said, "that the AG would approve a contract which contained such an unusual provision as secrecy--secrecy even from those hospital personnel whose assistance would be required to implement the contract." (page 112, January 1988 Report No. 88-8.)

II. CONSIDERATIONS OF SEQUENCING

1. Neither draft, if enacted, would go into effect until July 1, 1989.

2. The House draft already recognizes the need for additional factfinding--but this need can be filled in simpler ways.

3. Even more extensive questions need to be asked and answers received about the kinds of records held by government agencies.

4. Numerous information-related measures are still being considered during this Legislature; passing this bill without knowing their fate will again provide a piecemeal approach to what was to be a comprehensive information policy.

   Moreover, many of these bills call for studies that will be due in early 1989--for the next legislature. Information in these studies--especially those related to the state data bank--would lead to an improved version of H.B. 2002 next session.

5. Arguments underscoring the urgency to pass a draft this year are well-grounded because:

   a. The Governor has satisfactorily demonstrated his commitment to resolving this issue

   b. The Governor's support significantly contrasts with the hostility of two Presidents--of both political parties--who vetoed the 1966 federal Freedom of Information Act and its 1974 Amendments--but both vetoes were overriden by Congress.

   c. Interest in this issue by the community will persist.

6. Building a consensus on this issue and providing additional education would be a benefit.

7. For the reasons cited above, we urge this committee to hold this bill until next session so that an over-arching package of information-related measures can be sensitively crafted to meet Hawaii's unique conditions.

APPENDIX TO TESTIMONY OF HONOLULU BRANCH,
AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

BACKGROUND:

THE FIRST YEAR
OF THE
GOVERNOR'S OPEN-GOVERNMENT INITIATIVE

This legislative hearing ends a unique year-long dialogue between Hawaii's government leaders and the citizens they govern. Initiated by the Governor in February 1987, the Committee he appointed traveled to all the Islands to solicit opinions ranging from influential state and county officials to citizens from all walks of life. One unique feature of this dialogue -- its ad hoc, unstructured and informal nature -- enabled it to invite and to receive comments from an exceptionally wide array of citizens.

Thus, the Governor's Committee became in effect a mobile, laid-back substitute for the Constitutional Convention that had been mandated for 1988, but then was officially canceled. Perhaps fittingly the dialogue solicited by the Governor's Committee involved the idealistic decisions that were made by the 1978 Constitutional Convention--in which the Governor played a key role. But the fruits of those decisions are still absent from the daily lives of many of Hawaii's citizens, particularly those of Hawaiian ancestry.

The Governor's initiative was followed by this rapid-fire chain reaction:

1. On Dec. 3, 1987 the Hawaii Supreme Court held that a public record could not be withheld from public disclosure simply because a person's name was included. Instead only "highly personal and intimate" information about a person would justify nondisclosure of a record that otherwise would be considered public. (Painting Industry of Hawaii Market Recovery Fund v. Alm, 69 Haw. Advance Sheet No. 12094.)

2. On Dec. 7 the House Judiciary Committee held an interim hearing at the State Capitol.

3. In late December the Governor's Committee, headed by Robert Alm, issued a significant four-volume Report of the Governor's Committee on Public Records and Privacy.

   Despite this voluminous work, however, the Committee--which included state Attorney General Warren Price--declined to include the 22-page memorandum that Common Cause/Hawaii discusses here today. That memorandum, written by an earlier attorney general to then Gov.

George Ariyoshi, shows the tortured process that attorney general used to minimize release to the public of records held by the government.

4. On Feb. 9, 10, 11, the House Judiciary Committee held three consecutive hearings on H.B. 2002 and passed H.D. 1.

5. On March 16 --national Freedom of Information Day-- this Senate Committee received testimony on H.D. 1.

6. From March 15-18 four Freedom of Information Forums were held at the University of Hawaii by the student chapter of the Society of Professional Journalists.

   These four forums re-assembled some key persons from the public, government agencies and the Governor's Committee, re-examined past problems and began an assessment of future courses of action. Some of the main judgments on which this testimony is based resulted from these student-sponsored forums.

Against the backdrop of separate, but intertwined events we come today to discuss this Senate draft. We are among those groups whose interest in public-records issues has persisted for many years. This community interest has emanated from:

--the media, which see a need for public records as a key way to check government accountability and

--public-service groups who want to ensure that the government is held accountable to such mandates as defending the liberties of the weak.

Beverly Ann Deepe Keever
AAUW, HONOLULU BRANCH

Beverly Ann Deepe Keever
Open-Government Chair

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March 23, 1988

The Honorable Russell Blair,
Chairman, and Members
Committee on Government Operations
State Capitol
Honolulu, Hawaii 96813

Dear Chairperson Blair and Members:

GTE Hawaiian Telephone Company Incorporated supports the intent of S.D. 1 of H.B. 2002, H.D. 1.

With respect to the Committee Report on H.B. 2002 H.D. 1 (proposed S.D. 1), we would like to insure that the examples set forth in subsection (b), Confidentiality required by governmental need, which describe when records need not be disclosed, fully and clearly articulate the intent of the legislature. Specifically, we are concerned with the scope of example (7) which states, "[t]rade secrets or confidential commercial and financial information obtained, upon request from a person" need not be disclosed to the extent that disclosure would frustrate a legitimate government function. This phrase "upon request" raises numerous issues as to the scope of the word "request." Does "request" include or exclude situations where a person is lawfully ordered by a commission or judicial body to disclose trade secrets or confidential information or does so voluntarily or as a result of mutual agreement with a governmental agency. Should a narrow interpretation be assumed based arguably on what appears to be the statute's legislative intent, the example may serve to frustrate instead of aid a legitimate government function.

Therefore, we respectfully recommend that example (7) be modified to state, "[t]rade secrets or confidential commercial and financial information" need not be disclosed to the extent that such disclosure would frustrate a legitimate government function.

Thank you for your favorable consideration of our comments on H.B. 2002, H.D. 1.

Very truly yours,

DAVIS D. HIGA
Corporate Counsel

0174D

Y. Lind

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Testimony on H.B. 2002, H.D. 1, Proposed S.D. 1, "Relating to Public Records"

Senate Committee on Government Operations
Russell Blair, Chairman. March 23, 1988.

Thank you for this opportunity to testify on the proposed Senate draft of H.B. 2002, H.D. 1, which limits the bill to the provisions regarding public access to government records. I am generally in favor of the approach taken in the proposed draft. It appears to be consistent with the substance of parallel provisions of H.D. 1. However, there are certain points in the proposed Senate draft which need clarification and a few amendments which I would like to suggest.

1. Law enforcement records. There are two provisions in the proposed committee report relating to law enforcement records. Subparagraph (2) in the listing of information in which an individual would have a significant privacy interest relates to "Information compiled and identifiable as part of investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation." Subparagraph (1) in the list of information to be exempt because of governmental need refers to "Records or information compiled for law enforcement purposes."

These are potentially very broad exemptions and could be construed as a general exemption for all police records. This would be extremely dangerous would allow secret arrests, "cover-ups" of crimes committed, and a police administration that would not be accountable to the public. I would strongly oppose such an exemption and would suggest that this exemption be limited to investigative records under limited conditions as specified on page 9 of H.D. 1.

2. Section 4(b)(1) of the proposed committee is titled "Confidentiality required by governmental need." This conflicts with the body of the section which does not require confidentiality but rather defines records "which need not be disclosed...." Accordingly, I would suggest that the section be retitled "Information not subject to duty of disclosure because of governmental need."

3. The definition of public record should be amended as follows:

a) to include all government records regardless of their physical form, including information maintained on computer disks or tape, videotape, etc.

b) to adopt the "clearly unwarranted invasion of individual privacy" standard which is contained in H.D. 1. Adoption of this uniform standard, which is also used in federal law, would assist in interpretation of the statute. Further, I would strongly support inclusion of the balancing test which appears in both the Uniform Fair Information Practices Code and in H.D. 1, ie, "Disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual."

4. Fees. I would suggest that the statute explicitly follow the federal FOIA and authorize waiver of fees when the request is in the public interest. The Senate should adopt paragraph 8 on page 7 of House Standing Committee Report 342-88 on H.B. 2002 which clearly states that fees "shall not be a vehicle to prohibit access to public records."

5. Delete paragraph 92-53(1) in the proposed Senate draft which would not require disclosure of "personal records, as defined in section 92E-1 which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." This would be redundant insofar as the definition of public record already excludes any records which would constitute an invasion of privacy.

6. Paragraph 92-53(2) appears to describe an attorney's work product. If this is the intent it should perhaps be clearly stated in the committee report. This is important because testimony received by the Governor's Committee on Public Records and Privacy indicated that certain records were being denied to the public after being mingled with the work product of government attorneys.

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March 23, 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 reviewing the proposed draft, I would like to say that it appears like too much discretion is being given the various departments in administering this proposed law.

Having been thru that process and stymied by it, the least I would suggest is that you include directions in the committee report by listing those records that are specifically public records; without direction or standards, it will not be clear what is intended by this bill.

Another point is that the records, if public and available on "tape", should be made available for purchase at a reasonable fee. That's the "entire file", not just a single record.

Mahalo for your consideration of our comments.

Respectfully submitted,

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

Hawaii Professional Chapter
The Society of Professional Journalists, Sigma Delta Chi
News Building, 605 Kapiolani Blvd., Honolulu, Hawaii 96813

March 23, 1988

The Honorable Russell Blair
Senate Government Operations Committee

Testimony on Proposed Draft of H.B. 2002

Mr. Chairman and Committee Members:

Unfortunately, wecannot attend your hearing.

We thank you for your trouble in trying to deal with this complex issue. But because of numerous question marks on both the draft and the bill, we believe action should be held up for a year pending further study.

We are unsure how the draft would affect court case files and proceedings. Because it covers the judiciary, some parts of the bill could cause closure. As you well know, courts deal many times with personal information, such as death certificates, personnel forms, mental health exams for defendants. But this bill should not serve to close off traditionally open roceedings.

As drafted, the measure may not open up more government records to the public. That is the bottom line to us. Here are the areas of the draft that pose problems:

1. The definition of a public record should NOT include the phrase: "but shall not include records, which if disclosed, would violate the constitutional right of privacy of an individual." This would set up two different standards of privacy since privacy interests are stated later in another subsection establishing the "clearly unwarranted invasion of privacy" standard. We feel this will cause needless confusion.

2. We believe that you will have to eliminate the section of existing law (earlier in Chapter 92) which establishes copying costs at between 25 cents and $1 a page.

3. The proposed 92-53 causes us great alarm:

-- Subsection 1 again links public records with private records in the privacy code -- something that has caused past confusion and will do so in the future. This will again cause misinterpretation that any document with a person's name on it will be withheld because of the vagueness of the definition in 2E-1.

We suggest replacing that language with specific types of records, such as medical, psychiatric, etc., but leave out the vague references to names and identifying marks.

-- Subsection 2 could conceivably close case files in state courts in criminal cases, since the state is named in them, and civil suits involving agencies. We believe this is unintended. But you must remember that you are including the judiciary under the bill, and the vague reference to records could close cases to the public.

It appears to be an attempt to reestablish the attorney work product exemption of the current law. If you intend to use this, it should be more specific, along the lines of the current law. We ask that you consider forbidding the withholding of public records that are available in other agencies which are being sued or are suing.

-- Subsection 3. We are puzzled by the phrase: "To avoid the frustration of a legitimate government function." We fear this is too vague and could be interpreted as anything that just happens to frustrate a government official.

4. We ask you to consider your actions in relation to the courts. We don't mind coverage of the judiciary for its administrative tasks, but not for the workings of courtroom information. For example:

In the proposed committee report, medical and similar records have a significant privacy interest. A judge could conceivably seal a court file or close the courtroom when hearing information about a defendant's mental fitness to stand trial or use an insanity defense.

5. We question why law enforcement records have to be cited in two sections -- significant privacy interests and confidentiality. We fear that if this area of records isn't specified in more detail that police will enact rules shutting off access to all their records -- including arrest blotters, accident reports and basic information about crimes collected before detectives enter the investigation.

6. We believe social welfare benefits are not disclosable under federal law and don't have to be specified in the committee report.

7. We have problems with inquiries into a licensees fitness. If it is needed, then the exception should include records relating to revocation, suspension or any other disciplinary action.

8. We also question the need for confidentiality of collective bargaining. If it is really needed, then it should only relate to collective-bargaining negotiations.

9. Giving broad nfidentiality to proprie y information could just contracts such as that was granted by the Department of Health for hospital management -- which the legislative uditor soundly criticized.

There are probably other unseen problems with the draft. In the interim, a detailed study could be performed on: 1) the types of records kept by each state and county department, whether they are now open or closed and where they're located; 2) how this proposal might compare with the so-called model code and the federal Freedom of Information Act and related federal and state statutes.

We realize crafting this bill is no easy task.

Thank you for your time and attention.

Sincerely,

Stirling Morita

Stirling Morita
For Howard Graves, President

COMMON CAUSE/ HAWAII

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TESTIMONY OF COMMON CAUSE/HAWAII

PRESENTED TO SENATE GOVERNMENT OPERATIONS COMMITTEE

HONORABLE RUSSELL BLAIR, CHAIRMAN
HONORABLE PATSY YOUNG, VICE-CHAIR

HB 2002, S.D.1 - RELATING TO PUBLIC RECORDS

THE WORK ON THS IMPORTANT BILL STARTED ALMOST A YEAR AGO. HARD WORK BY BOTH THE GOVERNORS' COMMITTEE, AND THEN MORE HARD WORK BY THE HOUSE JUDICIARY COMMITTEE PRODUCED A GOOD BILL, BUT IT FELL SHORT OF ITS STATED PURPOSE TO "(MAKE) RECORDS MORE ACCESSIBLE." SO A NEW DRAFT HAS BEEN WRITTEN.

THIS NEWER SENATE DRAFT, WHILE ATTEMPTING TO REACH THE SAME GOALS, TAKES A RADICALLY DIFFERENT APPROACH. WE FEEL IT COULD BE THE BASIS FOR A GREAT FINAL DRAFT IF EVERYONE HAD THE PROPER AMOUNT OF TIME TO WORK ON IT, TO REALLY STUDY IT. COMMON CAUSE FEELS THERE ARE TOO MANY UNFORSEEN PROBLEMS, AND MORE TIME IS NEEDED TO FULLY STUDY THIS DRAFT. FOR THIS AND OTHER REASONS, COMMON CAUSE MUST FOR NOW OPPOSE THIS BILL.

COMMON CAUSE VERY RARELY SUPPORTS THE "STUDY" APPROACH IN ANY LEGISLATION. BUT ON THIS DRAFT, AS WELL AS THE HOUSE DRAFT, WE ARE SINCERELY ASKING FOR MORE TIME TO STUDY THIS VERY VERY COMPLEX AND SENSITIVE ISSUE.

SO MANY MANY GOOD THINGS HAVE BEEN PRODUCED AS A RESULT OF THE WORK PUT INTO THIS BILL. SOME OF THEM WERE NOTED BY REPRESENTATIVE WAYNE METCALF IN HIS MARCH 21 LETTER TO THE EDITOR OF THE STAR BULLETIN. WE DON'T WANT TO WASTE OR LOSE THESE KINDS OF IMPROVEMENTS TO SUNSHINE AND OPEN RECORDS.

ON THE OTHER HAND, DESPITE THE GOOD RESULTS, THERE ARE UNDENIABLE NEGATIVES, SPELLED OUT BY VARIOUS SPEAKERS AT THIS AND AT THE LAST HEARING, THAT MUST BE CHANGED OR ELIMINATED.

AND THERE ARE VARIOUS OVERLOOKED ANGLES, SUCH AS THE 1976 MEMO FROM THEN-ATTORNEY GENERAL RONALD AMEMIYA TO THEN-GOVERNOR GEORGE ARIYOSHI. DOES THIS MEMO SPELL OUT WAYS TO HIDE FROM THE SUNSHINE? ANYONE CONCERNED ABOUT OPEN RECORDS NEEDS TO THINK ABOUT THE ANSWER TO THIS QUESTION. NEEDS TO THINK ABOUT IT, DISCUSS IT, STUDY IT.

COMMON CAUSE HAS SPECIFIC ITEMS WE THINK NEED TO BE LOOKED AT. I WON'T READ THEM NOW, BUT THEY ARE INCLUDED IN THE RECORD FOR YOUR REVIEW.

WE DON'T THINK ANYBODY IS TRYING TO HIDE ANYTHING, WE JUST DON'T THINK THERE IS ANY ONE PERSON IN HAWAII WHO TRULY UNDERSTANDS ALL THE POSSIBLE UNDERLYING RAMIFICATIONS OF SUCH A COMPLEX ISSUE. THE LINE BETWEEN INDIVIDUAL RIGHT TO PRIVACY AND THE PUBLIC'S RIGHT TO KNOW IS A FINE AND SENSITIVE ONE. COMMON CAUSE BELIEVES THAT THE PROCESS IS NOT SERVED BY SPENDING ALMOST A YEAR IN COMPILING INFORMATION ONLY TO HAVE THIS BILL REWORKED AND THE PUBLIC BE GIVEN LESS THAN ONE WEEK TO EVALUATE AND RESPOND TO IT.

COMMON CAUSE BELIEVES THAT BY THE TIME OF THE NEXT SESSION THE LEGISLATURE WILL BE ABLE TO COMPLETE THE PROCESS, AND PRODUCE THE PERMANENT AND JUST GUIDE FOR "THE RIGHT OF PUBLIC ACCESS TO RECORDS ABOUT THE PUBLIC'S GOVERNMENT."

THANK YOU.

COMMON CAUSE/HAWAII ATTACHMENT TO TESTIMONY ON HB 2002

SOME SPECIFIC ITEMS TO CONSIDER ARE:

1. **THE DEFINITION OF PUBLIC RECORD.** IN GENERAL, ARE THEY ALL CLEARLY CONSIDERED OPEN? DOES IT PLACE THE BURDEN OF PROOF UPON THE GOVERNMENT AS TO WHY CERTAIN RECORDS ARE DENIED, OR DOES IT PLACE THE BURDEN OF PROOF UPON THE INDIVIDUAL (OR PRIVATE GROUP) TO PROVE THEY HAVE A RIGHT TO A RECORD HELD BY THE GOVERNMENT? BURDEN OF PROOF SHOULD CLEARLY BE ON THE GOVERNMENT WHENEVER RECORDS ARE DENIED.

2. **THE LEGISLATURE, JUDICIARY AND INTER- INTRA-AGENCY MEMOS** S.D. 1 SEEMS TO IMPLY THESE RECORDS WOULD BE OPEN. IT SHOULD BE EXPLICIT.

3. **ELECTRONIC RECORDS.** THE BILL NOW REFERS TO WRITTEN AND PRINTED DOCUMENTS. IT SHOULD TRY AND ADDRESS ALL POSSIBLE PRESENT AND FUTURE TECHNOLOGY.

4. S.D.1 SHOULD USE THE STANDARD OF **"CLEARLY UNWARRANTED INVASION OF PRIVACY"** (FROM H.D.1) FOR WITHHOLDING RECORDS. DISCLOSURE SHOULD NOT CONSTITUTE A CLEARLY UNWARRANTED INVASION OF PRIVACY IF THE PUBLIC INTEREST OUTWEIGHS THE PRIVACY INTEREST OF THE INDIVIDUAL.

5. **CHARGES FOR SEARCH, SEGREGATION, AND DUPLICATION OF RECORDS.** IT SHOULD BE CLEAR THAT FEES COULD NOT BE USED AS A WAY TO DISCOURAGE PUBLIC ACCESS.

6. **NOT ONE STATE IN THE NATION HAS THEIR LAWS BASED ON THE UNIFORM INFORMATION PRACTICES CODE.** DOES HAWAII REALLY WANT TO BE THE GUINEA PIG?

3/22/88

nolulu Star-Bulletin

March 23, 1988

Sen. Russell Blair, Chairman
Committee on Government Operations
Room 202
Hawaii State Senate
State Capitol

Dear Mr. Chairman:

The Honolulu Star-Bulletin supports in general the results of your work in redrafting H.B. 2002, (House Draft 1) The Uniform Information Practices Act.

We believe your bill is an improvement over the 47-page version that passed the House earlier this month. It also is an improvement over existing law in the areas of public information and rights of privacy.

The bill which passed the House, while well-intended, was cumbersome and unacceptable to the Star-Bulletin. We indicated our objections to it in our letter of testimony to your March 16 hearing on the House bill.

Your revision of that bill is five pages long and is directed toward Chapter 92 of the Hawaii Revised Statutes. It would repeal sections of that public records law which through the weight of their misplaced restrictions on privacy have inhibited the free flow of public information.

Your bill also adds a new section declaring state policy in the area of public records, meetings, decisions and other government information. It also expands the jurisdiction of the law to cover the legislative and judicial branches, as well as the executive. This represents a remarkable reform, unmatched even by the federal Freedom of Information Act, from which Congress has exempted itself.

The new bill also clarifies, for the most part, those exceptions to public records law where requirements of privacy and confidentiality take precedence.

We have reservations about the wording of at least one of these exceptions: "Information compiled and identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation."

We aren't sure how law enforcement officials or their desk clerks would interpret that. In its broadest definition it might cover every piece of information they handle.

Our support for your committee's version of the House bill would not preclude us from challenging the terms of such an exception should it become a hindrance to reporting news of police and fire departments, offices of county prosecutors, the state attorney general and other agencies which exercise enforcement powers in state and local government.

We thank the committee for its quick work. This bill may not be perfect. We

think it improves existing law. It is clearly preferable to the House bill.

Thank you,

Catherine Shen, publisher
Honolulu Star-Bulletin

John E. Simonds, senior editor
Honolulu Star-Bulletin

Testimony on House Bill 2002, House Draft 1, Senate Draft 1

Testimony before Senate Government Operations Committee

Wednesday, March 23, 1988

Mr. Chairman and Members of the Committee:

My name is Buck Buchwach, and I am the editor-in-chief of The Honolulu Advertiser.

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

We appreciate the interest in both the administration and the Legislature in protecting the right of the people to know what their government is doing. We believe that is a fundamental aspect of the Constitutional and common law rights of all citizens and essential to the survival of democracy.

At the same time, we recognize that government maintains some intensely personal records the disclosure of which would be an unwarranted violation of an individual's right to privacy.

In recent years, as you know, serious problems of secrecy in government have arisen due to the enactment and interpretation of Hawaii Revised Statute 92(E).

H.R.S. 92(E) barred access to a broadly defined category of "personal records," which was interpreted to mean any record containing an individual's name or identifying information.

We commend the Governor's committee and the legislators who have worked so diligently to correct the serious imbalance created by H.R.S. 92(E). And we are particularly grateful to this committee for taking the best of the work of others and refining it to the present draft.

We applaud your statement of purpose for its recognition that public records in a free society are indeed public and open.

We also welcome the inclusion of the Legislature and judiciary in the definition of "agencies" whose records are public.

Equally welcome is the elimination of earlier attempts to list or define those records which are open. Such a listing approach could have left the impression that all records not so listed were to be closed.

To the contrary, your draft lists the types of records which may be closed if their release would constitute an unwarranted invasion of an individual's right to privacy. This leaves the appropriate presumption that all other records are indeed open.

sue to obtain access to public records reduces the chilling effect that the cost of litigation can have for citizens seeking to enforce their right of access to their government.

Your draft eliminates proposals which were cumbersome at best and dangerous and costly at worst to create an entire new bureaucracy headed by an "information czar," and it reduces from 47 to five pages the proposed new law.

One major reservation which we have about the draft is its direction to each individual agency to establish its own rules to effectuate this chapter. We are concerned that this may create the legal equivalent of a tower of Babel, with every agency speaking a different language when asked for its records.

We urge the committee to consider the addition of concise minimum statewide standards for such rules, particularly with regard to the time within which a record must be produced or an appeal allowed, and with regard to charges for gathering and copying public records.

While the draft proposes that fees may be charged for time taken by public employes to search for records requested by a citizen, we urge the view, widely shared in this state in the past, that it is part of the function of government to make its public records available, and that this cost should be borne by the government as a whole rather than imposed on the industrious citizen who may be more interested in government than are his neighbors.

To that end, we believe it would be helpful if the law made clear that it is the intent of the Legislature that individual citizens normally and generally be allowed to personally search for and copy public records, and that, if necessary, agencies specify work areas and copying facilities for that purpose. This is so that even persons of modest means, if they are willing to invest the time, may not be barred from access to knowledge of their government by the requirement that they pay a fee.

Thank you again for your time and attention.

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

YOUR REFERENCE JF-CF

March 23, 1988

TO: The Honorable Russell Blair, Chairman & Members
Committee on Government Operations
The Senate
The Fourteenth Legislature
Honolulu, Hawaii

FROM: James F. Femia, Major
Honolulu Police Department
City and County of Honolulu
Honolulu, Hawaii

SUBJECT: Public Testimony on H. B. 2002, H. D. 1,
RELATIVE TO PUBLIC RECORDS

Mr. Chairman and Members:

I am James F. Femia, Major of the Records and Identification Division, Honolulu Police Department, City and County of Honolulu.

The Honolulu Police Department is in accord with the intent and purpose of H. B. No. 2002, H. D. 1, and recommends the passage of this bill.

Thank you for allowing us the opportunity to voice our concerns regarding the confidentiality of police records.

James F. Femia

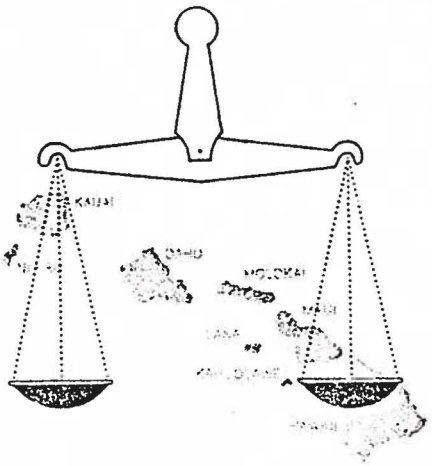
JAMES F. FEMIA, Major
Records & Identification Division

APPROVED:

Warren Ferreira
for DOUGLAS G. GIBB
Chief of Police

The Judiciary
State of Hawaii

1:30 p.m.
Wednesday, March 23, 1988
Senate Conference Room 06



H.B. NO. 2002, H.D. 1
RELATING TO PUBLIC RECORDS

Committee Submitted to:

Senator Russell Blair, Chairman
Senate Committee on Government Operations

Testimony
to the
Fourteenth Session
State Legislature
1988

Judiciary Representative:

Janice Wolf
Adminstrative Director of the Courts

March 22, 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
Relating to Public Records

The Judiciary has reviewed the proposed Senate Draft 1 to House Bill No. 2002, H.D.1, which amends HRS Sections 92-50 through 92-55, and 92E-4, and has the following concerns.

First, the draft committee report states that the Judiciary is be included in the definition of "agency" in HRS Section 92-51.[page 9] Accordingly, the Judiciary questions the ramifications of this bill on its operations and records. Is the Committee's intent to include within the definition of "public record" references to the Courts' legal files, records, court calendars, minutes, and administrative notes? Although most of the legal files and documents are open to the public, certain materials (e.g., a judge's notes on a particular case) are not presently accessible by the public.

Second, is the bill's intent to protect disclosure of any court records which would provide any information on a matter in which an individual has a significant privacy interest as listed on page 4, Section 4(a)?

For example, the definition of "public record" excludes those records in which disclosure would violate the constitutional right of privacy of an individual. The draft committee report provides that there is a significant privacy interest in information describing an individual's finances, income, assets, etc. [page 5, subsection (6)] Therefore, will the Judiciary be required to make confidential all records which disclose this type of information?

Such a decision would have severe repercussions on the Courts' present management and procedures. The potentially far-reaching effects of this determination may require closure of all civil and criminal files which include any type of financial disclosure. Regarding Family Court records, the Court may be required to make confidential all divorce records (financial statements are required of each party to assist the Court in determining property division and support issues); all records relating to the determination of the amounts of child support (e.g., URESA & FC-M cases); and any motion filed by a party for a court-appointed guardian ad litem or counsel (e.g., court requires that the party fill out financial statement to prove indigency).

Further, an initial determination would need to be made as to whether the Judiciary would bear the responsibility for determining which documents needed to be protected as opposed to whether a party to the action would be required to request a protective order from the Court. Another issue relates to the decision as to whether the particular document should be "sealed" (i.e., inaccessible to the general public) or whether the entire court file should be made confidential. Other attendant problems include the coordination of storage and retrieval of the pertinent documents and/or court files and the preliminary determinations as to which persons will be permitted access? Note also, that a possible adverse effect of this bill, which promotes public access to government information, may be to require closure of court records which are presently open to the public.

Third, is the intent of this bill to permit public access to Court records which are presently protected by administrative policy and not by statute? The applicable exceptions listed in Section 92-53 provide only for confidentiality due to "frustration of a legitimate government function" or protection by state, federal law or court order.

Presently, Family Court records in FC-G (guardianship of the person) and FC-CR (criminal matters within the Family Court's jurisdiction including intra-familial sexual abuse cases) are not protected by statutory authority. However, it is the Court's administrative policy to restrict public access to these documents. For example, if a news reporter requests access to an FC-CR file relating to the sexual abuse of a family member, the Court will require that the reporter review the file within the Director's office. The Court will also request that the identity of the victim be kept confidential.

Last, closure of large numbers of court files will require additional storage space for confidential records and many staff hours to screen and retrieve the relevant files and/or documents.

The Judiciary respectfully requests that the committee consider these concerns in its decision-making on this bill.

Respectfully submitted,

Janice Wolf

Janice Wolf, Administrative Director
of the Courts

TESTIMONY OF THE DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
STATE OF HAWAII

TO THE

SENATE COMMITTEE ON GOVERNMENT OPERATIONS

March 23, 1988

ON

H.B. 2002, H.D. 1, Proposed S.D. 1

TITLE: RELATING TO PUBLIC RECORDS

PURPOSE: The purpose of this bill is to expand and clarify Chapter 92, Part V, and repeal Section 92E-4.

COMMENTS: The Department of Accounting and General Services supports the general purpose and intent of H.B. 2002, H.D. 1, Proposed S.D. 1, but the State Archives will not be able to comply with the proposed Section 92-52 (a). Not all public records in the custody of the State Archives can be duplicated because of the fragile, deteriorating condition of documents which date back to 1790. Also, the Archives does not have the equipment to reproduce large maps and broadsides. Proposed Sections 92-52 (a) and (c) allow each agency to charge "a reasonable amount" for duplication and retrieval. But what is deemed "reasonable" is often subject to dispute between and agency and the requestors. Additional guidelines would be helpful.

RECOMMENDATION: The department recommends that proposed Section 92-52 (a) contain the language presently in Section 92-51 and be amended to include: Public records shall be available for duplication provided that the necessary equipment is available to reproduce such records, and that such duplication shall not contribute to further deterioration of records of historical value.

PRESENTATION OF THE
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

TO THE
SENATE COMMITTEE ON GOVERNMENT OPERATIONS

FOURTEENTH STATE LEGISLATURE
REGULAR SESSION, 1988

March 23, 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 the proposed draft of House Bill No. 2002, H.D. 1, Relating to Public Records.

On behalf of the Administration, we appreciate the effort to keep alive the discussion on substantial changes to the current records laws. In my testimony last week, I discussed a number of items which I believe should be part of a good law on records. The proposed Senate draft addresses most of those items, though in a substantially different manner than the House draft. As we read the Senate draft, much is left to be accomplished through rulemaking. We appreciate the confidence expressed by that structure and can assure you that if that is the way this bill is finally adopted, we will aggressively implement such rules.

Again, we appreciate the opportunity to testify on this bill and especially appreciate the fact that this measure is continuing to progress through the legislative process.